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62 P.(2d) 1149

STATE v. BOGART.

No. 4237.

Supreme Court of New Mexico.

Oct. 28, 1936.

Rehearing Denied Dec. 14, 1936.

W. A. Dunn, of Roswell, for appellant.

Frank H. Patton, Atty. Gen., and Quincy D. Adams, Asst. Atty. Gen., for the State.

HUDSPETH, Justice.

George Bogart was charged by information with the crime of operating a motor vehicle upon the highways of this State while under the influence of intoxicating liquor. He entered a plea of guilty and

was sentenced to a term in jail. A few days later he prayed for and was allowed an appeal to this court.

Appellant maintains that Trial Court Rule 35-4413, making it unnecessary to allege venue in an indictment or information, is in conflict with N.M.Const. art. 2, § 14, and therefore void; that, by reason of the absence of an allegation of venue, the information charged no offense, and, in consequence, the judgment was improperly entered. The section of the Constitution relied upon provides that the accused shall have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."

Appellant argues that rule 35-4413, which says that an allegation charging the defendant with committing an offense shall in all cases be considered an allegation that the offense was committed within the territorial jurisdiction of the court, is a fiction created by rule, in conflict with the constitutional provision quoted above, which, he avers, contains a double guaranty, each dependent upon the other; i. e., (1) a trial by jury, and (2) that the jury shall be from the county in which the offense is alleged to have been committed. Appellant cites State v. Balles, 24 N.M. 16, 172 P. 196, and discusses Knewel v. Egan, 268 U.S. 442, 45 S.Ct. 522, 69 L.Ed. 1036, where the syllabus is as follows: "A mere failure to allege venue, and thus affirmatively to show that the crime was committed within the territorial jurisdiction of the court, does not deprive the court of jurisdiction over the cause."

The Constitution does not specifically require an allegation of venue in the information or indictment, and the rule gives the accused notice of the venue of the offense. Moreover, the territorial court held in Haynes et al. v. U. S., 9 N. M. 519, 56 P. 282, that the objection that the venue is not alleged is waived by a plea of guilty. The Constitution of the State of Kansas contains the identical provision relied upon by appellant, and the Supreme Court of that State, in Re Mote, 98 Kan. 804, 160 P. 223, said:

"It is contended that the last clause of the statute just quoted violates section 10 of the Bill of Rights, which provides:

"'In all prosecutions, the accused shall be allowed to appear and defend in person or by counsel; to demand the nature and cause of the accusation against him; * * * and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.' * * *

"But none of these constitutional privileges were arbitrarily withheld from him. He might have invoked any or all of them. He might have demanded a jury trial in Finney county. He did not care to contest the state's accusation. He waived these privileges. He entered a plea of guilty.

"In the early case of State v. Potter, 16 Kan. 80, it was held: 'The constitutional

right of a defendant in a criminal action to be tried "by an impartial jury of the county or district in which the offense is alleged to have been committed" (Const. Bill of Rights, § 10) is a mere personal privilege which the defendant may waive or insist upon at his option. It is not a right conferred upon him from considerations of public policy; and public interests would not be likely to suffer by a waiver thereof' "—citing cases.

See, also, Kennison v. State, 83 Neb. 391, 119 N.W. 768; and 16 C.J. 184; 31 C.J. 874; 12 C.J. 774.

The appellant challenges the power and authority of this court to make valid rules prescribing the forms of indictment and information as set forth in rule 35-4446, which forms, counsel maintains, are mere legal conclusions and omit the substantive facts which the law theretofore required for charging the enumerated offenses. We recently had this proposition under consideration in the case of State v. Roy, 40 N.M. 397, 60 P.(2d) 646, and, after mature consideration, we decided the question against the contention of appellant. We adhere to that opinion.

Finding no error in the judgment, we conclude that it should be affirmed and the cause remanded, and it is so ordered.

SADLER, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

62 P.(2d) 1150

STATE of New Mexico, Appellee, v. O. M. WALLACE, Appellant.

No. 4238.

Supreme Court of New Mexico.

Oct. 28, 1936.

Rehearing Denied Dec. 14, 1936.

W. A. Dunn, of Roswell, for appellant.

Frank H. Patton, Atty. Gen., and Quincy D. Adams, Asst. Atty. Gen., for the State.

HUDSPETH, Justice.

This is a companion case of State Bogard, No. 4237, 41 N.M. 1, 62 P.(2d) 1149, just decided. The two cases were argued and submitted together. Wallace pleaded guilty to the same charge and received a like sentence. The same questions are submitted for determination as in No. 4237, in which we affirmed the judgment of the trial court.

From this, it follows that the judgment in this case should be affirmed and the cause remanded, and it is so ordered.

SADLER, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

62 P.(2d) 1150

STATE of New Mexico, Appellee, v. Herbert P. JOYCE, Appellant.

No. 4263.

Supreme Court of New Mexico.

Nov. 10, 1936.

W. A. Dunn and Askren & Watson, all of Roswell, for appellant.

Quincy D. Adams, Asst. Atty. Gen., for the State.

PER CURIAM.

This is an appeal from a judgment and sentence pronounced upon a plea of guilty entered by appellant to the charge of operating a motor vehicle on the highways of this State while under the influence of intoxicating liquor. The same points are urged in the present case as were decided in State v. Bogart, 41 N.M. 1, 62 P. (2d) 1149, and upon the authority of that case the judgment in this case should be affirmed and the cause remanded to the district court, and it is so ordered.

62 P.(2d) 1151

CITY OF CLOVIS v. HAMILTON.

No. 4216.

Supreme Court of New Mexico.

Nov. 23, 1936.

Frank H. Patton, Atty. Gen., and Quincy D. Adams, Asst. Atty. Gen., for amici curiæ.

James A. Hall, of Clovis, for appellee.

HUDSPETH, Justice.

The sole question involved in this case is whether or not the Governor of this state has power to pardon a person convicted of violating a municipal ordinance. The appellant was found guilty of a violation of a municipal ordinance of the City of Clovis. He appealed from the justice of the peace court to the district court, where he was again convicted, and from that judgment was granted an appeal to this court. He later filed a pardon duly executed by the Governor of New Mexico. The appellee tendered a skeleton transcript and a motion to docket and affirm. We granted the motion in so far as it prayed that the case be docketed, and it is now before us for consideration on the merits. Appellant is not represented here, but the thanks of the court are due Frank H. Patton, Attorney General, and Quincy D. Adams, Assistant

Attorney General, for preparing an exhaustive brief as amici curiae.

The Governor, by virtue of section 6, art. 5, of the Constitution, has the power to pardon, after conviction, for all offenses against the state except treason and in cases of impeachment. This court has taken a position against a narrow construction of this constitutional grant. Ex parte Magee, 31 N.M. 276, 242 P. 332; State v. Magee Publishing Co., 29 N.M. 455, 224 P. 1028, 38 A.L.R. 142. But all the authorities hold that a violation of a city ordinance is not an offense against the state.

"Subject to constitutional and statutory provisions, a pardon extends to every offense known to law. Under a constitutional provision giving the governor power to grant pardons for all offenses, the power extends only to offenses for violation of state laws, and not to those which constitute a violation of city ordinances." 46 C.J. p. 1188. See, also, 46 C.J. p. 1186; 20 R.C.L. p. 534; 3 McQuillin, Municipal Corporations (2d Ed.) § 1192, p. 667; State v. Alexander, 76 N.C. 231, 22 Am.Rep. 675; Allen v. McGuire, 100 Miss. 781, 57 So. 217, 38 L.R.A.(N.S.) 196, Ann.Cas.1914A, 483; Campion v. Gillan, 79 Neb. 364, 112 N.W. 585, 11 L.R.A.(N.S.) 865, 126 Am.St. Rep. 667, 16 Ann.Cas. 319; Jamison v. Flanner, 116 Kan. 624, 228 P. 82, 35 A. L.R. 973; Moore v. City of Newport, 198 Ky. 118, 248 S.W. 837; City of Paris v. Hinton, 132 Ky. 684, 116 S.W. 1197, 19 Ann.Cas. 114; State ex rel. City of Kansas City v. Renick, 157 Mo. 292, 57 S.W. 713; Shoop v. Commonwealth, 3 Pa. 126.

For the reasons stated, the judgment should be affirmed, and the cause remanded to the district court, with directions to enforce its judgment and sentence, and it is so ordered.

SADLER, C. J., and BICKLEY and BRICE, JJ., concur.

ZINN, J., did not participate.

62 P.(2d) 1367

CARON v. SOUTHWEST LUMBER CO.

No. 4136.

Supreme Court of New Mexico.

Oct. 7, 1936.

Rehearing Denied Dec. 28, 1936.

George A. Shipley and J. L. Lawson, both of Alamogordo, for appellant.

J. Benson Newell, of Las Cruces, for appellee.

SADLER, Chief Justice.

The legal question presented by this appeal is whether the restraint laid upon a creditor by injunction prohibiting his collection of moneys due him, absolves his debtor, not a party to the suit out of which said injunction issued, from the payment of all interest contracted to be paid by the terms of a promissory note theretofore negotiated to such creditor for a valuable consideration.

The plaintiff, appearing before us as an appellant, complains of the trial court's denial of interest otherwise to be considered as having been earned during the life of the injunction, and its refusal to award attorney's fees otherwise recoverable under the terms of the note.

The defendant, maker of the note, as stated, was not a party to the suit and was not served with the writ of injunction, although soon after issuance thereof its officers learned of same. At the time of its issuance, the note providing a six months' maturity was seventeen days overdue. However, at such time and by virtue of an understanding had between plaintiff and defendant prior to maturity, a temporary extension in the time of payment was being indulged by plaintiff at defendant's request.

The injunction continued in force for approximately three years. It was dissolved on May 3, 1934, following remand by this court to the district court of Otero county of the case of Longwell v. Caron, 38 N.M. 260, 31 P.(2d) 690, out of which the injunction issued.

Within a few days after dissolution of the injunction and upon demand by plaintiff for payment thereof, the defendant paid to plaintiff the principal amount of the note, $6,500, and six months' interest, $195, and when sued for the balance, claimed immunity from payment of interest during the life of the injunction. Its claim was sustained by the trial court. Hence, this appeal.

The plaintiff, indulging defendant continuously from maturity to issuance of the injunction, had made no demand for payment when the latter event transpired. He made no demand during the period of restraint on collection imposed by the injunction. Nor did defendant ever tender payment until after the demand which followed dissolution of the injunction. Neither did the defendant at any time during the period when the injunction was in force offer to pay into court the amount due on the note, nor segregate from its own funds and hold separately the amount due thereon for payment to plaintiff or

whomsoever subsequently should be held entitled thereto. About four months after maturity of the note, and while the injunction was still in force, the defendant by letter to plaintiff repudiated liability for interest on the note after its maturity. Apparently this was on the theory that the injunction exonerated it from the payment of interest, although the injunction was not issued until seventeen days after maturity of the note.

We think the trial court was in error in denying to plaintiff the interest promised by defendant under express terms of the promissory note sued upon. It was not a party to the suit out of which the injunction issued, nor concerned in the result thereof. And, under the facts shown, intervention of the injunction in no manner affects its contractual liability assumed toward plaintiff. McKnight v. Chauncey, Seld.Notes (N.Y.) 97; Neilsen v. Neilsen, 216 Cal. 150, 13 P.(2d) 715, 716. See, also, 2 High on Injunctions (4th Ed.) § 1133, p. 1114.

In the McKnight Case, the holder of certain notes as surviving assignee of one Chapman, sued Chapman to obtain possession of the notes, joining defendants, the makers, who were restrained pendente lite from paying the notes to Chapman as the payee prior to assignment. The defendants urged a set-off by reason of fraud claimed to inhere in the transaction out of which the notes originated. They further sought to be relieved of interest for the time the injunction was in force. The referee found against them both on the claim of fraud and immunity from interest. Upon appeal both rulings were upheld by the New York Court of Appeals, the reporter's digest of the decision reading:

"Notwithstanding the injunction, the defendants might have paid the money to the plaintiff, who was entitled to it, or might have paid it into court; and not having done so, were rightly charged with interest.

"That the referee having found a report against the existence of fraud in relation to the outstanding debts of the planing mill, his finding could not be disturbed on appeal."

In Neilsen v. Neilsen, supra, the plaintiff, claiming to have been defrauded, sued to have defendants declared trustees of certain property theretofore conveyed to them by her and of a certain note and mortgage arising from the sale of other property also conveyed to but later transferred by them. One Kyburz, the purchaser and maker of the note and mortgage, although not a party to the action, was enjoined from paying the note when due. The question arose whether Kyburz was to be relieved of paying interest earned during life of the injunction. In holding he was not, the court said:

"The defendants complain of the provisions in the conclusions of law relieving Kyburz from paying principal or interest on his mortgage note from the time the injunction order was served on him until the entry of judgment. There are two

answers to this contention. In the first place, this order, as above noted, was not carried into the judgment, and cannot be deemed a part thereof; and, secondly, the defendants were in nowise prejudiced by reason thereof, assuming that it was properly made, for the reason that it operated only against the interests of the plaintiff, and she has not taken an appeal therefrom. For the guidance of the parties in the adjustment of the interest on that obligation, we incline to the view and hold that the service of the injunctive order on Kyburz did not have the effect of relieving him of the payment of interest accumulating on the note during the period mentioned. Kyburz is not a party to this action, and the result of the service upon him of the order of injunction was merely to abate the payment of principal and interest to the defendants during the time the injunctive order was in effect and to save him from default on account of nonpayment thereof during the pendency of this action."

These cases are so like the one before us that the rulings therein become highly persuasive. We approve them. Something more is required than here appears to relieve a party of performing a solemnly made contract. Nor do we place defendant in the position of having had to carry a forced loan. Means were open to it to avoid future interest. The controversy over right to this money and other funds being between Caron and Longwell in the accounting suit out of which the injunction issued, the defendant here very easily might have relieved itself by securing leave and paying into court in said cause the amount due on said note.

Another very simple means of accomplishing the same result, among others suggested, would have been to make a lawful tender and keep it good. The plaintiff's inability to accept the tender because of the injunction could in no manner deny defendant benefit of the legal consequence of such tender. But the defendant did neither of these things. On the contrary, (although the showing is unessential to liability on a claim for conventional interest), the defendant retained and used in its business throughout the period of the injunction, the money otherwise payable in satisfaction of plaintiff's demand. However, aside from this circumstance, it promised to pay interest until it repaid the principal. Both upon reason and authority, it should perform as promised.

The theory upon which defendant seeks to escape liability for interest seems to be that the injunction prevents default, and without default there can be no interest. Truly such a doctrine can have no place where liability for interest does not rest upon any such contingency, but, instead, upon an express promise to pay. Admittedly there was no default on this obligation prior to maturity, and yet interest accrued under the promise to pay it.

The cases of Evancovich v. Schiller, 83 Utah, 1, 26 P.(2d) 830 and Watson v. McManus, 223 Pa. 583, 72 A. 1066, as

well as other authorities, are relied upon by the defendant. We find none of them decisive of the question here presented. All are easily distinguished. For instance, take the case of Evancovich v. Schiller, supra. There the money was deposited in a bank pursuant to stipulation signed by the complaining party. She received the money agreed to be paid as interest and the court held she had no cause for complaint. Obviously, this was a correct conclusion.

In Watson v. McManus, supra, the injunction restraining payment of the money was procured at the instigation of the party claiming interest by reason of its nonpayment. Furthermore, the interest claimed was not conventional interest. We have carefully considered the authorities presented by defendant and find none of them inconsistent with the conclusion reached by us. Some of them are on facts so dissimilar as to render them valueless as precedents.

The plaintiff also relies upon another point for reversal, to wit, claimed liability of defendant for interest by reason of having profited from use of the money, citing Woodruff v. Bacon, 35 Conn. 97; Candee v. Skinner, 40 Conn. 464; Cox v. Cronan, 82 Conn. 175, 72 A. 927, 135 Am. St.Rep. 268; Templeton v. Fauntleroy, 3 Rand. (Va.) 434. He is met by defendant's contention that this claim was not pleaded, and that there is no evidence of profit. The trial court's finding, which plaintiff assails as wholly without support, is against him on the question of profit. In view of our disposition of plaintiff's first point, we are relieved of passing upon this theory of liability.

It follows that the judgment of the trial court must be reversed. The cause will be remanded with a direction to it to set aside its judgment herein and to enter judgment in plaintiff's favor for the amount of interest provided by the note sued upon, less credits shown, and for proper attorney's fees. The plaintiff will recover his costs.

It is so ordered.

HUDSPETH, BICKLEY, BRICE, and ZINN, JJ., concur.

63 P.(2d) 345

In re ATCHISON, T. & S. F. RY. CO.'S TAXES IN EDDY COUNTY FOR 1933.

No. 4154.

Supreme Court of New Mexico.

Dec. 7, 1936.

W. C. Reid and E. C. Iden, both of Albuquerque, for petitioner.

G. L. Reese, Jr., of Carlsbad, for respondents.

SADLER, Chief Justice.

This is an appeal from an order entered in a proceeding instituted by the Atchison, Topeka & Santa Fé Railway Company, as petitioner, in the district court of Eddy county to secure a correction of the tax rolls of said county for the year 1933, by striking therefrom a certain levy against all the property of petitioner. No one is named as defendant or respondent in the petition filed, but upon filing of the petition an order to show cause was issued against the district attorney for Eddy county, the county treasurer, and the Board of County Commissioners of said county, directing them to show cause why the relief prayed should not be granted.

All of the officials named appeared by the district attorney in response to the order to show cause by filing a demurrer to the petition. No action was taken upon the demurrer. Thereafter an answer was filed to which the petitioner demurred. The demurrer being overruled, petitioner prosecutes this appeal from the ruling as an interlocutory order which practically disposes of the merits of the proceeding.

Enough appears to dispose of a matter, raised by respondents (appellees), not urged as a ground of affirmance, but decisive nevertheless, if meritorious. They suggest (though disclaiming intention to rely upon same if it can be waived) a want of jurisdiction in this court to entertain the appeal. The doubt expressed upon the question of jurisdiction is this. They say the proceeding is one under the provisions of 1929 Comp. §§ 141-306 to 141-308, to correct taxes, and, because the petition fails to show it was filed with the approval of the district attorney, this court is without jurisdiction to entertain the appeal. As stated above, they avow a willingness to waive the jurisdictional question, if it can be waived, and expressly consent to a hearing on the merits.

While this indulgence on respondents' part is commendable, we find it unnecessary to rely upon same. If it be true, as they insist, that the proceeding is under the statute, we find in the statute (1929 Comp. § 141-308) express provision for an appeal. And, if approval of the district attorney be essential to initiating the proceeding, the failure to secure and show such approval would affect the original jurisdiction of the district court, not the appellate jurisdiction of this court. Actually, the statute makes it obvious that approval of the district attorney is not required through express provision for conducting the proceeding with-

out such consent. It provides: "Should the district attorney refuse to permit the filing of any such complaint without cost to the taxpayer such taxpayer may proceed thereon in his own name and at his own expense."

Viewed as a proceeding under the statute and in the absence of an affirmative showing to the contrary, we should have to presume, in support of the jurisdiction entertained by the trial court, that it became satisfied of the district attorney's refusal to permit the filing of the petition without cost to the petitioner. The appearance of said official as a respondent below resisting the relief claimed by petitioner leaves no doubt of his attitude toward the claim.

Petitioner, apropos the jurisdictional question suggested by respondents, lays no claim to benefit of the statute and the right of review provided thereby. It says its suit is equitable "in the nature of a suit to quiet its title or remove the cloud upon its title, by reason of the illegal tax remaining upon the assessment rolls." If so conceived in the beginning, the petition is but little adapted in form to what it is claimed to be in substance. It is entitled as above indicated. No parties defendant or respondent are joined or named, either in the caption or the body of the petition. From its form, it strongly suggests a proceeding under the statute. But with its filing reliance on the statute either by court or counsel appears to cease. No copy of the petition nor of the order to show cause was directed to or served upon State Tax Commission as required by the statute.

Regardless of the chameleonic qualities possessed by the proceeding in the beginning, it emerges prior to the order complained of as a suit in equity, disclosing a subject matter of equitable cognizance (indeed, this it had in the beginning), with the parties necessary to an adjudication of the issue presented (petitioner and the county treasurer) before the court, properly aligned. Such a proceeding is a civil action (cf. Summerford v. Board of Com'rs, 35 N.M. 374, 298 P. 410) from judgments in which we may entertain appeals. Now to the merits.

The particular levy of which petitioner complains is a special one made for the purpose of satisfying two judgments rendered against the Board of County Commissioners of Eddy County in condemnation proceedings instituted for the purpose of acquiring rights of way for a state highway. Respondents' answer discloses that the total levy for general county purposes for 1933 approximated the five-mill limitation and that the special levy of .000155 made for the purpose of satisfying said judgments was made in addition to the total levy for general county purposes. However, the district court, in its order directing said levy, expressly exempts the same from the statutory five-mill limitation for all county purposes.

The sole question presented for determination, and raised by petitioner's demurrer to respondents' answer, is whether the special levy for the purpose mentioned is prohibited by the statutory limitation contained in 1929 Comp. § 141-1001. So far

as material, said section reads: "The maximum rate of tax to be levied for all county purposes and uses, excepting special school levies, general school tax levies, and special levies on specific classes of property, shall not exceed five (5) mills on the dollar; Provided, however, that a tax not exceeding two (2) mills on the dollar of the assessed valuation of all property subject to taxation in this state may be levied for the construction and maintenance of state highways, which said two (2) mills levy shall not be within the state or county limitations heretofore fixed. * * * The foregoing limitations shall not apply to levies for the payment of the public debt or interest thereon."

It is obvious that in condemning a right of way for the state highway in question the Board of County Commissioners was proceeding under the authority and compulsion of 1929 Comp. § 64-313. A major portion of the damages carried into each judgment was consequential, although in each instance the judgment covered damages for the taking. The county apparently sought no review of the condemnation decrees, and it is here immaterial whether the statute mentioned renders the county liable for consequential damages suffered by a defendant for the taking of property which the statute authorizes. For the purposes of this case it must be assumed that it does.

In Summerford v. Board of Commissioners of Dona Ana County, 35 N.M. 374, 298 P. 410, 412, we had before us the statute above mentioned. It provides that the several counties shall obtain and pay for rights of way for state highways. As stated in the case just cited, consequential damages are not mentioned in the statute, but as there observed, "the view * * * that they are comprehended is not without support in reason." We were spared the necessity of determining the question in that case by the county's admission that ordinarily its liability for damaging is the same as for taking.

We thus have before us a case where not only do the judgments for which the levy was ordered represent involuntary liabilities imposed by law but liabilities fixed in actions classified of necessity as ex delicto as distinguished from actions ex contractu. We think the case is enough like that of Barker v. State, 39 N.M. 434, 49 P.(2d) 246, 247, as to be controlled by it. We there held that the very statute, 1929 Comp. § 141-1001, here relied upon by petitioner as invalidating the levy challenged, did not apply to obligations sounding in tort. True, we were construing the five-mill limitation applicable to cities rather than that concerning counties. But both are contained in the same section of the statute and in practically the same language. Obviously the two limitation provisions do not carry different meanings.

In Barker v. State, supra, speaking of 1929 Comp. § 141-1001, we said: "Chapter 140 passed at the same session (1921) is the limitation act in question, now appearing in Comp.St.1929 as section 141-1001; the material parts of which have been quoted. That such statutes have reference to the ordinary municipal expenditures incurred

in carrying on business, enacted to protect the public against extravagance and waste where expenditures are discretionary, and not as to items definitely fixed by law and not specifically included, or judgments for torts, or like items over which the officials of municipalities have no control; has been the view expressed by the great majority of decisions where the question was an issue."

While, strictly speaking, the taking or injury to land by eminent domain is not a tort in the sense of a wrongful act, 10 R.C.L. 223, § 190, "Eminent Domain," nevertheless, as already indicated, proceedings in eminent domain are classified broadly as tort actions in contradistinction to actions ex contractu. As was said in Keller v. Scranton, 200 Pa. 130, 49 A. 781, 783, 86 Am.St. Rep. 708:

"The taking or injury to land by eminent domain is not a tort, in the sense of a wrongful act. When the broad distinction of actions into those ex contractu and those ex delicto was established, damages from the exercise of eminent domain were unknown. When they came into existence, they did not strictly fit into either class, but, as they were certainly not founded on express contract with the landowner, they were put in the only other class, as torts. But when, as, in the present case, the act which is called a 'tort' is done under a contract, and the assumption of the consequent damages is an express term of such contract, we have a perfectly clear case outside of the principle that makes municipalities liable for their wrongful acts, without regard to their indebtedness, and within the constitutional prohibition of a contractual obligation to pay in future for a consideration in the present."

In that case, as the quoted portion of the opinion indicates, the court declined to hold the damages recovered exempt from the constitutional debt limitation, but only so because the alleged tort was done under a contract by the express terms of which consequential damages were assumed by the city and agreed to be paid.

However, the Barker Case becomes even more persuasive in the light of the circumstance that, whether or not the judgments in question were recovered in actions correctly classified ex delicto, there can be no question that they represent (quoting from the opinion in the Barker Case) "items definitely fixed by law and not specifically included * * * or like items over which the officials * * * have no control." Certainly the obligations levied for are not contractual. As obviously they are involuntary. They represent no part of the ordinary current expenses incurred in carrying on the county business, to curb waste and extravagance in which, we said in the Barker Case, this and other similar statutory limitations have been enacted.

In thus emphasizing the involuntary character of the obligation, we are not unmindful that in Santa Fé Water & Light Co. v. Santa Fé County, 29 N.M. 538, 224 P. 402, as expressed in the syllabus pre-

pared by the court, we held: "The limitation against the payment of unpaid debts provided by the Bateman Act (sections 1227–1233, Code 1915) applies to debts created for necessities such as water and lights for use at a courthouse, or others which may be arbitrarily placed against a county or other municipality, with the same force as to those that may be voluntarily created by such county or municipality."

The court was there dealing with the Bateman Act (1929 Comp. § 33-4241 et seq.), long deeply imbedded in the declared public policy of this state. And so long as the obligation whose payment is sought to be coerced by mandatory levy classifies as an item of ordinary current expense of conducting county affairs in excess of its current income, it matters not whether the obligation be one arbitrarily placed against the county, as by imposition of law, James v. Board of Com'rs, 24 N.M. 509, 174 P. 1001; Sena v. Board of County Com'rs, 27 N.M. 461, 462, 202 P. 984; nor that it appears in the form of a judgment. The court will look behind the judgment to ascertain whether the claim is legally payable from the taxes sought to be levied. Atchison, T. & S. F. R. Co. v. Territory, 11 N. M. 669, 72 P. 14. This same reasoning employed in decisions dealing with the Bateman Act should hold by analogy when applied to the limitation statute under consideration. Nevertheless, when the true nature of the obligation is disclosed, whether reduced to judgment or not, if found not to be of a kind contemplated by the statute, the latter presents no obstacle to a levy for its payment. Barker v. State, supra.

Respondents refer us to article 8, section 7, of our State Constitution, and 1929 Comp. § 33-3704, both restraining execution upon judgments against counties and authorizing payment of same by tax levies. Petitioner replies that neither of these provisions, even if that in the Constitution be deemed self-executing, constitutes a grant of power to override other constitutional or statutory limitations. Of course, no constitutional limitation is here involved. We had occasion to refer to these constitutional and statutory provisions in Barker v. State, supra.

We entertain no doubt that authority in the Board of County Commissioners to make the levy is to be found in 1929 Comp. section 33-3704. Atchison, T. & S. F. R. Co. v. Lopez, 20 N.M. 591, 151 P. 308. Petitioner says the decision in the Lopez Case is unfortunate and in direct conflict with Atchison, T. & S. F. R. Co. v. Territory, 11 N.M. 669, 72 P. 14, previously determined but unnoticed in the Lopez Case, and James v. Board of Commissioners of Socorro County, 24 N.M. 509, 174 P. 1001, subsequently decided, which relies upon Atchison, T. & S. F. R. Co. v. Territory without mention of the Lopez Case.

We do not find in these cases the conflict which petitioner seems to sense. In Barker v. State, supra, we referred to the Lopez Case and quoted approvingly from it. If the obligation involved in the Lopez case had been of a kind interdicted by the Bate-

man Act or by section 141-1001, had such limitation statute been then in force, there would be patent inconsistency between the Lopez and James Cases on the one hand and Atchison, T. & S. F. R. Co. v. Territory, on the other. The fact is, however, that at the time of the decision in the Lopez Case the limitation statute mentioned had not been enacted and the Bateman Act was not invoked. Apparently the contention made was that the levy to satisfy judgments on interest coupons of past-due and defaulted bonds of Santa Fé county was illegal because not for current expenses of the county which could be satisfied by the five-mill levy for that purpose authorized by Laws 1903, c. 108, § 9, now Comp.1929, section 33-5601. Two statutes were discussed as bearing upon the county's authority to make the 1½-mill levy required to satisfy the judgments involved, to wit, Code of 1915, § 1155 (now 1929 Comp. § 33-3704), and Code of 1915, § 1339 (now 1929 Comp. § 33-5602). The latter is limited in character, providing for a levy not exceeding two mills on the dollar to meet current expenses. The former was held to be general in nature and to furnish authority for so much of the levy as was necessary to satisfy the only one of the judgments which actually had been rendered prior to the levy.

It is obvious from the opinion in the Lopez Case that the obligation represented by the judgment levied for was not considered current expense. If current expense, the amount of the levy, 1½ mills, being well within the limitation of two mills interposed in the statute authorizing levies to meet judgments rendered against counties on account of current expenses, there was no occasion for the court to rest warrant for the levy on section 33-3704 (Code of 1915, § 1155). Unquestionably this court, in reaching the conclusion it did in the Lopez Case (and whether correct in its classification of the obligation or not it is unimportant now to determine), necessarily held it to be of a kind entitled to satisfaction from the levy ordered. The court did not hold, as petitioner seems to contend, and in conflict with the cases cited, that the judgment could not be looked behind for ascertaining the true nature of the liability represented by it. It did hold that the judgment was not for current expenses, and necessarily held by sustaining the levy that the obligation was of a kind not affected by the implied limitation carried by Laws 1903, c. 108 (1929 Comp. § 33-5601) authorizing a levy of five mills for county current expenses. So viewed, we find no conflict with it.

The petitioner places its greatest reliance, aside from the conflict claimed to exist in our own decisions, upon the case of Grand Island & N. W. Ry. Co. v. Baker, 6 Wyo. 369, 45 P. 494, 34 L.R.A. 835, 71 Am. St.Rep. 926. We have carefully weighed this case, but consider the point ruled by our own decisions.

The conclusion reached upon the point discussed renders unnecessary a decision of other questions raised. It perhaps should be said that the language of the proviso in

§ 141-1001 exempting from the limitation of five mills "a tax not exceeding two (2) mills on the dollar of the assessed valuation of all property subject to taxation in this state," for construction and maintenance of state highways, is discussed by petitioner in anticipation of reliance thereon by respondents. They eliminate it from the case, however, by agreeing with petitioner that the proviso contemplates a state-wide levy by the state and not by a single county.

In what has been said, it is assumed in accordance with the theory upon which the case was tried below that the levy involved was for a "county purpose." The limitation imposed by § 141-1001 aforesaid is upon the rate to be levied by a county "for all county purposes and uses." This section, expressly excepting from the maximum rate imposed on state and county levies a levy of two mills "for the construction and maintenance of state highways," seems itself to carry statutory recognition, that a "state highway" is not a "county purpose." The broad powers conferred by the Legislature on State Highway Commission in the location, construction, and maintenance of state highways, would seem to remove the subject from the domain of mere county purposes.

Furthermore, 1929 Comp. § 64-313, requiring counties under the conditions set forth to obtain and pay for state highways, was enacted subsequently to the adoption of § 141-1001, imposing the five-mill limitation. In view of these considerations, it may well be doubted if the purpose of this levy is actually a "county purpose" within the purview of the statute.

It follows from what has been said that the judgment of the district court in this cause should be affirmed.

It is so ordered.

HUDSPETH, BICKLEY, and BRICE, JJ., concur.

ZINN, J., did not participate.

63 P.(2d) 350

In the Matter of the TAXES assessed Against the Property of the ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, IN EDDY COUNTY, N. M., FOR THE YEAR 1934.

No. 4155.

Supreme Court of New Mexico.

Dec. 7, 1936.

W. C. Reid and E. C. Iden, both of Albuquerque, for petitioner.

G. L. Reese, Jr., of Carlsbad, for respondents.

SADLER, Chief Justice.

This is a companion case to In re Taxes Assessed Against the Property of the Atchison, Topeka & Santa Fé Railway Company in Eddy County, N. M., for the year 1933, 41 N.M. 9, 63 P.(2d) 345, just decided. The cases are identical, in-

volving the same legal questions, the only difference being that this case involves a tax levy for the year 1934, whereas the other case involves a levy for the year 1933. On the authority of the decision just made in that case, the judgment in this case will stand affirmed.

It is so ordered.

HUDSPETH, BICKLEY, and BRICE, JJ., concur.

ZINN, J., did not participate.

63 P.(2d) 537

GOTTWALD et al. v. WEEKS et al.

No. 4153.

Supreme Court of New Mexico.

Oct. 19, 1936.

On Rehearing Dec. 7, 1936.

Edward C. Wade, Jr., of El Paso, Tex., for appellants.

W. C. Whatley, of Las Cruces, for appellees.

BRICE, Justice.

From a decree in an accounting following a mutual rescission of a contract for purchase and sale of real estate, this appeal is prosecuted. We will recite only facts necessary to a decision.

In the year of 1927 appellees (husband and wife) contracted to sell and convey to H. M. Gottwald and the appellant Julia L. Gottwald (husband and wife) certain real estate in consideration of $12,700 paid and to be paid. Gottwald died November 1, 1931, and appellant Julia L. Gottwald and the other appellants (his minor children) are his heirs at law and succeeded to his estate. This action was brought in January, 1932, to cancel the contract of sale and purchase and for an accounting. After the suit was filed, appellants abandoned the land, and appellees immediately took possession and conveyed it by warranty deed to another.

The court concluded there was a mutual rescission of the contract and that the parties should be placed in statu quo. The parties acquiesced in this conclusion and it is binding here, though we do not determine whether it is correct. But appellants disagree with the court's conclusion that such restoration entitled appellees to a credit for a 50 per cent. depreciation in the market value of the land, resulting from the economic depression, which was allowed them by the court. The conclusion of the court is stated in the following language: "That plaintiffs, at the time of the institution of this suit, were not entitled to rescind, but that by reason of the conduct of defendants in taking possession of said premises, and conveying same away, as the Court finds was done in June, 1932, the defendant should be held to have acquiesced in such rescission, so that it was a mutual rescission of said contract, which entitled plaintiffs to recover back all that had been paid on the purchase price, after accounting for the rental value during the time they were in possession, and for the depreciation in the market value of the property between the time of entering into the alleged contract and the time of the rescission by the plaintiff in 1932."

The court erred in allowing the credit complained of. The restoration of the status quo ante contemplates the return to each of the parties of that with which he parted, with compensation for its use or injury. This includes the return of the purchase money paid and interest thereon to the purchaser by the vendor, and the payment of the fair value of the use of the land, generally reckoned as its fair rental value, and consequential damages for waste or other injury to the real estate, caused by acts of the purchaser, to be paid by him to the vendor. The territorial Su-

preme Court in Daly v. Bernstein, 6 N.M. 380, 28 P. 764, 767, stated: "* * * 'In statu quo' means being placed in the same position in which a party was at the time of the inception of the contract which is sought to be rescinded. Now, at that time the defendant had merely the possession of the place. If the jury believed the testimony, that was delivered to him, and hence he was in statu quo."

[redacted] There are but few authorities on the identical question here presented, but these hold that the purchaser is not chargeable with a depreciation in the market value of the real estate caused by economic conditions.

"On the rescission of a contract for the sale of land, the purchaser will be held to account for all waste committed by him on the premises while in his possession, such as the cutting and removal of timber, the destruction of vines or fruit trees, to the cultivation of which the land was chiefly devoted, or the removal of buildings which were upon the land at the time he came into possession. And generally, the purchaser, on such rescission, will be chargeable with any deterioration in the value of the land caused by his mismanagement, improvidence, injudicious cultivation of it, or culpable negligence. But it is not an invariable rule that he must restore the land in the same condition in which he received it, and the fact that it may have depreciated in value will be no obstacle to his rescission of the purchase, good cause therefor existing, when that circumstance is not in any way attributable to his own act or fault." 2 Black on Rescission and Cancellation, § 633.

"'Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.' The words 'same position,' found in the section, are used with reference to the subject-matter of the contract; and the fact that the market value of the property may have depreciated while out of the possession of the vendor does not defeat the vendee's right of rescission. If the property can be returned by the vendee in substantially the same condition as when he received it, then the requirements of this section of the Code are fully satisfied." Goodrich v. Lathrop, 94 Cal. 56, 29 P. 329, 28 Am.St.Rep. 91.

"It is further contended that the plaintiff is estopped by his conduct from demanding the relief sought by him on the ground that during his occupancy of the premises there has been a material depreciation in the market value of real estate, and that the lands have been incumbered by a judgment lien rendered against the defendant in favor of one O. L. Mick.

"We may take judicial notice of the fact of the general depreciation in land values since March 1, 1920, but we are not ready to hold that a depreciation in the market value of real estate constitutes a defense to the instant action. A substantial restoration is all that in any event is required. The right to rescind does not depend upon plaintiff's ability to make the adverse party whole in a pecuniary sense as to the real

estate conveyed. The status quo depends upon returning to him what he has received." *Dickerson v. Morse*, 203 Iowa, 480, 212 N.W. 933, 935.

"The general rule is well settled that to entitle the purchaser to rescind he must place the vendor in statu quo, or offer to do so, and in some jurisdictions this is so under the statute as well as under the general rule of law, the obligation of the purchaser under a statute, however, being limited by its terms. A substantial compliance with the requirement, however, is all that is necessary, especially where a literal compliance has been rendered impossible by circumstances for which the purchaser is not responsible, or for which the vendor is responsible. If the impossibility of restoration has been caused by the vendor's acts or defaults, the purchaser's right to rescind will not be defeated thereby. It is sufficient that the purchaser return to the vendor what he has received, regardless of a depreciation in its market value." 66 C.J. § 467, p. 819.

Appellants' second point reads: "The Court erred in permitting the defendants to file an amended answer during the trial with new allegations as to depreciation."

This becomes immaterial in view of our holding that depreciation of the market value of the real estate in question was not a proper credit to appellees.

This case comes within section 45-601, N.M.Code 1929, which is as follows: "In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence."

The court found that in the year of 1931 appellees had advanced the Gottwalds $1,863.77 and had received payments thereon of $1,631.70, leaving a balance unpaid of $232. Dr. Weeks testified that he was paid $1,747.89, leaving a balance of only $114.88 in his favor. It seems that the books of Dr. Weeks corroborated most, but not all, of the credits claimed by appellees, and this satisfies the statute as to those corroborated. Radcliffe v. Chaves, 15 N.M. 258, 110 P. 699. Weeks' books showed he was paid $1,747.89 on account, instead of $1,631.70 as found by the court, leaving a balance of $114.88 instead of $232.07 allowed.

The other question raised is immaterial to a decision of the case.

The cause will be reversed and remanded, with instructions to strike from appellees' credits the allowance for depreciation of the farm in question, and to reconsider and determine the balance that may be due either party from the 1931 transaction consistent with this opinion and without further testimony or proceedings.

It is so ordered.

SADLER, C. J., and HUDSPETH, BICKLEY, and ZINN, JJ., concur.

On Motion for Rehearing.

BRICE, Justice.

We have considered appellees' motion for rehearing and have concluded that it should be overruled, but that the order of reversal in the original opinion should be amended.

There is considerable confusion in the findings of the district court that we are unable to reconcile, caused by the court's adopting various findings requested by the parties without making full and complete findings of his own. If the latter rule were followed, it would save this court trouble and annoyance in discovering the real findings of the court, and avoid duplication and inconsistencies.

There is a finding that the rental value was one-half the crops and that the value of the crops was $12,331.70. This finding fixes the rental value at $6,165.85. Appellees' requested finding No. 10 was refused, and the court in lieu found the rental value to be $2,550. There was no adjustment of the accounts, from which it was determined which party was indebted to the other and to what extent. The accounting should be completed with or without additional evidence, at the discretion of the court.

The motion for a rehearing is overruled.

The cause will be reversed and remanded, with instructions to strike from the appellees' credits the allowance for depreciation of the farm in question and to reconsider and determine the balance that may be due either party from the findings and conclusions of the court, to be made from the testimony heretofore taken, unless he shall be of the opinion that it is necessary for a just determination of the suit that additional evidence is required; in which case additional evidence upon any particular question may be received at the court's discretion.

The cause is reversed and remanded for further proceedings not inconsistent with this court's opinions.

It is so ordered.

SADLER, C. J., and HUDSPETH and BICKLEY, JJ., concur.

ZINN, J., did not participate.

63 P.(2d) 540

HOGSETT v. HANNA.

No. 4126.

Supreme Court of New Mexico.

Nov. 19, 1936.

Rehearing Denied Jan. 9, 1937.

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Hanna & Wilson and Wm. A. Brophy, all of Albuquerque, for appellant.

John F. Simms and H. O. Waggoner, both of Albuquerque, for appellee.

HUDSPETH, Justice.

This is an appeal from a judgment for $15,000 rendered in favor of plaintiff, as the administrator of the estate of Robert F. Hogsett, deceased, for the alleged negligence of the defendant and his servant resulting in the death of Dr. Hogsett.

Robert F. Hogsett, an able and well-educated physician, thirty years of age, who had a lucrative practice, died as the result of a fall from the floor of a garage through an unguarded floor door, down certain steps leading to the cellar containing a heating plant and used by a tenant of the garage as a storeroom. The defendant, appellant here, was the owner and landlord of said premises, including two offices occupied by unassociated parties. The garage was demised to William Keutter, a witness in this cause, by a written lease for the "garage located behind 217–219 West Gold Avenue, Albuquerque, New Mexico," without further description of the premises. The cause was tried to the court without the intervention of a jury. At the close of plaintiff's case the defendant moved the court to dismiss the complaint. The motion was denied and the defendant stood upon his motion, and, after saving exceptions necessary for a review, defendant took this appeal. Several points are now pressed upon our notice as calling for a reversal of the judgment.

The court made findings of fact requested by plaintiff, as follows:

"7. The heating plant for the entire building was in the basement, and prior to and at the time of the accident the Defendant, Hanna, as the landlord of the premises, furnished a servant, to-wit, a janitor, and furnished the fuel to run the furnace, and caused the janitor to use the doorway going down to the basement during the winter months when heat was necessary in the building, and neither Kuetter, the tenant of the garage, nor any other tenant of the building had any control over the firing of the furnace nor over the janitor in his trips up and down the steps and through the door leading to the basement of the building.

"8. The Defendant's servant, the janitor, left the door in the floor of the garage propped open during the season when the furnace was being run in order to increase the draft of the furnace, and prior to the 24th of November, 1933, the door in the floor of the garage had been left open for a number of days, and William Kuetter, the tenant of the garage, did not disturb it.

"9. Kuetter, the tenant of the garage, at times went into the basement where he kept some tires stored, but he exercised no control over the furnace or heating plant nor over the janitor who came and went as the servant of the Defendant."

"13. The janitor, servant of the Defendant, Hanna, was down in the basement before the accident and came out and left the door propped open, in which condition it remained until the time of the accident.

"14. There was no protective device or guard of any kind around the opening into the cellar."

The court adopted the following conclusions requested by plaintiff.

"1. The Defendant, as the owner of the garage premises, having rented the same for use as a public garage, with the knowledge that customers of the garage did come and go therein about their business, and having retained control of the operation of the furnace in the basement and the right to have his janitor go in and out of the basement through the door in the floor of the garage, owed a duty to Dr. Hogsett, as a customer of the garage, to keep the door into the basement, flush with the floor, closed, which duty he negligently failed to perform.

"2. That the negligence of the Defendant's servant, the janitor, in failing to close and keep said door closed was a proximate cause of the death of Dr. Hogsett.

"3. That the Plaintiff is entitled to judgment against the Defendant, Thomas W. Hanna, for the value of the life of Dr. Hogsett in the amount found by the Court."

At the request of defendant, the court made the following findings of fact:

"4. On the day of the accident described in the complaint, the garage was lighted with three 60 watt lights (and two 30 watt lights) hanging from the ceiling of said garage, the nearest light to the opening to the basement and hanging from the ceiling of said garage being about nineteen feet from said stairway; that there were three lights visible through three windows immediately south of said entrance to the basement, said windows through which the lights were visible being just above said basement opening and within two feet thereof; that at the time of the accident it was light around said entrance to the basement, and as light there as in any other part of the garage.

"5. That a few minutes prior to the time the deceased was found on the basement steps by William Kuetter, said deceased had stood in front of his car which was parked by the side of said stairway, and looked at the car and talked to his secretary, Miss Gibson, about the way the car had been polished; that said deceased had been in the garage taking his car in and out every day except Sundays for a period of six or eight months prior to the accident; that a few minutes before the accident and when last seen by William Kuetter, the deceased was walking sideways toward his car and toward the entrance to said basement; that deceased's car had been parked near the basement stairway before this time."

"7. That the tenant, William Kuetter, was down in the basement some time during the day of the accident, and the last time he went down into the basement and came up he left the door open. The evidence does not disclose whether any person was down in the basement after said tenant Kuetter left the door open and prior to the accident."

"10. On one occasion the defendant, Thomas W. Hanna, requested the tenant William Kuetter not to park cars on top of the door going into the basement so that the janitor could have access to the basement. During the winter months, except for a period of time during which the tenant kept all of the dóors locked so that no one could have access to the garage room, extending over some period of time, the tenant, William Kuetter, left a door to the garage unlocked, and also kept his cars off of the door so that the door could be opened. That the tenant, William Kuetter, used the stairway going into the basement and kept certain supplies and tires stored in the basement for his use in connection with the operation of the garage."

"13. That there was a coal chute outside of the garage occupied by said Kuetter, through which a janitor could enter the basement and have access to the furnace therein without using the basement steps in said garage room, and that said outside coal chute was used on occasions by the janitor (for that purpose when he had been locked out of the garage)."

And the court adopted the following conclusions of law at the request of defendant:

"2. Under the terms of the written lease between the defendant Hanna and the tenant Kuetter, the tenant Kuetter had the right to the exclusive control and possession of the entire premises including the door over the steps leading into the basement, and that said defendant Hanna had no right or privilege under said lease to enter said premises to repair or rehabilitate same or to change any of the structures in said premises without the consent of William Kuetter."

"11. The evidence does not show any pecuniary damage to the father or mother of the deceased, they being the ones shown by the evidence to be entitled to the distribution of the proceeds of any judgment obtained on account of the death of Deceased."

The parties will be referred to as in the trial court. The defendant maintains that the trial court erred in ruling that an individual master was liable for the wrongful death caused by the tort of his servant, and cites the case of Don Yan v. Ah You, 4 Ariz. 109, 77 P. 618, and Texas cases. Neither the Arizona nor Texas statute is identical with the New Mexico act.

Our statute was originally passed as chapter 61 of the Laws of 1882 and was taken from the statutes of Missouri. Prior to the enactment of this statute by our Territorial Legislature, the case of Proctor v. Hannibal & St. J. Railway Company, 64 Mo. 112, had been decided by the court of last resort of that state. The court in that case said: "It manifestly appears from these provisions—for they apply to the injuries alluded to in section 3, as well as to those in section 2—that it must have been in the mind and intention of the legislature only to confer upon the above classes of persons the right to sue in cases where the husband, wife or child could have sued, had not death been the result of the injury."

The statute was again construed in Gray v. McDonald, 104 Mo. 303, 16 S.W. 398, 399, where it is stated: "It is next insisted by the appellant that this action is founded on section 2122 of the Revised Statutes of 1879, being the third section of the damage act; that by that section the person only who committed the act of homicide is liable in damages to the designated survivor of the deceased, and hence a demurrer to the evidence should have been sustained. The first branch of the proposition is conceded; but we do not agree to the second, in the sense in which it is pressed by appellant. The statute declares: 'Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and the act, neglect, or default is such as would, if death had not ensued, have entitled the injured party to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.' This section, like the preceding one, does not, as is often supposed, create a new cause of action. It transmits to the designated persons a cause of action when the injured person would have had one had death not ensued. In other words, the cause of action does not abate by reason of the death of the person injured. Proctor v. Railroad Co., 64 Mo. 112; White v. Maxcy, 64 Mo. 552. The first inquiry, therefore, is whether the injured party would have had a cause of action against the defendant for the wrongful act causing death, had death not ensued. Crumpley v. Railway Co., 98 Mo. [34] 36, 11 S.W. 244. If the injured party would have had a common-law or statutory cause of action, had death not ensued, then the cause of action survives to the designated person."

And in the case of Casey et al. v. St. Louis Transit Co., 205 Mo. 721, 103 S.W. 1146, the court said: "These are purely statutory rights of action, and each must rest on its own statute. They may be joined in the same petition, but, when so, they should be stated in separate counts. The right of action given in section 2864 [Mo.St.Ann. § 3262, p. 3353] is for a death caused by the negligence of the servant operating the defendant's instrument of transportation, whether it be a locomotive, car, train of cars, steamboat, its machinery, stagecoach, or other public conveyance, while the right of action given in the two sections next following is for a death caused by the negligence of the defendant, which may mean his own negligence, as, for instance, in furnishing an unsafe vehicle, or it may mean his negligence through his servant in some particular other than the particular specified in section 2864, for which, if the person injured had not died, he would have had a right of action."

While the last two cases cited above were decided after the enactment of the statute by our Territorial Legislature, they appear to us to be sound. The determinative fact is whether or not Dr. Hogsett, if he had survived, could have maintained an action against the defendant for injuries

received. This proposition is not disputed. This point is ruled against the defendant.

The defendant strenuously urges that, since the court concluded that plaintiff had failed to prove any pecuniary damages to the father and mother of the deceased, they being the ones shown by the evidence to be entitled to the distribution of the proceeds of any judgment obtained on account of the death of the deceased, the court erred in rendering judgment for $15,000 against the defendant. This is one of the principal questions discussed in the case. This court had this question under consideration in Valdez, Administrator, v. Azar Bros., 33 N.M. 230, 264 P. 962, and Mr. Justice Watson prepared an able opinion covering this question. The case went off on another point and the opinion was withdrawn. In the course of that opinion, Mr. Justice Watson said:

"Appellee's intestate was eight years of age. Beneficiaries of the judgment are, under section 1823, Code of 1915, sisters and a brother, aged, respectively, fourteen, thirteen and six years. The evidence of pecuniary loss to these beneficiaries, if not wholly lacking, is very slight. This follows naturally from the ages and situation of the parties. Appellants contend that in the absence of actual proof of pecuniary loss only nominal damages are recoverable. They insist that where judgment is sought for the benefit of collateral kindred, no presumption of pecuniary loss may be indulged. They admit that to sustain their contention we must overrule Cerrillos C. R. Co. v. Deserant, 9 N.M. 49 [49 P. 807], but they urge that the rule there laid down is clearly wrong. In that case it was established as the measure of damages 'that from the proof as to age, earning capacity, health, habits and probable duration of life, the jury shall say what is the present worth of the life of deceased.' If this is the correct rule of damages, it is not questioned that the evidence supports the judgment.

"In considering the authorities on this question, the great divergence in and variety of statutory provisions must be kept in mind. As stated in Sutherland on Damages, § 1261:

" 'The most noticeable difference and the one which affects greatly the elements of damage is that between statutes which provide that the damages shall be distributed to the widow, husband and near of kin of the deceased, and those which provide that they shall be part of his estate. Under the former, the beneficiaries may recover the amount of loss resulting to them from the death; under the latter no such inquiries are relevant, but the question is how much has his estate suffered by his death?' See, also, Sedgwick on Damages, § 571B.

"This distinction is evidently logical, and we presume, upon the authority of the eminent author quoted, that it is generally to be observed in comparing statutes of the various jurisdictions. If we can place our statute in the one or the other of these categories, the problem will be solved.

"Sections 1821 and 1823, Code of 1915, which are here to be construed and applied, are as follows:

" 'Section 1821. Whenever the death of a person shall be caused by the wrongful

act, neglect or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act, or neglect, or default, is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured.'

"'Section 1823. Every such action as mentioned in section 1821 shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: Provided, He or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows:

"'First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children and grandchild or grandchildren by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.'

"Counsel calls attention to the provision that 'the jury * * * may give such damages, compensatory and exemplary, as they shall deem fair, and just, taking into consideration the pecuniary injury or loss resulting from such death to the surviving party or parties entitled to the judgment.' The surviving party or parties entitled to the judgment are the kindred mentioned later in the section to whom the proceeds of the judgment are to be distributed. Standing alone, such provision would seem to place our statute in the class limiting the damages to those compensatory of the pecuniary loss shown. Counsel relies mainly on this provision, and contends that it was not given sufficient weight in the formulation of the rule in Cerrillos C. R. Co. v. Deserant, supra.

"There are other provisions, however, which must not be overlooked. The right of action is not dependent nor conditioned upon the survival of any kindred. Section 1821 gives a cause of action against the

culpable party 'in every such case.' Section 1823 provides for the bringing of suit by the personal representative, and provides for the distribution of proceeds of the judgment to the designated kindred; not in the proportions that the jury may have found them to have suffered pecuniary loss, but according to an arbitrary priority. Thus the law seems to presume loss to these sisters and brother in the case at bar, even though the evidence might have disclosed that it was the parents who really suffered. The proceeds of the judgment are liable for decedent's debts only in case there are no kindred of the favored classes. If there be none of the kindred named, then the proceeds are to be disposed of under the laws of distribution. Our statute was under consideration in Whitmer v. El Paso & Southwestern Co., 201 F. 193, where the Circuit Court of Appeals of the Fifth Circuit said:

" 'The statutes allowing damages for wrongful act or neglect causing death have for their purpose more than compensation. It is intended by them, also, to promote safety of life and limb, by making negligence that causes death costly to the wrongdoer.'

"If the legislature intended no more than to compensate those of the surviving kindred who had suffered pecuniary loss, the statute is illdesigned for that purpose. It does not provide for a finding by the jury as to which of the kindred have suffered loss, nor in what proportions. It does not provide for distribution of the proceeds of the judgment in proportion to the losses suffered, but, arbitrarily, according to kinship. In such a case as that at bar the loss shown to have been suffered by one only of the three beneficiaries, and which the jury is directed to take into consideration in assessing damages, would inure to the benefit of the other two, in the equal distribution of the proceeds of the judgment.

"On the other hand, the direction that the jury take into consideration the pecuniary injury to the party or parties entitled to the judgment raises a question as to whether the legislature intended to compensate only for the injury to the decedent's estate. It clearly does not contemplate compensation to the 'estate' in the usual sense, because debts, which ordinarily have priority of claim against an estate, are, by this statute, not to participate in the distribution, except in the absence of kindred of the favored classes. If the compensation is for injury to the estate, it must be a special 'estate' which it is the legislative policy to distribute in a special manner.

"A careful reading of the sections under consideration suggests that the first thought of the legislature was to create a cause of action against a culpable party. It gave secondary consideration to the distribution of the proceeds of the judgment. It did not intend to relieve the tort feasor from liability in any event. While its first care was to provide for those whom it presumed to have suffered pecuniary loss, it contemplated the payment of the decedent's debts in the absence of kindred presumably damaged, and a distribution of the residue to other kindred. The statute clearly contemplates a re-

covery even if there be no surviving kindred of the favored classes. In such a case appellants' theory that the damages are only to be compensatory of pecuniary loss must fail. It is not to be supposed that the legislature solemnly provided for a payment of debts and a further distribution to kindred from nominal damages only. We should be slow to hold, either, that in a case where there were no kindred of the relationships mentioned in the statute, the administrator could show the amount of outstanding debts of the decedent, as a matter to be considered in the assessment of damages. We could hardly hold that a judgment to be recovered for the benefit of surviving brothers and sisters could be only nominal in amount, because of the impossibility of showing pecuniary loss, and, at the same time, hold that substantial damages might have been recovered if there had been no kindred. The law expressly prefers brothers and sisters to creditors. This preference must have been created, either upon a presumption of pecuniary loss, or because they, in their order of priority, were deemed the proper objects of a gratuity made possible by a penalty imposed, as matter of policy, upon the party whose act caused the death of the decedent. If the legislative theory was a presumption of pecuniary loss, that presumption supplies the lack of actual proof. If a gratuity, pecuniary loss is not a requisite. On either theory, substantial damages are recoverable, according to some measure, without actual proof of loss.

"These considerations lead us to conclude that our statute resembles rather those which provide for compensation to the estate than those which provide compensation for pecuniary loss to named kindred. It was these considerations, no doubt, and perhaps others, which impelled the territorial supreme court in Cerrillos C. R. Co. v. Deserant, supra, to establish as the measure of damages in all cases of death by wrongful act, 'the present worth of the life of deceased.' That pronouncement has stood for many years as the law of this jurisdiction. For that reason alone it should not be departed from except for weighty reasons. The people and their legislatures have long acquiesced in the construction there placed upon this statute, though they might at any time have changed it. The case does not require us to examine the question further. We have only to determine the validity of appellants' contention that the evidence warranted only nominal damages. This contention we must overrule, without speculation at this time as to the effect, in some other case, of the provision that the jury should consider the pecuniary injury to the party entitled to the judgment. In reaching the present conclusion, we are not without direct authority. In Whitmer v. El Paso & S. W. Co., supra, the court had under consideration the same statute and a similar case."

Defendant's able counsel have cited many cases from other jurisdictions interpreting statutes somewhat similar to ours which support their position. However, we do not feel justified in reversing the

case of Cerrillos C. R. Co. v. Deserant, supra, for the reasons so clearly stated by Mr. Justice Watson. The evidence of the worth of the life of the deceased is substantial and the entry of judgment with the findings made meet the requirements of Comp.St.1929, § 105-813.

The defense of contributory negligence is pressed upon us as a ground for reversal of the judgment. The defendant maintains that the deceased was plainly guilty of negligence, that the obligation rested upon him to exercise reasonable care for his own safety, that the stairway constituted no reasonable source of danger to any one familiar with the premises who took proper precautions to see where he was stepping and that one must accept the consequences of his own precipitation, and cites Hilsenbeck v. Guhring, 131 N.Y. 674, 30 N.E. 580; Leech v. Atlantic Delicatessen Co., 104 N.J.Law, 381, 140 A. 423; Micca v. Parentini, 150 A. 223, 8 N.J.Misc. 332; Gleason v. Boehm, 58 N.J.Law, 475, 34 A. 886, 32 L.R.A. 645; Silver v. Hause, 285 Pa. 166, 131 A. 668; Reynolds v. Los Angeles Gas & Electric Co., 162 Cal. 327, 122 P. 962, 39 L.R.A.(N.S.) 896, and note, Ann.Cas.1913D, 34; Solomon v. Finer, 115 N.J.Law, 404, 180 A. 567; Hammer v. Liberty Baking Co., 220 Iowa, 229, 260 N.W. 720; Larned v. Vanderlinde, 165 Mich. 464, 131 N.W. 165; Swanson v. Peter Schoenhofen Brewing Co., 215 Ill.App. 185. The deceased is presumed to have exercised due care. This presumption might be rebutted by circumstantial evidence, and is a question for the trier of facts to determine whether all the facts and circumstances rebutted that presumption. The burden in this state of showing contributory negligence is on the defendant, De Padilla v. Atchison, T. & S. F. Railway Co., 16 N.M. 576, 120 P. 724, 729. In that case the rule was laid down that: "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the fact is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the courts." The case was followed in Russell v. Davis, 38 N.M. 533, 37 P.(2d) 536; Crespin v. Albuquerque Gas & Electric Co., 39 N.M. 473, 50 P.(2d) 259.

The findings of fact have been quoted above, and it is not necessary to repeat them here or discuss the evidence, since the findings are supported by substantial evidence. We cannot say as a matter of law that the trial court erred in refusing to find that the deceased was guilty of contributory negligence, or that the open stairway was not a dangerous place.

The defendant maintained that there is a fatal variance between the complaint and the evidence, but we find no merit in this point.

Another point upon which defendant relies for reversal is: "The plaintiff failed to prove any violation of duty by the defendant unto the deceased or to the plaintiff which was the approximate

cause of the death of Robert F. Hogsett or injuries, if any, to the plaintiff." The negligence of the defendant according to the complaint consisted of (1) failure to furnish sufficient light; (2) failure to guard the opening to the basement; (3) he suffered and permitted the door or covering over the entrance to the basement to stand open. There was no evidence that the defendant had personal knowledge that the door was allowed to stand open.

The defendant, relying upon the construction of the written lease under which the tenant held, has cited many authorities on the assumption that the facts show the tenant in possession of the floor of the garage under an ordinary tenancy for a period of years. The law applicable to such state of facts is clearly stated in the case of Roberts v. Rogers, 129 Neb. 298, 261 N.W. 354, 356, as follows:

"In the absence of express contract to the contrary, a tenant takes demised premises as he finds them, and there is no implied warranty by the landlord that they are safe or fit for occupancy. The rule of caveat emptor applies. 16 R.L.C. 777, § 271; 36 C.J. 204; Hatzis v. United States Fuel Co., 82 Utah, 38, 21 P.(2d) 862; Miller v. Vance Lumber Co., 167 Wash. 348, 9 P.(2d) 351; Gray v. Pearline, 328 Mo. 1192, 43 S.W.(2d) 802; Davis v. Manning, 98 Neb. 707, 154 N.W. 239; Rankin v. Kountze Real Estate Co., 101 Neb. 174, 162 N.W. 531.

"In the absence of contract, no duty to repair leased premises devolves upon the landlord but, on the contrary, the relation of landlord and tenant devolves that duty upon the tenant. Whitehead v. Comstock & Co., 25 R.I. 423, 56 A. 446; 16 R.C.L. 1030, § 552.

"A landlord is under no duty to change the visible form and mode of construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger; as to these the tenant assumes the risk. Andrews v. Williamson, 193 Mass. 92, 78 N.E. 737, 118 Am.St.Rep. 452; Miller v. Hooper, 119 Me. 527, 112 A. 256.

"A landlord is not liable to his tenant for any defects existing in the demised premises at the time of the lease that are perceptible to the senses or that can be discovered by reasonable inspection or examination. Doyle v. Union Pac. R. Co., 147 U.S. 413, 13 S.Ct. 333, 37 L.Ed. 223; Keates v. Earl of Cadogan, 10 C.B.(Eng.) 591; Woods v. Naumkeag Steam Cotton Co., 134 Mass. 357, 45 Am.Rep. 344; Berlin v. Wall, 122 Va. 425, 95 S.E. 394, L.R.A.1918D, 161; Hines v. Willcox, 96 Tenn. 148, 33 S.W. 914, 34 L.R.A. 824, 832, 54 Am.St.Rep. 823; Booth v. Merriam, 155 Mass. 521, 30 N.E. 85; Bowe v. Hunking, 135 Mass. 380, 46 Am.Rep. 471. * * *

"As indicated by the foregoing excerpts, the evidence in the record, as an entirety, discloses that, so far as defects alleged in the petition were concerned, the dangerous condition actually inhered in the construction of the trapdoor, and became such as and when subjected to the natural law of gravitation. * * *

"The controlling principle in this case appears to be the following: A landlord is ordinarily under no duty to change the visible form and mode of simple construction of leased premises in order to make the premises safe for his tenant, nor is he bound to remove obvious sources of danger; as to these the tenant assumes the risk."

See, also, Dammeyer v. Vorhis, 63 Ind.App. 427, 113 N.E. 764; Lawler v. Capital City L. Ins. Co., 62 App.D.C. 391, 68 F.(2d) 438, and cases therein cited.

There are cases holding that the landlord is liable where he leases land which contains a nuisance whether he is in possession or not. Many of these cases are cited in 50 L.R.A.(N.S.) 288. The same rule is stated in 16 R.L.C. 1076, as follows: "No person can create or maintain a nuisance upon his premises and escape liability for the injury occasioned by it to third persons. Nor can a lessor so create a nuisance and then escape liability for the consequences by leasing the premises to a tenant."

But this law has no application to the case at bar, since the trial court properly held that the entrance to the basement did not constitute a nuisance. We have no statute inhibiting the mode of construction followed, and there are many buildings in the state with like unguarded entrances to basements. The trial court also found that the cover to the entrance to the basement was a sufficient cover and not defective in any way. Nor does the case under consideration fall within the class of those where the party injured has no connection with the tenant. In Mahnken v. Gillespie, 329 Mo. 51, 43 S.W.(2d) 797, 802, the court said: "In this case, the walk in question, including the covering to the well, was in no sense a public walk provided for the use of the public in general, and which all who desired were invited to use. It was at most a private walk on private property for the benefit of the occupants of the premises and their families, servants, guests, and invitees. Cases such as St. Gemme v. Osterhaus, 220 Mo.App. 863, 294 S.W. 1022, cited by plaintiffs, and dealing with the liability of landowners or tenants who maintain pitfalls or obstructions in sidewalks or other public ways, or so near thereto as to endanger users thereof, are not applicable. Meade v. Montrose, 173 Mo.App. 722, 725, 160 S.W. 11; Bender v. Weber, 250 Mo. 551, 561, 157 S.W. 570, 573, 46 L.R.A.(N.S.) 121."

In the case of Lucas v. Brown (C.C.A.) 82 F.(2d) 361, 362, it is stated: "The trial court thought the case governed by Davis v. Manning, 98 Neb. 707, 154 N.W. 239, and the decisions of this court in Midland Oil Co. v. Thigpen, 4 F.(2d) 85, 53 A.L.R. 311, and Fraser v. Kruger et al., 298 F. 693. We adhere to the rules announced in these cases, to wit, that ordinarily the duties and liabilities of a landlord to persons on leased premises by invitation of the tenant are the same as those owed to the tenant himself; that a subtenant, servant, employee, guest, or invitee of the tenant is so identified with the tenant himself that his right of recovery for

injury as against the landlord is the same as that of the tenant, if he suffers injury; that, where there is no agreement by the landlord to repair, and he is not guilty of any fraud or concealment, by failing to disclose hidden defects of which he has knowledge, a tenant, to whom the defects, if any, are as patent as to the lessor, takes the risk of safe occupancy, and the landlord is not liable to the tenant nor to his invitees for personal injuries sustained."

So the point based upon the mode of construction may be eliminated.

The plaintiff maintains that under the evidence and findings the defendant had control of the door leading to the basement and the basement, and he cites 25 A.L.R. 1273: "To the rule that a tenant takes the leased premises subject to defects not amounting to a trap, there is an exception to the effect that the owner of a building who leases it to different tenants, and expressly or impliedly reserves portions thereof, such as halls, stairways, porches, walks, etc., for the use in common of different tenants, is liable for any personal injury to a tenant, or a person in privity with a tenant, due to defects in the portion of the leased premises of which the landlord so retains control, provided the defect is ascribable to the negligence of the landlord, and the tenant or person injured is not guilty of contributory negligence."

Under this annotation and supplemental annotations in 39 A.L.R. 294, 58 A.L.R. 1411, 75 A.L.R. 154, 97 A.L.R. 220, there are hundreds of cases cited and the soundness of the doctrine cannot be questioned. However, its application to the case at bar depends upon whether or not the defendant "expressly or impliedly reserved * * * portions of the leased premises of which the landlord so retains control." The findings do not clearly cover this point. It is not determined whether the defendant used the entrance under an implied reservation of the right to enter the basement through the door forming part of the garage floor when closed or whether the written lease contract was modified at the time defendant made the request referred to in defendant's finding No. 10 quoted above.

Plaintiff cites Mancuso et al. v. Riddlemoser Co., 117 Md. 53, 82 A. 1051, Ann.Cas.1914A, 84, where it was held that, when the tenant rented the premises, he knew that the door was necessary for proper ventilation as well as a passageway for the employees of the landlord, and decided that the easement existed, although adhering to the well-settled principle that easement, by implied reservation, will not be sustained except in cases of strict necessity.

The defendant points out that this entrance to the basement was not in a hallway or along a usual and customary passageway, but formed a part of the floor of a room some 60′ by 60′ used as a garage; that, so far as the record shows, the tenant was the last person to pass through the doorway leading to the basement; and that the only testimony as to the use of the door for ventilation is that of the janitor, who testified that he left the door propped open 18″ in the daytime

in aid of the furnace draft and closed it at night.

The only other testimony touching on this point was that of the tenant, Kuetter, who testified as follows:

"Q. How often did the janitor come and go through that doorway? A. I presume from four to eight times a day.

"Q. How often did you go into the basement? A. I judge three or four times a day.

"Q. And through this door? A. Yes. * * *

"Q. Did you leave this door open, on the evening of the 24th of November, 1933, at which time Dr. Hogsett fell in it? A. Yes.

"Q. Did you leave it open? A. It was left open, I didn't leave it open; I had been down in the basement during the day but I didn't open it, consequently I didn't shut it.

"Q. You found it open and you went down and came back and left it open? A. Yes.

"Q. Do you know who opened it and propped it open? A. I believe the janitor did.

"Q. That was Pedro Urioste? A. Yes.

"Q. Did the janitor customarily leave that door open? A. Yes.

"Q. Every day? A. Yes, during the time they fired the furnace; that would be the winter months of the year.

"Q. Do you know why he left it open? A. Outside of being more convenient, I guess that was all.

"Q. Don't you know as a matter of fact he left it open for draft?

"Mr. Wilson: Object to his leading the witness.

"The Court: Objection sustained.

"Q. You know of no other reason than that it was just convenient for the janitor that he left it open? A. That was it.

"Q. On the day in question it was the janitor, not you, that left this door open? A. It was the janitor.

"Q. It had been open for several days constantly, hadn't it? A. Possibly longer than that."

The defendant contends, not without reason, that the tenant left the door to the basement open in order to save his own time and effort and not in the interest of defendant—that according to plaintiff's theory the door was required to be open only eighteen inches in order to supply the draft for the furnace, and that the undisputed fact is that there would have been only a few inches between the running board of the deceased's car and the edge of the door covering the entrance to the basement if it had been propped open at that angle. The defendant maintains that he owed no duty to the deceased beyond that owed to the tenant as landlord. This is true only in case the tenant had control.

In the case of Altemus v. Talmadge, 61 App.D.C. 148, 58 F.(2d) 874, 876, it is stated:

"The next assignment (confined to the appellant Altemus) is to the point that the tenant and not the owner is liable. * * *

"The fact that it was also essential in the practicable use of the leased premises

did not of itself, and without something more, shift the responsibility of maintaining it in good order from the owner to the tenant, and this is true, if for no other reason, because the principle of implied responsibility on the part of the tenant grows out of exclusive possession, and, where that is lacking, the implication falls."

See, also, Lawler v. Capital City L. Ins. Co., supra.

We find both the tenant and defendant using the basement. Whether the basement was an appurtenance of the garage is nowhere shown. The vital question seems to be whether the defendant or tenant had control of the door covering the entrance to the basement, which, when closed, formed a part of the garage floor. This is a question of fact. Randall v. First National Bank, 102 Neb. 475, 167 N.W. 564; Bellon v. Silver Gate Theatres, 4 Cal.(2d) 1, 47 P.(2d) 462, 468; 36 C.J. 254.

In the Silver Gate Theatres Case, the Supreme Court of California commented interestingly on a rule prevailing in this state, Trigg v. Trigg, 37 N.M. 296, 22 P. (2d) 119, as follows: "We think enough of the evidence has been summarized to indicate that, although the question is a close one, there is substantial evidence to sustain the implied finding of the jury that the basement did not pass under the lease. Under such circumstances, we are without power to disturb the verdict. As was said in Crawford v. Southern Pacific Company [3 Cal.(2d) 427] 45 P.(2d) 183, 184: 'In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.'"

This question is also a close one. On the one hand, the defendant can be held liable only on the theory that he had control of the doorway leading to the basement. Starr v. Sperry, 184 Iowa, 540, 167 N.W. 531. On the other hand, the learned trial judge found that the negligence of the defendant was the approximate cause of the death of Dr. Hogsett.

The defendant's motion to strike the complaint is in effect a demurrer to the evidence, and admits the truth of the testimony, and every reasonable inference which may be drawn from the evidence. Morrison v. First National Bank, 28 N.M. 129, 207 P. 62. We are unable to say that the trial court's inferences are unreasonable or without support. For the reasons stated, the judgment should be affirmed, and it is so ordered.

SADLER, C. J., and BICKLEY and BRICE, JJ., concur.

ZINN, J., did not participate.

63 P.(2d) 1037

STATE ex rel. GANDERT et al. v. ARMIJO.

No. 4274.

Supreme Court of New Mexico.

Dec. 24, 1936.

M. E. Noble, of Las Vegas, and E. R. Cooper, of Mora, for relators.

H. E. Blattman, of Las Vegas, for respondent.

SADLER, Chief Justice.

The relators were candidates, respectively, for the offices of school superintendent, treasurer, and commissioner of Mora county, N. M., at the general election held on November 3, 1936. Certificates of election having been issued to the opposing candidates for school superintendent and treasurer following the official canvass by the county commissioners, sitting as the county canvassing board, the relators seasonably filed a petition for recount of the votes cast and canvassed for all such offices in precincts 3, 13, and 25 of Mora county. The petition was duly presented to Hon. Luis E. Armijo, judge of the Fourth judicial district embracing Mora county, who, finding the same sufficient and the requisite bond on file, in accordance with mandate of the statute, signed and caused to be entered an order in the proceeding fixing November 21, 1936, at 10 o'clock a. m. at the county courthouse at Mora, N. M., as the time and place for holding said recount.

Thereupon, the three relators filed in said proceeding their separate affidavits pursuant to chapter 184, New Mexico Session Laws of 1933, seeking disqualification of respondent from proceeding further in the recount upon the ground, as alleged, that according to the belief of affiants, he cannot preside therein impartially. The respondent having announced in open court that he regarded the affidavits ineffective and would disregard the same, relators applied to this court for an alternative writ of prohibition and prayed that respondent be ordered to show cause why said writ should not be made permanent upon final hearing. An alternative writ having been granted, the matter is now before us upon said writ and respondent's answer thereto. The facts are all admitted and we have only to resolve certain legal questions arising on the facts.

Since one point raised by respondent's answer appears decisive, we shall proceed immediately to its consideration. Relators, upon filing the petition for recount, saw fit to submit to the respondent for decision the sufficiency of their petition to invoke an order directing the recount and the determination whether adequate security by way of cash deposits or bond had been furnished. His action in signing an order fixing the time and place for the recount reflects favorable judgment upon sufficiency of the petition and bond. In thus passing upon the petition and security, the respondent was performing a judicial function. State ex rel. Scott v. Helmick, 35 N.M. 219, 294 P. 316. Whether what remained in said proceeding for performance by respondent be deemed judicial or ministerial in its nature, it is here unimportant to determine. Even though conceded to be judicial, the judge may not, under the statute, be disqualified from proceeding in the case. State ex rel. Shufeldt v. Armijo, 39 N.M. 502, 50 P.(2d) 852; State ex rel. Tittman v. Hay, 40 N.M. 370, 60 P.(2d) 353.

The effect of the two decisions just cited is to declare that a party may not disqualify the trial judge under the statute after having submitted to him for ruling an important issue in the case. Of course, timeliness of filing the petition for recount and sufficiency of its allegations to invoke the order fixing the time and place therefor and to bring forth the direction to the clerk to summon the proper officials for conducting the recount form the very foundation of the proceeding. The right to the recount already has been adjudged. Nothing remains but to conduct it in the presence of the persons directed. It is then too late for the parties at whose instance the proceeding has been advanced thus far to stay the hand of the judge in sole reliance upon the statute.

Relators argue that it is not every exercise of judicial discretion by the trial judge at the instance of the party invoking the statute which will make a subsequent filing of the affidavit untimely, citing State ex rel. Tittman v. Hay, supra. In that case, before filing the affidavit of disqualification on behalf of the state, the Attorney General had presented to the resident judge an application for an order to show cause why a temporary restraining order should not be granted pendente lite. The order was granted and followed by filing of the affidavit.

While such fact appears, neither the opinion nor the record in that case discloses point to have been made of the circumstance in support of the claim of untimeliness. On the contrary, and as the opinion shows, the fact relied upon to support such claim was the filing of a demurrer to the complaint by relator as defendant in the case below and of brief in support thereof. He contended that the cause was thereby submitted for ruling on the demurrer. The trial judge had never indicated that the demurrer was to be submitted on briefs. The Attorney General had not filed a brief, nor had a hearing on the demurrer ever been held. As against this claim of untimeliness, there clearly being no submis-

sion, we held the affidavit was seasonably filed.

Even if the Tittman Case be interpreted as relators contend, there still is a noticeable difference between the order to show cause there signed and the order here involved. The former granted no relief whatever, merely citing defendant to show cause why the temporary relief prayed should not be awarded. It was but little, if any, different in effect from a notice served on defendant by plaintiff that on a given date he would apply to the court for a temporary restraining order. The ineffectiveness of such an order to render untimely an affidavit subsequently filed could not be made decisive of the present situation. The order here made actually awarded relief by ordering the recount and directing service of summons on all officials whose presence was essential to conducting same. All that remained to be done, indeed, was to count and tally the votes, in the doing of which the judge has no part except as an observer. The procural of such an order rendered untimely the affidavit subsequently filed by the party procuring it.

The conclusions reached render it unnecessary to decide relators' futher contention that the Legislature, by enacting Laws 1935, c. 147, § 52, has made the disqualification statute applicable to ministerial as well as judicial acts to be performed by a district judge in any action or proceeding, civil or criminal. It seems obvious such is not the case. But granting the contention, the doctrine of timeliness would still obtain and relators would not be aided.

For the reasons given, the alternative writ heretofore issued will be discharged and the petition dismissed.

It is so ordered.

HUDSPETH, BICKLEY, and ZINN, JJ., concur.

BRICE, J., did not participate.

63 P.(2d) 1039

STATE ex rel. ROMERO v. ARMIJO.

No. 4273.

Supreme Court of New Mexico.

Dec. 24, 1936.

M. E. Noble, of Las Vegas, and E. R. Cooper, of Mora, for relator.

H. E. Blattman, of Las Vegas, for respondent.

SADLER, Chief Justice.

At the general election held on November 3, 1936, Roman A. Romero, one of the relators herein, and Jose D. Medina were rival candidates for the office of county commissioner for district 3 in Mora county, New Mex. Relator, appearing upon the face of the returns to have received a majority of the votes cast and canvassed, was issued a certificate of election by the county canvassing board. Thereupon, and within the time provided by law, the said Medina filed with the district clerk of Mora county his petition for a recount of the ballots cast and canvassed in precinct No. 9 of said county.

The petition was presented by the said Medina to respondent, as judge of the Fourth judicial district embracing Mora county, who signed an order fixing November 21, 1936, at 10 o'clock a. m., at the county courthouse in Mora, New Mex., as the time and place for conducting said recount and directed the summoning of the officials designated by statute in connection therewith and the giving of notice to the county chairmen of the dominant political parties.

Thereupon, B. F. Cruz, county chairman of Mora county for one of the dominant political parties, a relator herein, and one of the parties whom the statute required to be noticed in connection with such recount, appeared and filed an affidavit seeking the disqualification of respondent pursuant to Laws 1933, c. 184, upon the ground that he could not, according to the belief of affiant, preside impartially in said proceeding. Respondent having announced in open court that he considered said affidavit ineffective and that he would disregard the same, the relators filed in this court their petition for an alternative writ of prohibition. The writ was duly granted, restraining respondent from further proceeding in said cause and commanding him to show cause herein why said writ should not be made permanent. The matter is now before us upon said

petition and respondent's amended answer. No facts are in dispute and we are called upon to decide only legal questions arising on the admitted facts.

Respondent's first important challenge to sufficiency of the affidavit of disqualification questions applicability of the statute, Laws 1933, c. 184, to a proceeding of this kind. It is pointed out that the statute authorizes the filing of such affidavits only in "actions or proceedings, civil or criminal," and then asserted that a recount proceeding is neither. We are spared the necessity of deciding the nice question upon which this contention rests. For, whether an "action or proceeding, * * * civil or criminal," the 1935 amendments to the election code, Laws 1935, c. 147, § 52, specifically declare the provisions of Laws 1933, c. 184 (mistakenly designated chapter 84, but otherwise clearly identified), shall be applicable to such a proceeding as this. The sole challenge to the sufficiency of this legislative mandate lies in a contention advanced in oral argument, but not set up in the amended answer, that the title to chapter 147, Laws 1935, is not broad enough to cover the declared applicability of Laws 1933, c. 184, to proceedings under the election code. We find this contention to be without merit.

It is next urged upon us that a recount proceeding does not involve the exercise by respondent of any judicial function; that the duties of respondent as defined by 1929 Comp., § 41-620, relating to recount proceedings are purely ministerial. At least, it is argued that the only portion of said proceeding which in any view can be deemed to involve an exercise of judicial functions, viz., the passing upon sufficiency of the petition for recount and approval of the bond, already had been performed when the affidavit of disqualification was filed; that all acts remaining to be done being purely of a ministerial character, the statute is inapplicable.

In the case of State v. Helmick, 35 N. M. 219, 294 P. 316, we held that the duties of the district judge in such a proceeding are largely ministerial. He must be present at the recount or be there represented by some one designated by him. In his capacity as observer, although his duties are by no means unimportant, they are nevertheless ministerial as we heretofore have held in State v. Helmick, supra. If such duties were judicial, the judge could not delegate another person to act for him.

Notwithstanding our holding in the Helmick Case that the duties of the judge in such proceedings are largely ministerial, we also held in that very case that he exercises a judicial function in testing the sufficiency of the petition for recount to see that it contains jurisdictional allegations warranting an order summoning the election officials and directing a recount.

What then is the effect of an affidavit of disqualification filed in the case after the judge already has tested sufficiency of the petition for recount by sign-

ing an order directing same and fixing the time and place therefor? If the affidavit be then filed by a party at whose procurement the judge has signed such an order, it is filed too late as we have just held in State ex rel. Gandert et al. v. Armijo, 41 N.M. 38, 63 P.(2d) 1037, this day decided.

The present case is distinguishable from that one. The present affidavit was not filed by the party procuring the order for recount. It was filed by B. F. Cruz, as county chairman of one of the dominant political parties, who appeared for the first time in the case. He is one of the parties required by the statute to be served with notice of the order for the recount.

If the disqualification statute is applicable at all to this kind of proceeding (and we have just held it applicable to so much thereof as involves an exercise of judicial discretion by respondent), the question then arises whether a party otherwise entitled to avail himself of the statute is to be denied such right by the ex parte procural of an order for the recount. We hold that he is not.

But, it may be asked, to what purpose is the statute invoked if, as a fact, when the affidavit is filed the judge already has performed every act of a judicial nature which he can be called upon to perform? The answer is that he has not done so. Unless the person or persons adversely interested by the proceeding, whoever he or they may be, are to be taken as admitting both timeliness and sufficiency of the petition for recount, their first opportunity to challenge either comes with notice of the proceeding. This they might do by motion to set aside the order directing the recount. In passing thereon, the judge would be called upon to perform a judicial act just as truly as in deciding such questions in the first instance. The right so to move and thus invoke judicial discretion is decisive of the statute's applicability.

Furthermore, the question arises whether the respondent, aside from what has just been said, even yet does not have a judicial act to perform, if he should so elect. The statute does not compel his actual presence at the recount. He is authorized to name another person to act for him. While the opinion in State v. Helmick makes the broad statement that with the signing of the order for recount the jurisdiction of the district court or judge ceases, the question whether the selection and designation of another person to represent him at the recount constitutes a judicial act was not presented. If held so to be, such conclusion would but afford additional proof of a timely filing of the affidavit to disqualify. Satisfied, as we are, with the conclusion of timeliness already announced, we do not resolve this question.

It follows that the affidavit in this case was timely filed, unless for some other reason it is ineffective. This brings us

to the contention that B. F. Cruz who filed the affidavit was not entitled to do so. The affidavit recites that he is county chairman of one of the dominant political parties. The statute requires service of notice of the proceeding upon him. It does not require service of notice upon the candidate opposing him who seeks the recount. Constitutionality of the recount sections of the election code was assailed in Sandoval v. Madrid, 35 N.M. 252, 294 P. 631, upon the very ground that notice to the opposing candidate was not required, but the contention was overruled. Unquestionably, the Legislature had some purpose in requiring notice to the county chairmen of the two dominant political parties. It must have felt that their interest in the success of their respective party's candidates was calculated to secure a proper representation and safeguard of such candidates' interests at the recount. We are constrained to hold that affiant, in his capacity as county chairman aforesaid, was entitled to file the affidavit. This conclusion disposes of the further contention that the said Cruz was without right to appear as one of the relators in this proceeding.

It follows from what has been said that the alternative writ of prohibition heretofore issued herein should be made permanent, and it is so ordered.

HUDSPETH, BICKLEY, and ZINN, JJ., concur.

BRICE, J., did not participate.

63 P.(2d) 1041

STATE ex rel. CRUZ v. ARMIJO.

No. 4275.

Supreme Court of New Mexico.

Dec. 24, 1936.

M. E. Noble, of Las Vegas, and E. R. Cooper, of Mora, for relator.

H. E. Blattman, of Las Vegas, for respondent.

SADLER, Chief Justice.

In this case an alternative writ of prohibition was granted at the instance of B. F. Cruz, as county chairman of Mora

county, New Mex., for one of the dominant political parties, to restrain the respondent pending final hearing herein from further proceeding in cause No. 3732 on the civil docket of the district court in said county, entitled "In the Matter of the Application of Mrs. Phillip N. Sanchez and Maximinio R. Valdez for a recount of the votes cast at the general election held on November 3, 1936, in Precincts 5, 9, 14, and 22."

Petitioners for recount on the face of the returns were the successful candidates for the offices of school superintendent and treasurer of said county and received certificates of election. The candidates opposing them for such offices having filed a petition for recount affecting certain other precincts (see State ex rel. Gandert v. Armijo, 41 N.M. 38, 63 P.(2d) 1037, this day decided), the present petitioners prayed a recount of the votes for such offices in the above numbered precincts.

Upon filing the petition for recount, petitioners presented same to Hon. Luis E. Armijo, judge of the Fourth judicial district, the respondent herein, who, finding the same sufficient and the security adequate, signed an order directing said recount and fixing November 21, 1936, at 10 o'clock a. m., at the county courthouse in Mora, New Mex., as the time and place for conducting the same. Said order also directed the summoning of the election officials of the precincts involved.

Thereupon Matias Zamora and Benjamin Gandert, as the candidates opposing petitioners for the respective offices involved, and B. F. Cruz, as county chairman aforesaid of Mora county, upon who by direction of the statute notice of the recount was required to be served, filed in said proceeding their separate affidavits of disqualification pursuant to the provisions of Laws 1933, c. 184. Respondent having announced in open court that he deemed said affidavits ineffective and would proceed in the matter, the said B. F. Cruz, as relator, sought in this court and was awarded alternative writ of prohibition, as aforesaid. The matter is now before us upon the writ and amended answer thereto. The facts are admitted. We are called upon to determine only legal questions arising therefrom.

Since every decisive question presented by respondent has been resolved against him upon similar facts in the case of State ex rel. Roman A. Romero v. Armijo, Judge, 41 N.M. 40, 63 P.(2d) 1039, this day decided, upon the authority of that decision the alternative writ heretofore issued herein will be made permanent.

It is so ordered.

HUDSPETH, BICKLEY, and ZINN, JJ., concur.

BRICE, J., did not participate.

63 P.(2d) 1042

JONES v. GREEN et al.

No. 4158.

Supreme Court of New Mexico.

Dec. 19, 1936.

Wm. H. Patten, of Hobbs, and Potash & Cameron, of El Paso, Tex., for appellant.

Tom W. Neal, of Lovington, for appellees.

BRICE, Justice.

On April 16, 1929, the appellee, H. F. Green (hereafter styled appellee), executed an instrument called "Underwriter's Agreement," in which, among other things, it was provided that appellee would engage in the business of "individual underwriting upon policies and contracts of insurance and re-insurance" and in furtherance of this purpose adopted the underwriter's agreement, which by its terms bound him and others executing like agreements. Among the provisions of this agreement are the following:

That the scope of the business would be the transaction of a general insurance business (excepting life insurance) now or hereafter allowable under the laws of Texas.

"* * * All policies of insurance and contracts relating thereto shall be written and issued by the subscribers hereto under the name of Lloyds America, by and through their Attorney-in-Fact, hereinafter provided for."

Each of the subscribers was required to execute and deliver to R. M. Worley a power of attorney to transact in subscriber's behalf such insurance business, who was authorized to take charge of all funds, assets, and properties belonging to the subscribers or deposited to the credit of any subscriber, "* * * direct the manner in which said funds, assets and properties shall be kept or invested, used or applied; handle and make payment or settlement of all claims; collect all premiums or other sums due, growing out of the transaction of the business herein provided for, and generally supervise and control the conduct of the business hereinabove referred to and safeguard the respective interests of all subscribers, all as more fully set forth in the Power-of-Attorney executed by the subscribers."

The attorney in fact was required to keep separate account for each underwriter, showing the disposition of his deposits, contributions, earnings and losses, etc., to which account he was entitled to access.

"Any subscriber may at any time revoke his Power-of-Attorney and discontinue all future transactions of the business contemplated, and such revocation shall become

binding upon the Attorney-in-Fact ninety days after receipt of written notice to that effect by said Attorney-in-Fact. * * *

"In the event of revocation or cancellation of said Power-of-Attorney, the stipulations and provisions of this Underwriters Agreement and the provisions of the Power-of-Attorney shall have full operation and effect as far as concerns any transaction previously entered into on behalf of said retiring or retired Underwriter, or anything resulting therefrom, before the adjustment and settlement of said Underwriters interest * * *. The account of a withdrawing, retiring, retired or deceased Underwriter shall not be closed until all liability on contracts on his behalf shall have been terminated * * * Upon termination of said Power-of-Attorney granted by any subscriber hereto, whether by death of subscriber or otherwise, such subscriber or his legal representatives shall neither be liable under any contract there after entered into nor be entitled to any rights, interest or profits of an active Underwriter, * * * When the account of an Underwriter has been closed as provided herein, there shall be paid over to him or his legal representatives any property and credits which may be due him by virtue hereof. The interest of every Underwriter in the profits arising from every transaction in which he shall participate as an Underwriter, shall be measured by the proportion which his subscription, as herein provided, shall bear to the total subscriptions of all subscribers severally participating with him therein."

The attorney in fact was given 10 per cent. of gross premiums, less cancellations, for his compensation. The underwriter was required to contribute in "cash, bonds, stocks or other securities," to the guaranty fund of the underwriters, a sum not less than 25 per cent. of the amount of his total subscription; and that the remainder of his subscription should be evidenced by a non-negotiable promissory note subject to payment as a contribution at the discretion of the attorney in fact, and in proportion to the underwriter's interest, to be called for the purpose of keeping the insurance business solvent. That the underwriter should not be liable for the payment of the expenses or losses beyond the total amount he should have to his credit at any one time, and his total unpaid subscription.

"* * * In every policy issued under the arrangement herein contemplated all of the then subscribers shall become insurers and every such subscriber shall become and be severally liable under policy so issued in the proportion which his subscription at the time of the issuance of such policy shall bear to the total subscriptions of all subscribers at that time."

The attorney in fact was authorized to pay from the funds of the underwriters all losses and legitimate expense and attorney's fees, etc. Profits were to be divided on the fourth Monday in January of every year. As a part of this instrument, and attached thereto following it, was a power of attorney executed by appellee H. F. Green, wherein he appointed R. M. Worley of Dallas, Tex., his attorney in fact to act for

him in the matter set out in the instrument previously mentioned; that is, to transact for him all such insurance business, giving full and complete power to do any and all things in connection therewith, to appoint, substitute attorneys in fact, with all powers conferred by the power of attorney on Worley, and "* * * to accept, receive, endorse, buy, sell or collect, hypothecate and/or transfer, in whole or in part, on such terms as my said Attorney-in-Fact may see fit, any script, notes, bills of exchange, drafts, stocks, bonds, property and/or securities belonging or due to or from me by virtue hereof, and to give good discharge for any and all proceeds therefrom; to collect all interest, dividends, profits and income on same; to invest and re-invest as provided in the Underwriters Agreement all funds, assets and properties in their hands belonging to me; to make underwrite, execute, sign and deliver any documents or writings whatsoever for any of the purposes herein mentioned; to do and perform for me and in my name and stead every act and thing not herein especially mentioned which I could myself do in relation to any policies, contracts and/or binders made by virtue hereof and as may be necessary or proper to carry out the intent and purpose of this Power-of-Attorney and said Underwriters Agreement signed by me." By its terms the power of attorney "may be terminated upon ninety days written notice given by the subscriber to said attorney in fact."

In furtherance of these agreements and for the purpose of advancing funds to carry on his part of such insurance business, the appellee on April 17, 1929, executed his promissory note for $5,000, payable on demand after thirty days' notice, to "R. M. Worley and Elliott Jones, or their successors as Attorneys-in-Fact, for the underwriters at Lloyds America," with interest thereon after maturity, at the rate of 6 per cent. per annum until paid. On the same day the appellee (who was a resident of the State of Texas) executed a mortgage on 320 acres of land situated in Lea county, N. Mex., to secure such note, and executed a $5,000 subscription note hereafter mentioned. Thereafter on April 24, 1929, R. M. Worley and Elliott Jones, as attorneys in fact "for the underwriters at Lloyds America," issued to H. F. Green a certificate in which it was certified that Green had subscribed $10,000 as an underwriter at Lloyds America and had deposited with R. M. Worley and Elliott Jones, attorneys in fact for all underwriters at Lloyds America, one $5,000 mortgage note secured by a deed of trust, and one nonnegotiable, nontransferable, noninterest-bearing subscription note for $5,000. That the underwriter should receive from the attorneys in fact all interest and dividends arising from the securities and 6 per cent. per annum on all cash deposited by him, and that he should receive on the fourth Monday in January of every year his net realized profits on the business transacted for him by such attorneys in fact for the preceding year.

This seems to have concluded the organization of this business. Thereafter

certain correspondence was passed between appellee and the attorneys in fact of Lloyds America, from which the court held that appellee had exercised his option to revoke the power of attorney and cancel the agreement, effective on March 1, 1931; after which defendant ceased to be an underwriter at Lloyds America. The other defendants, Snyder and wife and Charles E. Green, were charged as having or claiming some interest in the mortgaged real estate, and made defendants on that account.

This action was brought by appellant to recover on the mortgage note and to foreclose the mortgage. Appellees admitted in their answer the execution of the note and mortgage, but alleged that the note was to be held by appellant as the property of appellee with authority to negotiate or convert it into cash by appellant in order to meet any losses which might be sustained for which appellee was liable on his contract, and that it could be converted or used for no other purpose. That in fact there were no losses occasioned in said business for which appellee was liable, but there were in fact profits for which appellant should account.

As another defense it was alleged that the appellee on the 31st day of October, 1930, notified appellant of his intention to cancel the power of attorney and withdraw from and cancel the contracts referred to, effective at the expiration of ninety days from October 1, 1930, as provided by the terms of the contract and power of attorney; and thereupon it became the duty of appellant to return to appellee his securities and to account to him and pay to him the net premiums on insurance theretofore written; all of which appellant failed, neglected, and refused to do.

Appellees filed a cross-complaint to cancel the note in question because of each and all of the facts theretofore set forth, alleging that the note was the property of appellee and that he was entitled to have the note and deed of trust surrendered and canceled.

The defenses called for an accounting by a trustee to his cestui que trust.

There were three assignments of error, each of which will be considered in its order. Appellant first contends that the district court erred in holding that appellee withdrew as underwriter of Lloyds America and revoked his power of attorney, as found by the court, in that there was no substantial evidence to prove it.

The evidence on this assignment is substantially as follows:

On August 16, 1930, Lloyds America, by J. J. Shields, manager of its Texas division, wrote appellee, in substance, that the Department of Insurance of the State of Texas had placed a value of $3,200 on his deed of trust, and requested him to have the property appraised at a value of $10,000, and stated: "For if this property will not appraise for $10,000.00 it will, of course, be necessary for you to substitute other security to make up the difference or to reduce the subscription accordingly." Appellee testified as follows:

"Q. Shortly after receiving that letter, then, did you write to Lloyds America a letter exercising your right under your contract and power of attorney to withdraw as underwriter of insurance? A. I did, after I received that letter.

"Q. About when was it that you wrote? A. I don't remember just how long afterwards.

"By the Court: Q. Do you have a copy of your letter? A. No, sir; I have an answer from them.

"Q. What did you say to them in that letter? A. They wrote me, wanted me to put up more collateral. I didn't have it. I decided I didn't want to be a member. I wrote to them and told them I wanted to withdraw. That was about all there was in the letter, and they told me I had ninety days to notify, notify them in 90 days I would withdraw."

In answer to appellee's letter, Lloyds America, by Elliott Jones, attorney in fact, wrote him on November 10, 1930, stating that he inclosed a statement of account, and stated further: "According to Article 4 of the Underwriters Agreement which every Underwriter executes, it is necessary to give us ninety days' written notice signifying your desire to withdraw. At the end of that time your account is figured up and may be liquidated on the basis of its condition at that time. However, it is within the province of the management of this organization, under the terms of your Underwriters Agreement, to hold your securities until the policies on which you have been an insurer in the past have expired; but ninety days after receipt of your notice that you wish to revoke your power of attorney, you cease to share in any losses, or participate in any profits or earned premiums in the future. Your account remains and your securities are held in suspense until the policies on which you have been an insurer in the past have expired. * * * It may be that after reviewing the statement you will not want to withdraw." And further stated reasons why appellee should not withdraw and: "But if you still wish to withdraw, ninety days must elapse and the account liquidated on the basis of the figures at the end of ninety days." And then: "* * * We suggest, before making any decision in the matter, that if you are going to be in San Antonio or Dallas at an early date, you call and see us. The workings of an insurance company could then be more intelligently explained to you, and we assure you that it would be a very great pleasure to us to go into this matter in detail with you. We believe the result of same would be that you would be content to remain as an Underwriter, because of the fact that as long as you remain as an Underwriter, you are not charged with anything for organization."

Appellee, on November 8, 1932, wrote appellant a letter requesting a release of the mineral rights from the mortgage sought to be foreclosed in this action; also in a deed from appellee to appellee Charles E. Green, conveying this property, there was a recitation to the ef-

fect that the property was free and clear "excepting a certain deed of trust in the sum of $5000 in favor of Lloyds America Insurance Company, taken as collateral security, and which said second party assumes and agrees to pay." The evidence substantially supported the finding of the court to the effect that the power of attorney was revoked and that appellee ceased to be an underwriter in Lloyds America. The evidence was certain that appellee had requested the cancellation of the contract. The indication was that he was withdrawing from the whole transaction. He stated: "I decided I did not want to be a member. I wrote to them and told them I wanted to withdraw." All of the contracts were so bound together that they really constituted one transaction. A withdrawal from the insurance contract necessarily revoked the power of attorney. We are satisfied that Lloyds America so understood appellee's letter. It is contended that oral evidence of the contents of the lost letter should not have been admitted by the court. Aside from the fact it was not objected to, the appellee did not keep a copy of the letter; but appellant received it. Its witness claimed to have in his possession in court all of the correspondence between the parties, but this letter was not produced. Under the circumstances availing objection to the admission of secondary evidence to prove the contents of this letter cannot be first made in this court.

Appellant's second point is as follows: "H. F. Green became an underwriter at Lloyds America in 1929, and thereby entered into the insurance business on his own account and made Jones and Worley his Attorneys in Fact to transact the insurance business for him. Business was carried on in accordance with his Underwriters' Agreement and Power of Attorney, and in accordance with the Lloyds plan. He had a right to withdraw and revoke his Power of Attorney, subject to the conditions contained in his written instruments, which, among others, was a written notice of ninety (90) days and an accounting for the losses, if any, sustained for his business. The Trial Court ordered an accounting (R. 103–4), but the court held (R. 156) that a detailed accounting had not been made and rendered to the defendant. But inasmuch as the plaintiff seemed unable to comply with the original order of the Court to produce the books and bring them from San Antonio, Texas to Lovington, New Mexico, we now assert that we should have an opportunity to render an accounting by other competent evidence—that is, by depositions rather than transporting the books several hundred miles as originally ordered by the Court, and the case should be reversed for that purpose, and the other underwriters should not be required to bear the losses of Green's business, and there is no evidence to support Finding No. V (R. 50) and the Judgment."

In the midst of the trial of the case the proceedings were stopped and the court made certain findings of fact, among them the following: "That the defendant is liable to the plaintiff for any losses which may have been sustained for his portion of

its business as an underwriter, prior to January 1, 1931 but that the plaintiff will be required to make a complete accounting of the transactions between itself and the defendant, and of the business written in his behalf, so the court may determine the true status of the account between the parties; and so long as there is any liability on insurance written on behalf of the plaintiff prior to January 1, 1931, I will not cancel the note or mortgage but will enter a decree as conditions arise."

Then the following occurred:

"Mr. Neal: In that connection, I think we would have the right to have the books and papers of this company pertaining to those transactions here in the jurisdiction of the court, where we could examine them within a reasonable time.

"The Court: The plaintiff will be required to produce the books and papers for examination by the plaintiff, by the defendant, prior to the subsequent hearing.

"If you don't want to make an accounting, I will dismiss your complaint. This case will be continued for the taking of further proof until the further order of the court, for the taking of proof on the status of the account of the defendants and the plaintiff Lloyds. The plaintiff will be required to establish by competent evidence the extent of defendant's present liability under the findings heretofore made."

Thereupon a recess was taken from the 11th of October, 1934, until March 29, 1935, at which time the case was again called for further proceedings. The appellant appeared without the books of account ordered to be brought into court, claiming that they were too voluminous to be brought, which in fact the court found. But it appears that appellant had waited all this time without filing the accounting that had been ordered by the court. Appellant stated to the court, in substance, that he was asking for judgment on the note and foreclosure of the mortgage; that the appellee had introduced no evidence to support his answer, and: "Our position is we are brought into court here, now, to furnish evidence for the defendant." The court stated:

"The Court: * * * You have possession of the books and papers, you took the man's note and mortgage and undertook to manage the business under a contract which provided that each account should be kept separate. Now, you have sued on the note and mortgage and I am not going to give you a judgment unless you make an accounting to him and show the extent of losses on his business. * * * My holding is it is incumbent upon the plaintiff to show the extent of loss on the transactions had on behalf of this man. * * *

"I understand that this note was given, they engaged in this business, was given by way of indemnity as capital for this enterprise; that it is incumbent upon the plaintiff before it is entitled to foreclose here to show there has been loss sustained. This man has withdrawn, which he has a right to do. If you are not here with your books and papers to show the extent of the loss the complaint will be dismissed."

Appellee then offered a statement of balances showing losses of appellee on account of the insurance business. This the court held did not comply with his order, and thereupon judgment was entered dismissing appellant's case with prejudice, and a decree canceling the note and mortgage in question, on appellee's cross-complaint.

It is apparent from the above that the district court took the view that, as the contract was at an end and the power of attorney revoked, the action had resolved itself into an accounting; that as appellant was a trustee handling the business of the appellee, it was encumbent upon him (he having in his possession all the information, books of account, etc., of the trust) to produce them in court; or by a deposition to establish the differences between the parties; in short, that the burden of proof was upon the appellant to establish a balance in his favor before he could foreclose the mortgage. The contention made by appellant in the last hearing, to the effect that they were not required to bring in the evidence ordered by the court, seems not to have been relied on here, as shown by point II, above set out. The contention here is that appellant should have had an opportunity to render an accounting by deposition rather than by producing the books in court; that the case should be reversed for that purpose, so that other underwriters will not be required to bear the losses of appellee's business. If, as conceded by appellant here, it was his duty to make the accounting as ordered, then opportunity and time were not lacking. The court was adjourned for some months for that purpose, in which time depositions, written or oral, could have been taken and the information supplied as evidence. But the appellant appeared a second time before the court without complying with the court's order and without having furnished any evidence in the nature of an accounting to show the balance due him if any. There is no claim made in this court that such balance could not have been struck, or that it was not shown by the books of appellant. We think the court was authorized under the circumstances to dismiss the case, and we see no reason why we should reverse the case with instructions to permit an accounting at this time. Appellant had the opportunity (in fact was ordered) to make an accounting and refused to do so. No objection was made by appellant in October to the order of the court requiring him to bring in the books, and not until the final hearing in March following was the objection made that the books were too voluminous to bring to New Mexico. There is every indication that appellant was trifling with the court and refused to obey its orders. Under such circumstances this court will sustain the district court.

Appellant's third point reads as follows: "When a case is on trial and no competent evidence is offered to support the allegations in the Complaint, or in the Cross-complaint, then the only judgment that can be rendered by the Court is a dismissal of the case without prejudice. No affirmative relief can be rendered except upon evidence. A judgment must be sustained by the evi-

dence. The only judgment that could be legally rendered in this case was a judgment of dismissal of plaintiff's cause of action as alleged in his Complaint and a judgment of dismissal of the cause of action alleged in defendant's Cross-complaint. A judgment granting affirmative relief cannot be legally rendered on lack of evidence."

The court, in substance, held, as we have shown from statements made by him, that this action was in the nature of an accounting, in which the appellant had the burden of proof. This is conceded in this court by appellant's point II, which we have just disposed of. The note being only a guaranty, the appellee had the right to have the note canceled if the appellee was not indebted to appellant on account of the insurance contract which had been canceled. As the parties agree appellant had the burden of proof, which he failed to meet, there was no evidence of any indebtedness to appellant on which the note or its proceeds should be applied. Under these conditions the court correctly canceled the note. The point was raised in the district court that the burden was on appellee to establish that there were no losses for which appellee was liable. This question is not raised here, but we find that the district court correctly held that the burden was upon appellant to account to appellee. He occupied a fiduciary relation as trustee and attorney in fact; had all the facts and evidence of the condition of the accounts in his possession, and he alone could furnish it. After appellant had introduced evidence to prove the trust, delivery of the note, that some trust business had been transacted, and the appellee's withdrawal from the business, the burden or duty was then upon appellant to render an account of his trusteeship as ordered.

The agreements executed by appellee show he had an astonishing confidence in appellant or else appellee was easily imposed upon. No doubt the documents were prepared by appellant and he did not fail in any particular to take upon himself full, complete, and absolute authority to handle appellee's business as he pleased. The trust was to that extent his own creation and he should be held to a strict accountability.

"A trustee or executor is bound to keep clear, distinct, and accurate accounts. If he does not, all presumptions are against him, and all obscurities and doubts are to be taken adversely to him. The burden of proof is upon a trustee to show that the charges or expense for which he claims credit upon an accounting were proper disbursements. If he enters these accounts in his private books, he is bound to produce the books, although such books contain his private accounts; and even if he enters the accounts of the trust in the books of the firm of which he is a partner, the books must be produced." 2 Perry on Trusts, § 821.

"The law assumes that he knows all about the transactions involved and he must reveal the true facts. 39 Cyc. 476; 2 Perry, Trusts, § 821; 3 Pom.Eq. 1063. If he claims credits, he must prove them. Choctaw, etc., R. Co. v. Sittel, 21 Okl. 695,

97 P. 363. It is not necessary for the cestui to show that there is anything his due. Frethey v. Durant, 24 App.Div. 58, 48 N.Y. S. 839." Stockwell v. Stockwell's Estate, 92 Vt. 489, 105 A. 30, 31, 32.

See Johnson v. Redfield, 149 Wash. 618, 272 P. 55; Freeman v. Donohoe et al., 65 Cal.App. 65, 223 P. 431; Knowlton v. Fourth-Atlantic Nat. Bank et al., 271 Mass. 343, 171 N.E. 721; Villa Site Co. v. Copeland, 91 N.J.Eq. 503, 111 A. 39, 13 A.L.R. 356 and note; Equitable Life Assurance Society v. Winn, 137 Ky. 641, 126 S.W. 153, 28 L.R.A.(N.S.) 558; 65 C.J. Title Trusts, § 799.

And when appellant refused to account, after he was given every opportunity to do so, the presumption is that such accounting would not favor him.

"Where one party is due to account to another, his refusal to do so warrants the presumption against him most favorable to his adversary from the then state of the record; for it is to be supposed that, rather than suffer default upon the matter expressly charged, the party accused would answer so as to reduce the amount could he do so conscientiously. Accordingly it is held that the court may enter decree upon such default and contumacy, treating it as an admission against his interest by the party, and affording a sufficient quantity of evidence to justify the chancellor in so proceeding to judgment." Equitable Life Assurance Society v. Winn, 137 Ky. 641, 126 S.W. 153, 155, 28 L.R.A.(N.S.) 558.

If justice has miscarried in this case, then the fault lies with appellant and not the court or the appellees.

The judgment of the district court will be affirmed.

SADLER, C. J., and HUDSPETH, BICKLEY, and ZINN, JJ., concur.

63 P.(2d) 1049

TELMAN v. GALLES.

No. 4148.

Supreme Court of New Mexico.

Dec. 28, 1936.

John F. Simms and Augustus T. Seymour, both of Albuquerque, and Wilson & Watson, of Santa Fe, for appellant.

Rodey & Dickason, of Albuquerque, for appellee.

BRICE, Justice.

After considering appellant's motion for a rehearing herein, the original opinion was withdrawn and the following substituted:

From a decree in favor of the appellee (plaintiff below) for $1,200 upon a charge of fraud and deceit, the appellant (defendant below) has prosecuted this appeal.

It is alleged in the complaint that appellee made an offer in writing to purchase an automobile from the New Mexico Motor Corporation, of which appellant was president and principal stockholder, a copy of which is attached to the complaint. At the same time he delivered to the corporation his automobile to be sold for not less than $1,200, which amount was to be applied to the price of the new car to be selected by appellee. That his automobile was sold for $1,200. That subsequent to the making of the contract the New Mexico Motor Corporation had been placed in receivership by order of the district court of Bernalillo county, N. M., and all of the assets of the corporation sold to Galles Motor Corporation (of whom appellant is president and principal stockholder) for a price equal to all the claims filed and approved in the receivership case, and that the receiver had been discharged. That appellant promised and agreed to pay to appellee the amount of his claim against the New Mexico Motor Corporation if appellee would not file it with the receiver for allowance. That such promise was made with the intent to deceive and defraud the appellee, for appellant's own personal gain, in that appellant did not intend to fulfill it at the time it was made. That appellee relying upon such promise did not file his claim with the receiver, which he would have done but for appellant's fraudulent promise made for the purpose of keeping the amount of the claims against the receivership as low as possible so that appellant could profit personally as principal stockholder in a new corporation organized to take over the assets of the New Mexico Motor Corporation. That the assets of the old corporation were sufficient to pay appellee's claim in full if it had been filed. That by reason of the fraud and deceit of defendant and by reason of the representations made by defendant, which representations were made with the intent to deceive plaintiff and prevent him from filing his claim upon which promises and representations plaintiff relied, plaintiff has been damaged in the amount of $1,200.

The defense as alleged in the answer was to the effect that the motor corporation had offered to deliver to the appellee an automobile as specified in the contract, "and demanded that the plaintiff pay the balance due thereon, which the plaintiff failed and refused to do, and thereupon, the New Mexico Motor Corporation, after waiting more than ten days from and after notice to the plaintiff that the automobile was ready for delivery, canceled the plaintiff's order, and retained his deposit as liquidated damages in accordance with the terms and provisions of said contract." That thereafter the appellee had notified said corpora-

tion he would not claim any interest, right, or title *in such deposit;* that appellee knew the limitation of time within which claims could be presented against the receiver in question and without in any manner being deceived or misled by the appellant the appellee elected not to file his claim with the receiver, and as a result it was not presented to the court within the time allowed and was barred by the action of the court after the conclusion of the time within which claims might be presented.

At the close of the plaintiff's (appellee's) testimony at the trial in the district court, the defendant (appellant) moved the court for a dismissal upon the ground "that there has been no evidence introduced upon which this suit for fraud and deceit could be maintained." This motion was overruled, and appellant refusing to introduce testimony, decree was entered as stated.

The rule, which applies under such condition of the record, has been often stated by this court. The real facts may be different from those which bound the district court; but in making his motion to dismiss, appellant rested his case on the question of law, viz., considering only plaintiff's testimony together with all reasonable inferences that could be deduced therefrom, in a light most favorable to the plaintiff, had a case been made that would support a decree? The district court and this court are bound by the rule.

From the testimony so considered, we deduce the following facts: In May, 1931, the appellee entered into an agreement with the New Mexico Motor Corporation to purchase a La Salle or Cadillac automobile, and as a part of the purchase price delivered to that corporation his secondhand automobile which was accepted at $1,200. The appellee not being financially able to pay the balance of the consideration at the date agreed, the time for closing the transaction was extended until appellee should be able to pay the balance. The written contract provided, among other things: "This order is not binding upon you (referring to the New Mexico Motor Corporation) until accepted in writing signed by H. L. Galles, president." The order was never accepted in writing, but appellee's car was delivered to and accepted by the New Mexico Motor Corporation, sold by it for $1,200, and this money retained by it. The contract also provided: "In case the automobile cannot be delivered as specified, the deposit shall be returned to the undersigned, and thereupon all obligations hereunder shall cease. * * * In case the undersigned does not pay the balance of the full purchase price within 10 days after notice that the automobile is ready for delivery, you may cancel this order and retain the deposit as liquidated damages."

On the 4th day of May, 1933, the appellant filed a suit against the motor corporation, alleging in his complaint that he was its president and principal stockholder (in fact, his counsel stated in oral argument that he owned all the stock except qualifying shares for directors); that it was insolvent; and prayed for the appointment

of a receiver to wind up its affairs. To this action the corporation immediately filed an answer admitting the allegations of the complaint, and on the same day an order was entered appointing a receiver of that corporation's property. In the order it was provided that the 10th day of June, 1933, should be the limit of time within which creditors could present claims for allowance against such corporation. Before the time for filing claims had expired, appellant agreed to pay appellee's claim if appellee would not file it with the receiver. The appellee, relying on this agreement and believing appellant would pay the claim as promised, did not file it, with the result that it was barred by the order of the court, mentioned. Appellant told appellee he had stated to some federal officials that appellee had no claim to any of the assets of the receivership and gave as a reason for not wanting the claim filed that if it was filed it would "put me in a kind of bad position because I told the Government Revenue Officers you did not have anything coming as far as that claim was concerned." Stating further to appellee, "You don't have to file your claim with the receiver, I will take care of you myself." The assets of the corporation were sold at private sale to the appellant, the consideration being that he would pay all the claims allowed against the corporation and the expense of receivership.

The assets of the corporation were transferred to a corporation organized and dominated by appellant (in which he owned the majority, if not all, of the stock, probably the latter), and the receiver thereupon was discharged; after which appellant again stated he would take care of appellee's claim and thus redeem his promise; but later denied legal liability and refused payment. The inventory of the receivership showed assets of the corporation of a value in excess of $37,000, with approximately $25,000 debts; claims of $20,500 of which were filed and approved. Of approved claims, $18,500 were claimed by a bank, and these were bought by appellant for about $7,500; so that really the $37,000 in listed assets were taken over by appellant through the medium of a new corporation for about $10,000. About $14,000 of the bank's claim was listed as a disputed item, but the evidence does not indicate the nature of the dispute. Other facts and inferences will be mentioned in the opinion.

If appellee had a valid claim against the corporation, it was lost by reason of his failure to file it with the receiver; there being ample assets to take care of it.

The contract provided: "In case the automobile cannot be delivered as specified, the deposit shall be returned to the undersigned, (appellee) and thereupon all obligations hereunder shall cease."

It is a reasonable inference that when the corporation was placed in receivership for insolvency, it could not deliver the automobile, and therefore appellee's claim against the receiver, according to the terms of the contract, was the return of the $1,200.

Appellant suggested in his motion to dismiss that appellee's remedy was by suit on the appellant's *promise to pay the debt* of the New Mexico Motor Corporation, and not for fraud and deceit. We agree that this remedy was available to him, as the court would infer from the facts proved that the main object of appellant in making the agreement was to subserve a pecuniary or business purpose of his own, though incidentally it would have the effect of extinguishing the debt due appellee by the motor corporation. In such case the statute of frauds is not a defense. Davis v. Patrick, 141 U.S. 479, 12 S.Ct. 58, 35 L.Ed. 826; Rice v. Hardwick, 17 N.M. 73, 124 P. 800.

But an action for fraud and deceit was likewise available to him at his election; and while more difficult to establish, it was within his discretion to choose it as a remedy. Pomeroy's Code Remedies (5th Ed.) §§ 459 and 464; Wilson v. New U. S. Cattle-Ranch Co. (C.C.A.8th Cir.) 73 F. 994; Missouri Savings & Loan Co. v. Rice et al, (C.C.A.8th Cir.) 84 F. 131; Hobbs v. Smith, 27 Okl. 830, 115 P. 347, 34 L.R.A. (N.S.) 697; 1 C.J. title Actions, § 170, p. 1040.

Appellee's action is based upon the proposition that there was an actual fraudulent intent on the part of appellant to *not* pay the debt due him by the motor corporation at the time appellant promised to pay it. Such intent, if it existed, removed this case from the general rule that fraud must relate to a present or pre-existing fact and cannot ordinarily be predicated on unfulfilled promises or statements as to future events. The contentions of appellant, as stated in his original brief, are as follows:

"As stated in 51 A.L.R. 49, 'The general rule, which is supported by numerous decisions in almost all jurisdictions, is that fraud must relate to a present or pre-existing fact, and cannot ordinarily be predicated on unfulfilled promises or statements as to future events'. This text continues and at page 63 [of 51 A.L.R.] states a general exception to the aforesaid rule, as follows: 'According to the weight of authority, if the person making the promise or statement as to a future event is guilty of an actual fraudulent intent, and makes the promise or misrepresentation with the intention of deceiving and defrauding the other party, and accomplishes this result, to the latter's injury, fraud may, under many circumstances, be predicated thereon, notwithstanding the future nature of the representations.' In support of this general exception, cases are cited from the United States Supreme Court, from the courts of thirty-four states, and from Hawaii, including Witt v. Cuenod, 9 N.M. 143, 50 P. 328 (1897). Appellant subscribes to this general exception and does not contend for an existing minority rule to the effect that fraud may not be predicated in any case upon an unfulfilled promise.

"However, in the application of this exception to cases of particular kinds, there is a difference of degree which is noted at

page 131 of the foregoing text [51 A.L.R.]: 'Representations or promises as to payment of money are involved in many of the cases and, without attempting at this point to collect all of the cases of this kind, attention is called to the fact that this is a kind of promise to which especially the general rule that fraud may not ordinarily be predicated upon unfulfilled promises and representations as to future events has been regarded as applicable.' "

The contention, that the promise to pay money in the future with the present intent to *not* keep the promise is not actionable fraud, is, we believe, not supported by appellant's authorities. It is true it is said in Brooks v. Pitts et al., 24 Ga.App. 386, 100 S.E. 776, cited by appellant to support his contention: "Ordinarily the breach of a promise to perform some act in the future, *especially a promise to pay money, is not of and within itself,* sufficient to establish fraud in legal conception." But the reference is to the quantum of proof to establish the intent and not to any rule to the effect that such deceit is not actionable. This is shown by a decision of the same court in Donnelly Co. v. Milligan, 37 Ga. App. 530, 140 S.E. 918, in which it was held that the purchaser of merchandise on a credit made just prior to filing a petition in bankruptcy was evidence of an intent existing at the time of purchase to not pay the purchase price, though promised. Also see Donaldson v. Farwell, 93 U.S. 631, 23 L.Ed. 993.

We therefore hold if there is substantial evidence to prove that at the time appellant agreed to pay the debt due appellee by the New Mexico Motor Corporation, he had the present intention to not keep such promise, then the judgment of the district court must be affirmed; for acting on this promise and believing appellant's promise would be redeemed, appellee refused to file his claim; whereby his debt was barred by the order of the court and lost, unless appellant is responsible for his wrongful act. Blackburn v. Morrison et al., 29 Okl. 510, 118 P. 402, Ann.Cas. 1913A, 523; 12 R.C.L. title Fraud and Deceit, § 28. p. 261; 26 C.J. title Fraud, § 26, p. 1093; Foster v. Dwire, 51 N.D. 581, 199 N.W. 1017, 51 A.L.R. 21.

The intent with which an act is done is known only to the person who does it and can only be proved by circumstances unless he admits it himself. In this case appellant introduced no testimony. He did not testify as to his intent and he alone knew it. He got the benefit of the $1,200 rightfully appellee's and defends against this apparent dishonesty with the contention that his intent to deceive and defraud was not proved.

As we view the evidence, it clearly establishes all facts necessary to a recovery unless it is this fraudulent intent; and the circumstances of the whole transaction must be marshaled with a view of discovering what the appellant knew in that regard and kept within his breast.

Appellant, who owned practically all of the stock of the corporation, brought a suit against it and forced it into receivership; the corporation answered admitting the allegations of the complaint, and an order appointing a receiver was entered the same day the suit was filed, in which order an extremely short time was fixed for filing claims and some $4,500 of them, exclusive of appellee's, were not filed and therefore lost. If the record is to be the criterion, both parties to the proceeding were controlled by appellant. While not necessarily fraudulent, it gave him a decided advantage of unrepresented creditors. After making a compromise with a creditor holding large claims and after having induced the appellee not to file his claim, appellant secured an order of the court for a new corporation, which he organized for that purpose (and the majority, if not all, of the stock of which he owned), to take over the assets of the old corporation for the amount of the approved claims. He was thus interested in preventing appellee's claim from being filed, as it would necessarily have to be paid before the corporation's property could be transferred to the new corporation.

We do not know the object of this receivership, but from the result it could be reasonably inferred it was to reduce the liabilities of the corporation at the expense of its creditors. Appellant owned all of the stock of the corporation except the qualifying shares for directors, and inferentially he owned the stock of the new corporation organized to take over the assets of the old one. Their loss was his loss and their gain his gain. Forty-five hundred dollars of just claims, other than appellee's, were barred by the court's order limiting the time to file claims to about thirty-seven days. As we have seen, the $37,000 listed assets were purchased by appellant's new corporation for about $10,000, effecting a reduction in listed debits of about $15,000 exclusive of appellee's claim, which was not listed. This, it may be inferred, was the object of the receivership as no other appears in the record. Now if this reasoning is valid, it may be further inferred that this object included a defeat of appellee's or any other claim.

Appellant's answer denies that he agreed to pay such debt, or that he entered into the agreement sued on. Testimony of like character was held by this court in Anderson et al. v. Reed, 20 N.M. 202, 148 P. 502, 506, L.R.A.1916B, 862, sufficient to show a fraudulent intent. It is true that case involved a contract to care for an aged person, and in such cases fraudulent acts are construed more favorably to the injured person than in ordinary cases of deceit; but it may be assumed that if appellant as a defense denied the existence of the contract which the court found he made, after bringing this receivership proceedings to reduce its (or his) debts, he would testify that he had no intent at any time to pay it. This court in the Anderson Case, stated: "The theory of fraud, in the inception of the contract, in such a case will support a decree of cancellation,

where there is an inexcusable and intentional failure to perform, and the facts in the case show that the grantee never intended to perform the contract which the court found she entered into. She says that no such contract was ever made by her, and, this being true, we may reasonably assume that she never intended to perform or keep it."

We must infer that appellant intended to get possession of the assets of the corporation at the time he sued it, though apparently he had no ready means; that he knew if he could prevent the filing of appellee's claim for $1,200 the remainder of the claims presented and allowed (except the bank's claim, which the bank carried for him) amounted to only about $2,000, for the payment of which he was able to give a bond; that his representations prevented the filing of appellee's claim, which was the only one in the way of securing possession of the entire assets of the corporation without a cent's cash outlay.

It may be reasonably inferred that the promise was made, not as collateral to the original promise of the motor corporation, but for the benefit of appellant; that he was not interested in the payment of the debt except as it benefited his own schemes; that his object was to secure the assets of the corporation for his own benefit; and if he could do so by the promise to pay this debt and thereafter refuse to pay it, he would be $1,200 ahead.

We know by stipulation he owned a majority of the stock in the purchasing corporation, and from the evidence it may be inferred that he alone controlled its affairs. These circumstances and inferences, coupled with the fact that he refused to pay the debt while admitting he owed it, might well have influenced the district court's decision, and were peculiarly matters to be considered by it. When a case depends upon the intent with which a party acted in a given matter, and he, the only one who knows it, refuses to enlighten the court, this may be considered along with the other facts and circumstances in arriving at such intent. We are not able to say as a matter of law that they are not sufficient to support the decree.

What we have stated disposes of the case as originally presented here, and all contentions save one presented in appellant's motion for a rehearing. That contention may be thus stated:

Assuming the evidence does establish that appellant promised appellee to "take care" of *his claim against the motor corporation,* such claim was not a money demand, but only a conditional contract to deliver an automobile upon payment of a balance due thereon; whereas, the appellee's suit was for the value of the deposit paid on the purchase price, conceded to be $1,200.

This defense was urged for the first time on motion for rehearing. The parties and the district court treated the action as one for a money demand. Appellant's motion for dismissal is, in part, as follows: "If counsel had a remedy, he should have sued Mr. Galles upon his contract to pay the debt of the New Mexico Motor Corporation."

The suggestion is made that Mr. Galles contracted *to pay the debt* of the New Mexico Motor Corporation, which could only be a money demand. In his original brief in this court appellant states: "It is at once apparent that the instant case falls in the class of *promises to pay* or loan money, concerning which the text makes the statement noted in the preceding paragraphs".

This court speaking through Mr. Justice Watson stated in Albuquerque Lumber Company v. Tomei et ux., 32 N.M. 5, 250 P. 21, 24: "They now advance a theory of the case not brought to the attention of the trial court. Such new theory we cannot consider. * * * 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. * * * They cannot now prevail upon the different and inconsistent theory."

And in American Investment Company v. Lyons, 29 N.M. 1, 218 P. 183, 186, we stated: "It is the declared law of this state that parties cannot on appeal change their contentions, shift their positions, nor advance new and different theories from those made and advanceed upon the trial. We will review only the questions presented to the trial court."

Appellant cannot here mend his hold by shifting to a new theory of defense in a motion for rehearing.

Our review of the evidence, however, satisfied us that the theory upon which the case was tried below and presented here was correct. We have quoted from the contract to show that the deposit was to be returned to appellee if the motor corporation was not able to deliver the new automobile as agreed, and that it was a reasonable inference it could not so deliver it. We have further stated that appellant had agreed to pay appellee's claim upon condition that the former would not file it with the receiver for allowance. This we infer from the testimony. Appellant stated to appellee, "I will take care of you, don't file any claim"; also "I will take care of your claim." Appellee further testified: "And I said 'What are we going to do about it?' and he (appellant) said: 'You don't have to file your claim with the receivers and I will take care of you myself.' I said 'All right.' "

After the receivership was closed and appellant had possession of all of the corporation's property, he stated to appellee: "I don't have to pay you anything if I don't want to, I owe you but I don't have to pay you anything." The only theory upon which this statement would make sense is that appellant recognized he owed appellee the $1,200, but that he did not have to pay it. He spoke of it as a debt and not as the contract for the sale of an automobile. There is lack of clearness in the testimony, as well as in the pleadings, but there is sufficient upon which to base the decree.

It is to be regretted that such cases are not tried upon a full disclosure of the facts;

as entirely different inferences might be reached than where, as here, one party is entrenched behind a rule of law strongly favorable to him.

The judgment of the district court will be affirmed. It is so ordered.

HUDSPETH and ZINN, JJ., concur.

BICKLEY, Justice.

I concur in the result.

SADLER, Chief Justice (specially concurring).

I agree with the statement of legal principles applicable to this case as contained in the opinion written by Mr. Justice BRICE. One of the principles here pertinent is that a promise to pay money, accompanied by a present intent not to do so, will support an action of deceit where injury follows reliance on the promise. I do not understand appellant now to contend otherwise. What he does challenge, and vigorously, is sufficiency of the evidence to sustain a finding either that there was ever any such promise to pay money, or, if it be held there is such evidence, that it was made with the evil intent charged.

Although no express promise to pay is shown, viewing all the testimony and permissible inferences in the light most favorable to appellee, as must be done upon demurrer, or motion to dismiss treated as demurrer, it was within the proper sphere of the fact finder to characterize what was said as a promise to pay, however much one may feel a contrary inference more warranted. Proof of the making of such a promise was absolutely essential to appellee's action of deceit. He alleged it. Appellant's answer denied it. This denial, plus proof and finding of the promise, supports the inference of an intention not to keep it entertained at the time the promise was made. Anderson v. Reed, 20 N.M. 202, 148 P. 502, 506, L.R.A.1916B, 862; Texas Employers' Ins. Ass'n v. Knouff (Tex.Civ.App.) 297 S.W. 799, 804, reversed on other grounds (Tex.Com.App.) 7 S.W. (2d) 68. In Anderson v. Reed, supra, where fraud in the inception of the contract was involved, we said: "She says that no such contract was ever made by her, and this being true, we may reasonably assume that she never intended to perform or keep it."

In Texas Employers' Ins. Ass'n v. Knouff, supra, the court said: "The very fact that appellant's agent denied he made said agreement, in the face of the fact found by the jury that he did make it, is a strong circumstance tending to show he had no intention of carrying out the agreement which he in fact made."

I am unable to see in the receivership proceedings anything to support an inference of fraudulent intent on appellant's part in making the promise found by the jury to have been made. It is not claimed appellant initiated and conducted this necessarily expensive and complicated receivership of a corporation showing inventoried assets in excess of $37,000 as one step in a scheme to defraud appellee of $1,200. Such a contention would be absurd on its face.

Yet this conclusion seems essential to finding in the receivership proceedings evidence of evil intent not to pay as promised. Without the order there made, limiting the time for proving claims, no bar would have attached to appellee's claim. Without the bar the whole scheme fails. Did the latter initiate the proceedings to supply such a bar? If agreed such proceedings were not prosecuted with this end in view, then no unfair implication should rest upon the circumstances that the time for filing and proving claims was limited by court order as in ordinary cases of corporate receiverships, or that other proceedings and results usual in such receiverships transpired.

But, for the reasons given, I think the judgment of the trial court must stand. I therefore concur in its affirmance.

64 P.(2d) 92

NIXON-FOSTER SERVICE CO. v. MORROW.

No. 4233.

Supreme Court of New Mexico.

Dec. 21, 1936.

Rehearing Denied Jan. 22, 1937.

Robert A. Morrow and H. M. Rodrick, both of Raton, for appellant.

H. A. Kiker, of Santa Fé, for appellee.

HUDSPETH, Justice.

This is a suit on a promissory note. The defense is partial failure of consideration. Defendant's amended answer states:

"That the consideration of said note was as follows: (A) That the defendant herein had purchased from the copartnership of Nixon-Foster Service Company a certain electric refrigerator for $301.00 and a certain light plant and equipment, consisting of a generator and batteries, for the sum of $587.00, and that at the time of said purchase it was represented to defendant, and defendant was led to believe, by Nixon-Foster Service Company, acting by and through their representatives, and in conjunction with the agent of the Delco Light Company, that said light plant and electric refrigerator and equipment were protected by insurance, and that it was represented that the purchase price of said electric refrigerator, light plant and equipment, included all carrying charges, insurance, and all costs and things to be done and paid by this defendant.

"2. That defendant relied upon said representation as he then and there had a right to do, and that said representation caused him not to procure fire insurance on said property. That thereafter said electric refrigerator, light plant and equipment were completely destroyed by fire and were a total loss to this defendant, the same not being insured at the time of loss.

"3. That at the time of such loss there was an unpaid balance of $273.50 on the electric refrigerator, and $446.40 on the light plant and equipment, and that this defendant refused to pay any of said balances because of the misrepresentations of the said Nixon-Foster Service Company as to said property being insured."

The amended answer further states that after altercations and negotiations the parties arrived at a compromise agreement for the settlement of the matter; that the plaintiff agreed to deduct $50 from the balance due on the refrigerator and to furnish another light plant as good as the one destroyed by fire; that pursuant to said agreement plaintiff installed a light plant, which it warranted as to quality, whereupon defendant executed the note sued upon and paid the balance due plaintiff in cash; that the second light plant proved to be old and badly worn, and not of the quality represented, and defendant tendered back the plant to plaintiff and demanded credit on the note for the price thereof, $446. The reply was a general de-

nial of the new matter in the amended answer.

The plaintiff proved that no part of the note had been paid and rested. The defendant tendered evidence which tended to prove the first contract, the dispute over the indebtedness, the compromise agreement with reference thereto, the installation of the second light plant, and the failure of the second light plant to meet the specifications of the compromise agreement. Much of this tendered evidence was excluded. From the judgment rendered for the plaintiff upon an instructed verdict, this appeal is prosecuted. The parties will be referred to as plaintiff and defendant.

Defendant tendered the written orders for the refrigerator and light plant and the conditional sales contract covering these items. Upon objection being made that copies thereof were not attached to the amended answer, they were excluded. 1929 Comp. § 105-522 provides that when an instrument in writing is the foundation of an action or defense, a copy must be filed with the pleading, and in case of failure to so file a copy, such instrument cannot be received in evidence. Sections 1, 2, and 3 of the amended answer quoted above, and particularly the statement that defendant had purchased an electric refrigerator and light plant following the first line of section one "that the consideration of said note was as follows," justified the ruling. It appears from the whole pleading that the defense was partial failure of consideration of the note sued upon which was executed as part of the compromise agreement. Clearly, the documents tendered were not the foundation of this defense. "No contract * * * need or should be filed * * * which is not the foundation of the action or defense." Beebe v. Fouse, 27 N.M. 194, 199 P. 364; Laws v. Pyeatt, 40 N.M. 7, 52 P.(2d) 127; Daughtry v. B. F. Collins Inv. Co., 28 N.M. 151, 207 P. 575; Weggs v. Kreugel, 28 N.M. 24, 205 P. 730; Lohman v. Reymond, 18 N.M. 225, 137 P. 375.

Both parties agree that it was necessary to prove enough of the facts relating to the former transaction out of which the dispute grew to disclose the basis for a compromise agreement. The courts are liberal in receiving evidence of the circumstances leading up to and surrounding the transaction constituting an alleged settlement. Frank v. Heaton, 56 Ill.App. 227; Mead v. White, 8 A. 913, 6 Sad.(Pa.) 38; McLendon v. Wilson, 57 Ga. 438; City Elec. R. Co. v. Floyd County, 115 Ga. 655, 42 S.E. 45; Duflo v. Juif, 63 Mich. 513, 30 N.W. 105.

In the last case cited the Supreme Court of Michigan held: "Where, in an action on a promissory note, defendant pleads that it was without consideration, as given for an alleged balance of old transactions, which included two notes actually paid in a settlement, in which a farm was deeded to plaintiff in full liquidation of all debts, leaving a balance coming to defendant of any excess

obtained on sale, it is competent for defendant to introduce the deed in evidence, not as conclusive proof of the consideration for the farm, but as an *element of the settlement* relied upon in determining the question whether the notes which were the *consideration of the note sued on* were included in the settlement made when the deed was given." (Italics ours.)

12 C.J. p. 366, § 80, states:

"On the issue of good faith in making the settlement, evidence of collateral facts relevant to such issue may be admitted.

"Documentary evidence. Documentary evidence that is relevant to any issue in the case is admissible under the same conditions that such evidence is admitted in other cases."

"Where the question at issue is as to whether or not a settlement was had between the parties, evidence of all the matters comprised in and of the circumstances leading up to and surrounding the transaction constituting the alleged settlement is admissible." 3 Encyc. of Evi. p. 251.

The learned trial court ruled and appellee maintains, that the defendant could not prove by oral evidence that there was a dispute—that the allegation of the specific elements of the fraud relied upon, i. e., representation that the chattels sold were protected by insurance, confines the defendant to the written contract by the terms of which the purchaser expressly assumes responsibility for the insurance.

Plaintiff's able counsel says: "Without showing his original contract, under the issues tendered by him, he could not show a dispute. Without a dispute he could not show a compromise."

The Supreme Court of Iowa in the case of Jacobsen v. Moss, 268 N.W. 162, 164, lately commented upon the rule which plaintiff maintains is applicable to this case, as follows:

"Under the written lease there was no dispute about the amount of the rent agreed to be paid, and under the evidence there was no dispute as to the amount of cash which had been paid. All allegations with reference to the previous oral agreement for a lesser amount were properly stricken by the court. Defendant's plea of accord and satisfaction cannot be sustained as against count 2 for the rent due under the written lease for the year 1932, for the reason that under the written lease there was no dispute as to the amount due and no dispute as to the amount that had been paid upon the rent under the terms of the written lease. The plea of accord and satisfaction can only apply where there is a settlement of a disputed claim. Unless the defendant was entitled to introduce evidence of his alleged oral contract in contradiction of the written contract, there was no disputed amount in controversy. Before there would be any dispute as to the amount due, there would have to be proof of the alleged oral agreement, and no competent proof was possible under the parol evidence rule. There could be no good-faith dispute as to the rent of 1932. There is no claim that there is any ambiguity in

the terms of the written lease. The dispute only arises under the claimed oral agreement between the plaintiff and the defendant, which the court properly held could not be proven, and the exclusion of this testimony and the striking of the allegations of the petition in reference to such matters eliminated the dispute and hence the court was justified in striking the allegations in reference to accord and satisfaction as to the balance of the rent due for the year 1932. 'Without an honest dispute an agreement to take a lesser amount in payment of a liquidated claim is without consideration and void.' 1 C.J. p. 554; Walston v. F. D. Calkins Company, 119 Iowa, 150, 93 N.W. 49; Rauen v. Prudential Insurance Co., 129 Iowa, 725, at page 740, 106 N.W. 198.

"There is no claim by defendant that the $65 item of indebtedness which was owing to him by Vander Striek and which Vander Striek paid to plaintiff on a written order directed to Vander Striek, and which contained this statement, 'And it is agreed and understood by and between Mr. Jacobsen and myself that this amount of $65.00 is accepted as balance in full of back rent due Asmus Jacobsen, and charge the same to my account,' fully paid the balance due under the terms of the written lease. The court permitted the plea of accord and satisfaction to stand as to count 1, which was based solely upon an oral agreement. There was no error in striking the allegations of the answer with reference to plea of accord and satisfaction as applied to the second count of plaintiff's petition."

The question is whether this sound rule is applicable in the case at bar. The facts are different. This suit is on a note which, it is alleged, is the fruit of the compromise agreement. It has been held that where a compromise agreement has been breached by what, in effect, is a failure or refusal to perform, the other party may elect to regard the compromise as rescinded and proceed on the original cause of action. Pacheco v. Delgardo (Ariz.) 52 P.(2d) 479, 103 A.L.R. 494. But the plaintiff did not choose to pursue that course. Plaintiff points out that the amount in dispute is the same as the balance due on the first light plant, $446, and argues that, "if the defendant did no more at the time he executed the note than he was already legally bound to do, then there was no consideration moving from him to appellee for the alleged new agreement." If there was a valid compromise agreement, further controversy in regard to the first agreement is ended.

The main point of attack is upon the good faith of defendant in maintaining the dispute over the first contract. The surrender or discharge of a claim which is entirely without foundation, and known to be so, is not a good consideration. The pivot is the bona fides of the claimant or disputant.

"The settlement of a bona fide dispute or a doubtful claim, if made fairly and in

good faith, is sufficient consideration for a compromise based thereon." 12 C.J. p. 324; Union Bank v. Geary, 5 Pet. 99, 8 L.Ed. 60; McKinley v. Watkins, 13 Ill. 140; Sweitzer v. Heasley, 13 Ind.App. 567, 41 N.E. 1064; Keefe v. Vogle, 36 Iowa, 87.

The language of Judge Harlan in Hennessy v. Bacon, 137 U.S. 78, 11 S.Ct. 17, 19, 34 L.Ed. 605, seems to describe the situation of the parties in this case: "It is the case of the compromise of a disputed claim, the parties dealing with each other upon terms of perfect equality, holding no relations of trust or confidence to each other, and each having knowledge, or having the opportunity to acquire knowledge, of every fact bearing upon the question of the validity of their respective claims."

The trend of modern decisions is toward a liberal construction of compromise agreements. The case of Frazier v. Ray, 29 N.M. 121, 219 P. 492, 495, is cited in 1 C. J.S., Accord and Satisfaction, p. 546, § 42, in support of the following rule: "Where an accord and satisfaction was entered into without fraud, duress, or mutual mistake, the courts will not go behind it and reopen the controversy which preceded it." And the language of Mr. Justice Bratton, who wrote the opinion of the court, is quoted in a note as follows: "This must necessarily be the true rule, because in every controversy one of the parties must be right and the other wrong, and if the court, in such cases, goes behind their accord and satisfaction and determines which of them was in fact right and renders judgment accordingly, their settlement would become futile and a mere idle ceremony." See, also, Wooley v. Shell Petroleum Corp., 39 N. M. 256, 45 P.(2d) 927; McKee v. Woods, 35 N.M. 168, 291 P. 292; Bennett v. Bennett, 219 Cal. 153, 25 P.(2d) 426; Rosencrantz v. Mason, 85 Ill. 262; Adams v. Crown Coal & Tow Co., 198 Ill. 445, 65 N. E. 97; O'Brien v. City of New York, 25 Misc. 219, 55 N.Y.S. 50; Marshall v. Larkin, 82 Mo.App. 635; 5 R.C.L. 882, § 7; Reed v. Kansas Postal Tel. & Cable Co., 125 Kan. 603, 264 P. 1065, 57 A.L.R. 275; Bowers Hydraulic Dredging Co. v. Hess, 71 N.J.Law, 327, 60 A. 362; Harrington v. Mutual Benefit Health & Accident Ass'n (Vt.) 182 A. 179; Shrader v. McDaniel, 106 Kan. 755, 189 P. 954; Gottlieb v. Scribner's Sons, 232 Ala. 33, 166 So. 685.

In the case of Root Refining Co. v. Brooks (Ark.) 90 S.W.(2d) 221, 223, the court said: "The letter of March 29, 1928, set out above, lacks but little, if anything, of being a novation. A new lease was executed and new terms of payment provided. If this writing expressed the new agreement as it purported to do, it is apparent that an additional payment of only $10,000 was provided for. * * * There was no mistake. Ezzell had the option of accepting the check as tendered or of returning it. He did not return nor has he tendered the return of the proceeds of the check or of any of the other twenty-five payments. He made his election and is bound by it."

Furthermore, the plaintiff released the original sales contract and installed the second light plant. Some of the cases make a distinction where the compromise agreement has been partially performed. It tends to show that the plaintiff thought the defendant's claim had merit.

The insurance clause in the first contract reads as follows: "Purchaser shall keep said property insured against loss by fire to properly protect all interests therein, and on failure to do so seller may procure said insurance. Purchaser agrees to pay premium on demand and that on failure to do so payment of same shall be secured by this contract. The proceeds of any insurance, whether paid by reason of loss, injury, return premium, or otherwise, shall be applied toward the replacement of the property or payment of this obligation at the option of the seller."

A part of the tender reads as follows: "* * * that H. R. Foster, one of the partners of Nixon and Foster, a copartnership, the payee named in the note herein sued on, in the presence of C. S. Lilley, while attempting to sell the defendant the original light plant and Frigidaire, at the home of the defendant in or near Folsom, New Mexico, on the 6th day of May, 1929, after discussing the matter of said sale for some time with the defendant and while he had the defendant's Exhibit 1 and defendant's Exhibit 2 before him, preparatory to having them signed, made this statement in answer to the defendant's question 'How much is all of this going to cost me, including everything that I have to do under the contract?' That C. S. Lilley, in the presence of H. R. Foster, replied 'Eight Hundred Eighty Eight Dollars.' That, after doing some figuring, he said 'Eight Hundred Eighty Eight Dollars.' That the defendant then asked the question of H. R. Foster and C. S. Lilley 'Now, does that include everything that I have got to pay, carrying charges and everything else?' That C. S. Lilley replied 'That includes everything that you have to pay for under the contract.' That the defendant then said 'All right, I will take them,' and signed the agreement herein, the exhibits of the defendant, defendant's Exhibits 1 and 2."

Defendant's Exhibit 8, a letter from Delco-Light Company to plaintiff, in part, is as follows:

"We have before us your letter of January 2nd, in which you request information in regard to the James Morrow plant that has recently been burned.

"* * * It was for a time the policy of the Delco-Light Company to carry a blanket policy on equipment sold under the GMAC plan but this has for some time been discontinued * * *."

The evidence on all other points was sufficient and there is room for dispute, apparently, as to whether the first written contract actually embodied the contract made by the parties. The letter in the record, which states that previously it was the practice of the plaintiff's principal to carry blanket insurance on these plants,

lends support to the allegation that the salesman represented that the moneys paid covered the insurance premiums.

It is not necessary for us to pass upon the question as to whether this evidence should be excluded under the oral evidence rule in a suit based upon the original contract, since the plaintiff is not suing on that contract.

The question to be determined, assuming that the plaintiff is in position to question the validity of the compromise agreement, is as to the good faith of the defendant in disputing the account of plaintiff. The oral evidence rule aside, the defendant might reply in the language of the court, Ry. Co. v. Kisch, L.R. 2 H.L. 120, quoted in Poe v. Texas & Pac. Ry. Co. (Tex.Civ. App.) 95 S.W.(2d) 505, 508, as follows: "When once it is established that there has been any fraudulent misrepresentation, * * * by which a person has been induced to enter into a contract, it is no answer to his claim to be relieved from it to tell him that he might have known the truth by proper inquiry. He has a right to retort upon his objector: " 'You, at least, who have stated what is untrue, * * * for the purpose of driving me into a contract, cannot accuse me of want of caution because I relied implicitly upon your fairness and honesty.' " The evidence was sufficient to take the case to the jury.

It is stated in 12 C.J. 364:

"The execution and delivery of a bill or note is prima facie evidence of the settlement of all existing demand between the parties up to date. * * *

"A settlement being once shown every presumption is indulged in favor of its fairness and correctness; and the burden of proving mistake, fraud, duress or other facts relied on in avoidance of a compromise and settlement is on the party seeking to avoid the settlement."

And it is further stated in the same volume, at page 367: "Where a compromise is alleged, the determination of all controverted questions of fact is for the jury. Thus on conflicting evidence it is for the jury to determine whether there was an agreement of compromise * * * whether there was a consideration, whether there was such an honest dispute between the parties as could be made the basis of a compromise * * * whether the party relying on the compromise has performed conditions imposed on him, and the damage suffered from the breach, if any."

We believe that the court erred in excluding the evidence tendered and taking the case from the jury. Other questions are argued, but they are not likely to arise upon a second trial; hence they have not been considered.

For the reasons stated, the judgment should be reversed, the cause remanded, with directions to grant the defendant a new trial, and it is so ordered.

SADLER, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

64 P.(2d) 97

OLLMAN et al. v. HUDDLESTON et al.

No. 4150.

Supreme Court of New Mexico.

Jan. 5, 1937.

Rehearing Denied Jan. 25, 1937.

David A. Grammer, of Albuquerque, for appellants.

Donald M. Bushnell, of Albuquerque, for appellees.

BRICE, Justice.

The appellants will be styled plaintiffs, and the appellee, Oscar L. Huddleston, defendant.

This suit was brought to recover $1,853.36 on a promissory note made payable to the plaintiffs and signed by the defendants. The defense was want of consideration and res adjudicata. The defendants for affirmative relief pleaded a counterclaim in the sum of $137.50. The plaintiffs replied to the answer and demurred to the counterclaim. The demurrer was overruled, and the plaintiffs elected to stand thereon. On motion of defendants, judgment was entered on the pleadings, to the effect that plaintiffs take nothing by their suit and the defendants recover $137.50 on their counterclaim.

Plaintiffs in their reply denied some of the allegations in the answer, but these denials were conclusions of fact or law. A careful reading of the answer and reply, which are more or less confusing, shows that the essential facts in the case are not controverted. Under these circumstances the court did not err in considering the motion for judgment on the pleadings.

The essential facts, deduced from the pleadings, are as follows:

In August, 1930, the plaintiffs and the defendant entered into a contract in writing, whereby defendant agreed to construct a dwelling house for the plaintiffs for a consideration of $5,800. At that time plaintiffs had an equity in a residence in Albuquerque, hereafter referred to as the Sycamore avenue property. The contract provided, with reference to this equity, as follows:

"In payment for the above work the parties of the second part agree to assign their contract on the property at 439 N. Sycamore to the party of the first part. Taxes paid to December 31st, 1930. Paving to be assumed by the party of the first part. Unexpired insurance to be turned over to party of the first part, gratis.

"It is understood and agreed that the parties of the second part have the right to continue to live in the property at 439 N. Sycamore until the new house is com-

pleted unless the 439 Sycamore house is sooner sold, in which case they agree to vacate, moving expense to be borne by party of the first part. The equity in the 439 Sycamore house which the parties of the second part transfer to the party of the first part shall be the net equity based upon a price of $6000.00.

"In addition to the equity in the 439 Sycamore house, the party of the first part is to receive the proceeds of a $4300.00 loan, less $200.00 which is to complete the purchase price of a lot on which the new house is to be built; less the expense of obtaining the aforesaid loan."

To secure the $4,300, plaintiffs agreed to mortgage the new house. After the execution of the contract, defendant found a purchaser for the plaintiffs' equity in the Sycamore avenue property and requested its transfer, in accordance with the contract. The plaintiffs refused to do this (though clearly required to under the terms of the contract), unless the defendants would make a note payable to plaintiffs, in an amount equal to the value of such equity. The defendant had sold this property and was under obligation to deliver title, so was compelled to comply with this demand or lose the sale. The defendants executed the note (the one herein sued on), and thereupon plaintiffs transferred their equity in the Sycamore avenue property to defendant, who transferred it to third persons. There was executed with the note, and a part of the same transaction, a memorandum signed by the parties hereto, in the following words:

"Wesley R. Ollman & Myrtle Ollman, formerly Myrtle B. Willson, agree to accept a note for $1,853.36 from Oscar L. Huddleston & Dora Huddleston, his wife as security for their equity in 493 North Sycamore. Note is to be settled by completing of a house now under construction on University Avenue in accordance with the agreement now pending between the parties, above mentioned.

"Wesley Ollman, et al, agrees to sign a Quitclaim Deed to Oscar L. Huddleston, et al. In no way is this Agreement to conflict between the above parties other than transferring the Title of the place from Ollman to Huddleston."

The house was completed and the plaintiffs moved in. The defendant claimed that the plaintiffs were indebted to him in the sum of $6,177.11 for building the house, instead of $5,800 as the original contract provided, on account of extras, which seems not to be denied. That plaintiffs were entitled to the following credits: The proceeds of a loan on the new house in the sum of $3,837.05; $41.75 excess payments on the Sycamore avenue property; and $148.48, cost of the loan, making a total credit of $4,027.28.

The plaintiffs were in fact entitled to the further credit of $1,853.36, the value of the equity in the Sycamore avenue property, making a total of $5,860.64. Defendant offered to allow credit for the $1,853.36 if plaintiffs would surrender the

note, but they apparently refused. The defendant filed a mechanic's lien against the property in the sum of $2,149.83, in which amount the value of the equity in the Sycamore avenue property was included and for which he had been paid. This action of defendant violated the provision of the contract to the effect that the defendant should not permit any liens to be filed against the property. Defendant claimed that he included the amount of the equity in the Sycamore avenue property in his claim of lien because advised by counsel that such was necessary to protect himself against the outstanding note. Defendant brought suit to foreclose the lien and process was duly served on plaintiffs, but they made default. The holder of the note for $4,300, secured by the deed of trust, was made a party to this suit; in which she filed a cross-complaint to foreclose the deed of trust because of the filing of the liens. Although process was duly served, the plaintiffs defaulted in that proceeding.

One Zapf, who had secured the loan for the plaintiffs on the new house, had guaranteed the lender that no mechanic's liens would be filed, and, to make his guarantee good, bought defendant's liens. A decree was entered foreclosing the deed of trust, but the decree recited that all of the liens filed had been adjudged of no effect, and "the same are hereby dismissed as having been paid and satisfied." The plaintiffs carried out all their part of the contract and paid over all the money that they agreed to pay to the defendant, but the defendant violated his contract in the particulars heretofore mentioned. By reason of the transaction the plaintiffs lost their interest in the equity of the Sycamore avenue property, worth more than $1,800.

We have taken all of the allegations of fact in the reply, as distinguished from conclusion, as true, because the case was decided on defendant's motion for judgment on the pleadings.

The great weight of authority holds that an agreement to give an additional consideration for the performance of a provision in a contract which the party receiving the consideration is already under obligation to perform is void because without consideration. The following cases support the rule: Vanderbilt v. Schreyer, 91 N.Y. 392; Shriner v. Craft, 166 Ala. 146, 51 So. 884, 28 L.R.A.(N.S.) 450, 139 Am.St.Rep. 19; Lingenfelder et al. v. Wainwright Brewing Co., 103 Mo. 578, 15 S.W. 844; Hoskins v. Powder Land & Irrigation Co. et al., 90 Or. 217, 176 P. 124, 125; 4 Page on Contracts, § 2463. See case notes to McGovern et al. v. City of New York, 234 N.Y. 377, 138 N.E. 26, 25 A.L.R. 1442; Creamery, etc., Co. v. Russell, 84 Vt. 80, 78 A. 718, 32 L. R.A.(N.S.) 135 and Linz v. Schuck, 106 Md. 220, 67 A. 286, 11 L.R.A.(N.S.) 789, 124 Am.St.Rep. 481, 14 Ann.Cas. 495.

The courts of a few states hold otherwise in some cases, for various reasons stated in their opinions. Linz v. Schuck,

106 Md. 220, 67 A. 286, 11 L.R.A.(N.S.) 789, 124 Am.St.Rep. 481, 14 Ann.Cas. 495; King v. Duluth, M. & N. R. Co., 61 Minn. 482, 487, 63 N.W. 1105; Parrot et al. v. Mexican Cent. Ry. Co., 207 Mass. 184, 93 N.E. 590, 594, 34 L.R.A.(N.S.) 261. In the last case cited it is stated: "This limitation in the application of the general rule to such facts is not recognized in England, nor in most of the states in this country. See Abbott v. Doane, 163 Mass. 433–435, 40 N.E. 197, 34 L.R.A. 33, 47 Am.St.Rep. 465 [citing other authorities]. While it is well established in Massachusetts, the doctrine should not be extended beyond the cases to which it is applicable upon the recognized reasons that have been given for it." Some of these decisions recognize the general rule, but make distinctions in exceptional cases. Linz v. Schuck, supra.

[redacted] The written contract provided in substance that plaintiffs should transfer to defendant their equity in the Sycamore avenue property when the new house was built; or when sold, if sold before the new house was completed. Plaintiffs refused to transfer their equity to defendant, though it had been sold, unless defendants would execute and deliver to them the note herein sued on. Defendant was compelled to do so, or lose his sale. Clearly plaintiffs were required under the written contract to do all they promised to and did do under the new agreement. In fact, the supplemental agreement shows that there was no intention to modify the original contract. The case comes squarely within the rule we have stated.

Plaintiffs allege in substance in their reply the following (which the motion for judgment admits is true):

That defendants should not be heard in their plea of lack of consideration because, at the time the note was made, the contract was wholly executory; that, subsequent to the making of the note, the Sycamore avenue property was conveyed by the plaintiffs to defendant, who transferred it to third persons; that, subsequent to the completion of the new house, and contrary to the terms of the contract, the defendant filed a lien against the new house for an amount which included the value of the equity in the Sycamore avenue property, which he thereafter brought a suit to foreclose and the rights to which defendants sold to a third person.

That plaintiffs relied on the statement of lien filed, and believed that the contract had been amended by agreement by the action of the defendants, so that the note sued on was to be deemed a separate and distinct evidence of indebtedness and contract; that, as a result of defendant's actions, plaintiffs have lost their interest in the Sycamore avenue property and defendant has received value therefor; that plaintiffs have received nothing but the note for the Sycamore avenue property; and that all parties have elected to consider the transfer of the equity as an independent transaction and are now estopped to allege the lack of consideration.

The defendant not only permitted liens to be filed against the new house in violation of the contract, but placed one against it himself, although plaintiffs fulfilled their contract. Defendant claimed further indebtedness and a lien against the premises and received payment in settlement from third parties.

What right did plaintiffs have to rely on the statement of lien filed? They are held to know that the note was given without consideration and was a nullity, and knew that the statement of lien was false. The fact that plaintiffs claimed a lien for the value of the equity in the Sycamore avenue property did not vivify an instrument that never had or could live without a consideration. Defendant claimed a lien to which he was not entitled, and which he could never have enforced had plaintiffs defended the suit. It does appear that no judgment was obtained on the lien account or that the property was foreclosed by reason of the liens; though it also appears that the suit to foreclose the liens (or their filing) was ground for foreclosing the deed of trust by which plaintiffs lost their property.

It is alleged in the answer: "(d) That final decree was entered in said Cause No. 18863 adjudging the claim of this defendant, and the other assigned lien claims, 'to be and the same are hereby dismissed as having been already paid and satisfied,' and foreclosing as against the plaintiffs only the lien of said deed of trust;"

This is not denied. If defendant received anything for his alleged lien, it cost plaintiffs nothing. Defendants cannot be deprived of their defense of want of consideration because plaintiffs relied on a claim they knew was false; nor because (as they alleged) "in such reliance they believed that the contract had been amended by agreement and action of defendant to provide that the promissory note sued on herein was to be deemed a separate and distinct contract." They knew that the contract was not modified and could not have been misled.

We know of no authority to support such contention and none has been cited. The defendants are not estopped to defend upon the ground of want of consideration.

A second estoppel is pleaded to the effect that the foreclosure suit proceeded to final decree and that defendants are estopped to claim "a statement of account different from that on which the former adjudication was based; because these plaintiffs having relied on the former adjudication and materially changing their position with reference thereto, they should not now be misled and caused to suffer loss by defendants' inconsistent statements and positions."

But plaintiffs could not have been misled. They knew as well as the defendants every fact in connection with the case. There is no charge of fraud or any facts that show plaintiffs were misled to their injury.

In re Madison, 32 N.M. 252, 255 P. 630, 632, is cited as approving the following rule, laid down in 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."

Aside from the fact that neither the defendants nor their successors succeeded in maintaining their position in the foreclosure suit, if defendants by the rule of law cited are now permitted to deny their claim of lien as filed, it would not give life to an utterly void note, though claimed and filed because plaintiffs held the note. The lien was false and without foundation and violated the contract. It could have been defended against successfully had plaintiffs desired. There is no ground for an estoppel.

The defendant by counterclaim sued to recover $137.50 he had paid on taxes on the Sycamore avenue property, which, under the terms of the contract, plaintiffs had agreed to pay. It was alleged "* * * that when this defendant found a purchaser for said equity, as hereinbefore set forth, the plaintiffs neglected and refused to pay such taxes and this defendant, in order to carry out a deal which he had negotiated for said equity on the faith of said contract, Exhibit 'A,' was compelled to assume and ultimately pay such taxes in the amount of One Hundred Thirty-seven Dollars Fifty Cents ($137.50) as of September 8, 1930."

Plaintiffs demurred to the allegations of counterclaim upon the ground "that the counterclaim does not allege that the sums and moneys claimed to have been expended therein by Defendants, were so expended at the instance and request of these Plaintiffs."

Plaintiffs contracted with defendant to pay the taxes, with the understanding that the property would be sold. They knew that, unless plaintiffs would pay the taxes as agreed, defendant would necessarily have to pay them to deliver title to the property. Under these facts defendant was not a mere volunteer; but there was an implied promise on the part of plaintiffs to refund the money defendant was compelled to pay for their benefit. Tuttle v. Armstead, 53 Conn. 175, 22 A. 677; 13 C. J. title Contracts, § 10.

The judgment of the district court is affirmed, and the cause remanded.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

64 P.(2d) 377

CONTINENTAL LIFE INS. CO. v. SMITH.

No. 4160.

Supreme Court of New Mexico.

Dec. 31, 1936.

Works & Bassett, of Amarillo, Tex., and A. T. Rogers, Jr., of Las Vegas, for appellant.

M. E. Noble, of Las Vegas, for appellee.

BRICE, Justice.

This suit was brought by appellee against appellant to recover on a note for $9,740.92, and to foreclose a mortgagee deed securing it. The appellant answered, claiming damages because of breach of a contract to convey the same and other real estate described in the mortgage, made prior to the execution to appellant of a deed to the property, and the note and mortgage in suit; by reason of which it is claimed nothing is due on the note. By cross-action appellant sued to cancel the note and mortgage in suit and to recover damages for such breach, in excess of the amount due appellee on the note. Appellee demurred to the second amended answer and cross-complaint, which demurrers were sustained. Appellant refusing to further amend his answer, judgment was entered for appellee as prayed for in its complaint.

The demurrer admitted the allegations of fact in the answer that were well pleaded. With this in mind, we deduce from the voluminous pleadings of the appellant, the following essential facts upon which this case must be determined:

On the 17th of August, 1926, the appellant and appellee entered into a written contract, whereby appellee agreed to sell, and

the appellant to buy, approximately 13,000 acres of land in New Mexico for $40,000, to be paid as follows: $6,000 cash upon execution of the contract; $5,000 to be paid on January 1, 1927, and $2,500 to be paid each six months thereafter to and including July 1, 1932, and the balance of $1,500 on January 1, 1933. The appellant sold 5,000 acres of the land for $19,000; $16,000 of which was applied on his debt to appellee, and the land sold was released by appellee from the contract. Other payments were made (some in advance) so that on April 25, 1929, there was a balance of $9,740.92 due appellee on the purchase price.

In July, 1929, appellant entered into a binding contract with Earl J. Brennon and Thomas Brennon for a sale to them of 5,000 acres of the land remaining unsold, for a consideration of $23,500. A part of this consideration was the assumption of the balance of $9,740.92 due appellee. At that time, and until May 14, 1930, the Brennons were ready, able, and willing to carry out said contract, but on the latter date, because of the delay in closing the contract, hereinafter referred to, the Brennons gave written notice that they had exercised their right to cancel, and did cancel, said contract. The consideration which the Brennons had agreed to pay would have liquidated the balance due appellee and left a profit of $13,100 to appellant, together with 1,320.21 acres of specifically described lands unsold.

During all the time the contract was in effect, the appellant was not in default in any particular in its performance. On and before April 25, 1929, he had paid appellee all matured payments and a portion not matured, so there was due appellee on said date only $9,740.92.

The contract of sale from appellee to appellant, among other terms and covenants, provided:

"* * * on the first day of January 1929, provided there be no default of the terms of this contract, second party may demand, and first party, upon surrender of this contract to it for cancellation, shall then make its special warranty deed to the land above described, in favor of the party of the second part, provided, however, that upon making delivery of said special warranty deed, by party of the first part to second party, the second party shall execute and deliver a first mortgage, on the usual form, satisfactory to party of the first part, on all of the said realty, said mortgage to secure the payment of notes then to be executed and delivered by second party to first party, for the amount of all immature installments not paid at the time of delivery of deed as above mentioned, with accrued interest, if any, thereon, such notes to mature on the respective dates on which the deferred installments above noted would become due if such notes were not executed; such notes shall bear interest at the rate of six percent per annum from their respective dates until paid, 'interest payable semi-annually,' and if any interest or principal note be not paid when due, the same shall then bear interest at the rate of ten percent per annum until paid, both the notes and mortgage shall be made in favor of the party of the first part and such mortgage shall be

conditional also upon the performance of the other agreements of the party of the second part in this contract contained, regarding the payment of taxes and other liens. * * *

"The party of the second part further agrees that he will not assign this contract, nor any part thereof, nor interest therein without the written consent of the party of the first part."

The parties hereto and said Brennons agreed to close the Brennon sale in the following manner: Appellant and wife would make a quitclaim deed conveying the unsold acreage to appellee; then appellee would convey the same land to the Brennons, taking back from them their note in the sum of $9,740.92, due February 1, 1933 (the balance due appellee), secured by a mortgage on the land. That after the execution of these documents the Brennons would deed to appellant a specifically described 1,320.21 acres of the land, being the excess over the land they had bought. The maturity date of the note from the Brennons to appellee would be February 1, 1933, in consideration of appellant having paid some installments of the purchase price in advance of their due date.

In pursuance to these arrangements, appellee wrote appellant a letter containing the following: "In accordance with your suggestion to Mr. Mays, and at his request, I am enclosing herewith a photostatic copy of form of Deed we will execute to the Brennons, when the mortgage papers and your Quit Claim Deed properly completed are forwarded to this office."

There was inclosed in this letter a photostatic copy of a proposed deed from appellee to the Brennons that complied in terms with the agreement.

After appellee had agreed to the Brennon sale, and to the manner of carrying it out, as stated, it arbitrarily demanded, as a condition to completing its part, that the wives of the Brennons join as makers of the note (which it had been agreed the Brennons would make) and in the execution of the mortgage securing it. This the Brennons refused to do, with the result of long delays while the Brennon contract was in effect.

In an endeavor to close the Brennon sale after appellee refused to carry out the agreement to convey to the Brennons, the appellant, joined by his wife, about February 17, 1930, executed a note for the balance due appellee and secured it by a mortgage on the unsold land, and sent them to appellee with the demand that they be accepted and the land deeded to appellant. Appellee agreed, and executed a deed to appellant for the unsold land; but held said papers until April 30, 1930, when it mailed them to appellee's attorney in Las Vegas, N. M. Acting under instructions from appellee, its attorney held said papers until January 27, 1931, long after the Brennon contract was canceled; at which time appellee's attorneys telephoned appellant's attorney that they were ready to place the deed and mortgage of record; to which appellant's attorney

consented, though neither he nor appellant had ever seen the deed. The defendant alleged further that there was an implied covenant in appellant's contract with appellee that appellee would execute a deed to the Brennons in a reasonable time after demand; and to appellant likewise after its refusal to carry out its agreement to convey the land to the Brennons, which appellee in each instance failed and refused to do. That if either had been complied with, the appellant would have closed the Brennon sale.

That at the time of the filing of this suit the land had so deteriorated in value that it was not worth the balance due appellee on the purchase price.

It is alleged in the answer and cross-complaint:

"* * * In this connection, this defendant further says and shows that no surrender of said contract or original notes between plaintiff and this defendant for cancellation was mentioned or required by plaintiff in connection with said Brennon deal or otherwise and that any such surrender for cancellation of said contract was by plaintiff waived and said contract retained and is now held by this defendant.

"* * * that said deed was not accepted by him in full satisfaction or discharge of all of the covenants and obligations resting on plaintiff under its said contract of sale to this defendant, but that same was only accepted as a conveyance of said remaining portion of said land to which deed plaintiff understood and alleges the fact to be that he was entitled to under the expressed termination (terms) of said contract, and he further in this connection especially denies that any of the other covenants or obligations of said original contract were merged into said deed except the covenant and obligation to make deed to said land and he further specially denies that he in any sense waived fulfillment of any of the other covenants or obligations of said contract or that there was any consideration for any such waiver and he further and specially said that he at no time intended to nor did he agree that said contract should be merged into said deed, note and mortgage, or that he at any time waived, agreed to waive, or intended to waive the breach of said original contract, or any of the covenants thereof, or that there was any consideration of any character whatsoever, for any such agreement to waive on his part."

The facts here set out are alleged both as a defense and as base for affirmative relief in the cross-complaint.

From the facts it may reasonably be inferred that had the appellee conveyed the property either to the Brennons or the appellant within a reasonable time after demand, the sale to the Brennons would have been accomplished and appellants saved from a loss of several thousand dollars, and that appellee's refusal to make a deed to the property as the contract provided was a willful disregard of its obligation. It had full knowledge of the Brennon contract and the desire of appellant to close it; and no reason appears thus far why it could not

have delivered the deed in a few days after demand instead of the many months wasted without the slightest justification, before delivery.

The cross-action and counterclaim is for special damages resulting from the loss of the bargain with the Brennons. While courts differ as to the measure of damages in such cases, no question in that regard is raised here, and we do not pass on it. See 66 C.J. title "Vendor and Purchaser," §§ 1703 to 1712, inclusive, and 27 R.C.L. § XVI, p. 630, title "Vendor and Purchaser," and cases cited.

The question is whether a right to recover damages for the breach of a contract to convey real estate at a particular time is waived or lost by the acceptance of a deed subsequent to the accrual of a right of action for such breach.

The appellee contends that the covenant to convey title and accept a note and mortgage for the balance due on the purchase price, as stated in the facts deduced, was merged in the deed which appellant accepted after a right of action had accrued for the breach.

The general rule with regard to merger in such cases was stated in Norment et ux. v. Turley et al., 24 N.M. 526, 174 P. 999, 1000 as follows: "It is a well-established rule of law that prior stipulations are merged in the final and formal contract executed by the parties, and this rule applies to a deed or a mortgage based upon a contract to convey. When a deed is delivered and accepted as performance of the contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, the deed alone must be looked to to determine the rights of the parties. Devlin on Real Estate, § 850a. The rule is followed in practically all the cases." Also see annotation in 84 A.L.R. 1008 et seq.

An exception to this general rule is likewise stated in the Norment Case in the following language: "There is an exception to the rule stated, which is that the contract of conveyance is not merged upon execution of a deed where under the contract the rights are conferred collaterally and independent of the deed; there being no presumption that the party in accepting the deed intends to give up the covenants of which the deed is not a performance or satisfaction. Where the right claimed under the contract would vary, change, or alter the agreement in the deed itself, *or inheres in the very subject-matter with which the deed deals, a prior contract covering the same subject-matter cannot be shown as against the provisions of the deed.*" Also see annotation, 84 A.L.R. division IV, p. 1017 et seq.

It is held by some courts of high standing that where preliminary contracts for the sale of real estate have been made and the covenants and stipulations are such that the mere delivery of a deed is not a full performance, then it is a question of intention, to be determined from the deed, or if not contained therein, then from other evidence, whether such stipulations have been

surrendered. If covenants regarding the same subject-matter, consistent or inconsistent, with those in the contract appear in the deed, they are conclusively presumed to have merged therein; but if the deed contain no evidence of intention on the subject, then the question is open to other evidence to determine such intention, and in the absence of evidence there is no presumption that either party intended to waive stipulations in the contract by the delivery or acceptance of a deed. This is the rule in New York, as will be seen from the oft cited case of Morris et al. v. Whitcher, 20 N.Y. 41, from which we quote the following:

"Again it is said that an executory agreement for the sale of lands is always satisfied and performed when the conveyance comes to be made. It needs no argument to prove that a simple covenant to convey is performed by a conveyance. The obligation being thus satisfied, that is the end of it. But it is just as plain, both in common sense and in law, that covenants which relate to other things than a mere conveyance are not thus performed or satisfied. Especially it would seem to be a self-evident proposition, that the performance by the vendor of his antecedent covenant to convey is not a performance of a different covenant, contained in the same instrument on the part of the vendee. * * *

"In all cases then, where there are stipulations in a preliminary contract for the sale of land, of which the conveyance itself is not a performance, the true question must be whether the parties have intentionally surrendered those stipulations. The evidence of that intention may exist in or out of the deed. If plainly expressed in the very terms of the deed, the evidence will be decisive. If not so expressed, the question is open to other evidence, and I think in absence of all proof there is no presumption that either party, in giving or accepting a conveyance, intends to give up the benefit of covenants of which the conveyance is not a performance or satisfaction."

The rule adopted in the Norment Case, supra, we believe to be supported by the weight of authority. We state it more in detail, as follows:

[redacted] In the absence of fraud, mistake, etc., the following stipulations in contracts for the sale of real estate are conclusively presumed to be merged in a subsequently delivered and accepted deed made in pursuance of such contract, to wit: (1) Those that inhere in the very subject-matter of the deed, such as title, possession, emblements, etc.; (2) those carried into the deed and of the same effect; (3) those of which the subject-matter conflicts with the same subject-matter in the deed. In such cases, the deed alone must be looked to in determining the rights of the parties.

[redacted] But where there are stipulations in such preliminary contract of which the delivery and acceptance of the deed is not a performance, the question to be determined is whether the parties have intentionally surrendered or waived such stipulations. If such intention appears in the deed, it is de-

[redacted]

cisive; if not, then resort may be had to other evidence.

The following cases are pertinent: Caveny v. Curtis et al., 257 Pa. 575, 101 A. 853; City of Bend v. Title & Trust Co., 134 Or. 119, 289 P. 1044, 84 A.L.R. 1001; Woodson v. Smith, 128 Va. 652, 104 S.E. 794; Vermont Marble Co. v. Eastman, 91 Vt. 425, 101 A. 151; Davis v. Lee, 52 Wash. 330, 100 P. 752, 132 Am.St.Rep. 973; Disbrow v. Harris, 122 N.Y. 362, 25 N.E. 356; Carey et al. v. Walker et al., 172 Iowa, 236, 154 N.W. 425; Christiansen v. Intermountain Ass'n of Credit Men, 46 Idaho, 394, 267 P. 1074; Goodspeed v. Nichols et al., 231 Mich. 308, 204 N.W. 122; Reid v. Sycks, 27 Ohio St. 285; Blake-McFall Co., Respondent, v. Wilson et al., 98 Or. 626, 193 P. 902, 14 A.L.R. 1275; Brownback v. Spangler, 101 N.J.Eq. 388, 139 A. 524; Read v. Loftus, 82 Kan. 485, 108 P. 850, 31 L.R.A.(N.S.) 457, and note; Kessler et ux. v. Troast et ux., 101 N.J.Eq. 536, 138 A. 371; 27 R.C.L. 532.

The authorities may perhaps be reconciled by a determination of what are "collateral stipulations." If the stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein. Bull v. Willard, 9 Barb.(N.Y.) 641; Winn v. Taylor, 98 Or. 556, 190 P. 342, 194 P. 857; Van Hee v. Rickman et al., 109 Or. 357, 220 P. 143.

We now come to the principal question: Did the stipulation to convey the property at a stated date, under conditions duly performed by appellant, merge in the deed?

[redacted] Strictly speaking, a covenant to convey does not merge, but terminates as a completed transaction upon delivery and acceptance of a deed. It is never breached if a deed is accepted at any time. But a stipulation to deliver a deed at a certain time, or within a reasonable time, or upon a contingency, is either breached before the delivery of a deed or falls with such delivery and acceptance. It was never intended to survive the deed except as a basis of an action for damages, and this appears from its terms. Such stipulation could not merge in a deed, but it may be intentionally waived or surrendered.

There are but few cases on the question and these uphold our conclusion. The court in Houston & T. C. Ry. Co. et al. v. Wright, 15 Tex.Civ.App. 151, 38 S.W. 836, 837, had the identical question to decide. That court concluded that the acceptance of a deed was not a waiver of damages.

The railway company contracted to sell Wright certain land at $2.50 an acre; $1,280 was paid on the land and the remaining $320 was to be represented by a vendor's lien note to be executed when the deed was delivered, which was to be within a reasonable time, alleged to be thirty days. After an unreasonable delay the deed was delivered and accepted by the purchaser, and the vendor's lien note executed. The court said: "According to the further contention of the appellee, he contracted in May, 1893, for the sale of the section to his brother W. C. Wright,

at the price of $7.50 per acre. This contract he was unable to consummate, on account of the fact that the defendants had failed to execute a deed in accordance with the agreement of Napier. It is further contended by the appellee that the land had decreased in value to such an extent as not to be worth more than $3,200 at the date of the execution and acceptance of the deed. The record shows that the transaction with W. C. Wright was made the basis of the plaintiff's recovery; and the court charged the jury, in effect, that the measure of damages was the diminished value of the land at the time of the execution of the deed, with reference to the amount which would have been realized had the sale to W. C. Wright been completed."

The court held that there was nothing to show that the contract was made with reference to the special conditions rendering the damage claimed the natural and probable result of the breach, and cited Missouri, K. & T. Railway Co. v. Belcher, 89 Tex. 428, 35 S.W. 6, and Tynan v. Dullnig (Tex.Civ. App.) 25 S.W. 465, for the correct measure of damages. The court further stated:

"We also overrule appellants' proposition to the effect that the final acceptance of the deed should be regarded as a waiver of damages previously and otherwise legitimately accruing from a breach of the contract. Had the deed not been executed, the vendee could have sued for a specific performance and for damages in the same action. Pom. Cont. §§ 469, 481. The execution of the deed avoided the necessity of a suit for specific performance. If, however, damages had been sustained in the meanwhile, no reason is perceived why an action would not lie for their recovery, especially under the liberal system of procedure prevailing in this state.

"Other assignments criticising the charge need not be considered. The judgment is reversed, and the cause is remanded."

We copy the following from 66 C.J. title "Vendor and Purchaser," § 1652, p. 1552: "Execution and acceptance of a deed at a time subsequent to that fixed for that purpose by the sale contract entitles the purchaser to sue for the damages from delay arising from the breach of the provisions as to the time of conveyance; in such a case, the acceptance of the deed when it is tendered does not preclude the action. Delay in executing a valid conveyance does not entitle the purchaser to damages, however, when it is occasioned by the mutual mistake of everyone concerned as to the sufficiency of an invalid deed tendered and accepted at the proper time for performance."

Also see Warner v. Bacon, 8 Gray (Mass.) 397, 69 Am.Dec. 253.

[redacted] There are a number of cases holding that after a contract has been breached the right to damages therefor is not waived or surrendered because the parties subsequently entered into a new contract covering the same subject. The principle applies here. We call attention to the following cases:

In Luckey v. St. Louis & S. F. R. Co., 133 Mo.App. 589, 113 S.W. 703, the shipper

claimed he had an oral contract with the railway company to ship his strawberries in a refrigerator car. This was not done, because of which the strawberries were damaged. The railway company claimed that the oral agreement had merged into a written contract in which there was no such agreement. The court said: "A written contract of affreightment, under the terms of which the transportation was effected, was introduced in evidence; but it is not contended by defendant, nor do we find, that it contains an agreement on the part of plaintiff waiving the damages he claims accrued under the prior oral contract alleged. In such cases, the rule is well settled that 'if damages have accrued under a verbal contract, and there is no waiver or disclaimer of such breach in the subsequent writing, an action may be maintained on the verbal agreement, notwithstanding there was a subsequent writing.' "

Hoover v. St. Louis & S. F. R. Co., 113 Mo.App. 688, 88 S.W. 769, 770, was a case of shipment of livestock, which was damaged by delay. No written contract was signed at the time of shipment, but a written contract was signed on the way, in which the shipper waived damages by reason of delay in shipment. The court stated: "After an examination of the authorities presented by the respective counsel, we understand the law, where there is a verbal contract and a subsequent written contract, to be this: If damages have accrued under a verbal contract, and there is no waiver or disclaimer of such breach in the subsequent writing, an action may be maintained on the verbal agreement, notwithstanding there was a subsequent writing. But if the subsequent agreement contains among its stipulations that any breach of the verbal contract relating to the shipments is waived, thereby evincing an intention on the part of the contracting parties to regard the writing as covering the whole shipment, and determining their rights arising by reason of such shipment, no action can be maintained on the verbal agreement."

In Garfield, etc., Co. v. Fitchburg R. Co., 166 Mass. 119, 44 N.E. 119, 120, it was said: "It is suggested that the plaintiff waived its rights by allowing its vessels to be discharged at a later time. No doubt, cases occur in which parties going on with a contract after the time stipulated for performance show by their acts that they have modified the contract and enlarged the time. But a contractor, by taking what he can get under his contract when he can get it, no more necessarily, and as matter of law, waives a claim for damages for failure to perform on time, than he necessarily waives a defect of quality by accepting goods."

In Phillips, etc., Construction Co. v. Seymour, 91 U.S. 646, 651, 23 L.Ed. 341, the court held that where the owner urges a builder who has defaulted as to time in constructing a building to complete it, and pays him for part of his work after such failure, he waives strict performance as to time and the builder may recover for the work actually done, though liable in damages for delay. In this case the court said:

"If the builder has done a large and valuable part of the work, but yet has failed to

complete the whole or any specific part of the building or structure within the time limited by his covenant, the other party, when that time arrives, has the option of abandoning the contract for such failure, or of permitting the party in default to go on. If he abandons the contract, and notifies the other party, the failing contractor cannot recover on the covenant, because he cannot make or prove the necessary allegation of performance on his own part. What remedy he may have in assumpsit for work and labor done, materials furnished, etc., we need not inquire here; but if the other party says to him, 'I prefer you should finish your work,' or should impliedly say so by standing by and permitting it to be done, then he so far waives absolute performance as to consent to be liable on his covenant for the contract price of the work when completed.

"For the injury done to him by the broken covenant of the other side, he may recover in a suit on the contract to perform within time; or, if he wait to be sued, he may recoup the damages thus sustained in reduction of the sum due by contract price for the completed work."

The facts in El Paso & S. W. R. Co. v. Harris & Liebman (Tex.Civ.App.) 110 S.W. 145, 146, 148, were: Appellant employed appellee to perform services and breached the contract to appellee's damage. After such breach a new contract was made between them regarding the same subject-matter. Appellee sued for the breach. The defense was that the earlier oral contract was merged into a subsequent written contract. It is stated in the opinion: "The position assumed by appellant that the verbal contract was merged into the written contract, and that appellees could not therefore recover for the breach of the verbal contract theretofore made, is not tenable. The verbal contract was to the effect that appellees should go to Arizona and begin work at once, and appellant failed to comply with that agreement. The verbal contract was in full force and effect until it was superseded by the written contract. That is what is held in Jones v. Risley, 91 Tex. 1, 32 S.W. 1027, cited by appellant. The damages claimed by appellees arose during the life of the verbal contract, and nothing is claimed for anything that transpired after the execution of the written contract. The verbal contract was in full force, however, until the written contract was executed, and appellees' claim is based upon a breach of the oral contract."

Also see Fountain et al. v. Wabash R. Co., 114 Mo.App. 676, 90 S.W. 393.

[redacted] There are certain cases involving the sale and delivery of personal property in which it is held that the acceptance of the property after the agreed date of delivery did not waive damages caused by such delay. The principle involved is that in accepting performance the buyer did not waive damages he had suffered from the seller's delay in delivery. We think the rule applies as well in cases of sale of real estate.

It was held in Ruff v. Rinaldo, 55 N.Y. 664, that a person permitting the completion of the performance of a contract after the time had expired does not therefore forfeit

his right to damages for the breach of the contract as to time. This seems to be the general rule.

Also see Redlands, etc., Ass'n v. Gorman, 161 Mo. 203, 61 S.W. 820, 54 L.R.A. 718, and note; Johnson et al. v. North Baltimore, etc., Co., 74 Kan. 762, 88 P. 52, 7 L.R.A. (N.S.) 1114, 11 Ann.Cas. 505; Johnson v. Henry, 127 Mich. 548, 86 N.W. 1027; Lawrence County v. Stewart Bros., 72 Ark. 525, 81 S.W. 1059; Huntsville Elks Club v. Garrity-Hahn Bldg. Co. et al., 176 Ala. 128, 57 So. 750; Bryson v. McCone, 121 Cal. 153, 53 P. 637.

We conclude: (1) A stipulation, in a preliminary contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, does not necessarily merge in a subsequently delivered and accepted deed. (2) Damages occasioned by reason of the breach of a stipulation in a preliminary contract for the sale of real estate, to deliver a deed at a specified time upon a contingency fully performed, are not waived or surrendered merely by the delivery and acceptance of a deed to the real estate to be conveyed.

Under the allegations of fact in the answer and cross-bill (taken as admitted by the demurrer), no rights, under the stipulation in question contained in the preliminary contract, were waived or surrendered, but still exist.

It is unnecessary to decide whether appellee was required under the terms of the contract to deed the property to the Brennons. Assuming that it was not, its attitude misled appellant, who, no doubt, would have demanded performance earlier except for the agreement on the part of appellee to deed the property to the Brennons. This may be considered in determining what was a reasonable time in which to deliver the deed after demand.

The case will be reversed and remanded, with instructions to overrule the demurrer to the answer and cross-complaint, permit amendments of pleading, and otherwise proceed with the trial of the case not inconsistent with this opinion.

It is so ordered.

SADLER, C. J., and HUDSPETH, BICKLEY, and ZINN, JJ., concur.

64 P.(2d) 384

TOWN OF ALAMOGORDO v. BEALL et al.

No. 4267.

Supreme Court of New Mexico.

Jan. 5, 1937.

Frank H. Patton, Atty. Gen., and J. R. Modrall, Asst. Atty. Gen., for appellants.

J. L. Lawson, of Alamogordo, and Clyde C. Dawson, Jr., and Pershing, Nye, Bosworth & Dick, all of Denver, Colo., for appellee.

HUDSPETH, Chief Justice.

This cause originated in the district court upon a complaint for a declaratory judgment. A demurrer was filed to the complaint upon the ground that said complaint failed to state a cause of action. The demurrer was overruled and the defendants Byron O. Beall, John S. Clark, and Donaciano E. Rodriguez, constituting the members of the New Mexico State Tax Commission, appealed from the order overruling the demurrer. The other defendant, Ed Le Breton, appeared by answer admitting, on information and belief, the allegations of the complaint and consenting to the disposition of the cause without further notice to him.

The plaintiff, Town of Alamogordo, has outstanding $202,500 worth of general obligation water system bonds. These are term bonds issued May 1, 1916, payable May 1, 1946, and optional May 1, 1936. They bear interest at the rate of 5½ per cent. per annum. The plaintiff sought to refund $100,000 of these outstanding bonds by the issuance of $100,000 of serial bonds payable from the present time until 1946, in equal annual amounts, and to leave outstanding the balance of $102,500 of the old bonds.

The plaintiff, in determining what particular old bonds were to be called for payment, used its own discretion in picking certain numbered bonds and did not draw the bonds to be called by lot. The defend-

ants Byron O. Beall, John S. Clark, and Donaciano E. Rodriguez, constituting the members of the New Mexico State Tax Commission, refused to approve the issuance of the refunding bonds, upon the advice of counsel, and this action was thereupon brought to determine whether or not the plaintiff might legally refund a portion of a single outstanding bond issue without refunding the whole thereof, and to determine what method should be used in calling the bonds to be refunded.

Defendants maintain that there is no provision in the New Mexico statutes authorizing a municipality to refund a portion of a single outstanding bond issue. 1929 Comp. Stat. § 90-1101, is as follows: "Refunding bonds—Approval of tax commission. That the governing body of any county, municipality, or school district in this state may with the approval of the state tax commission issue negotiable coupon bonds, to be denominated refunding bonds, for the purpose of refunding any of the bonded indebtedness of such county, municipality, or school district, now existing or hereafter created, which has or may hereafter become due and payable, or which has or may hereafter become payable at the option of such county, municipality, or school district, or by consent of the bondholders, or by any lawful means and for the payment or redemption of which there shall not be funds available in the treasury of such county, municipality, or school district."

Defendants argue that "any of the bonded indebtedness of such * * * municipality" appearing in the foregoing statute means any particular bond issue of the municipality and not any portion of a bond issue. The question is one of first impression in this state, and no authority in point is cited from any other jurisdiction. The plaintiff claims that since all the bonds are payable on the 1st day of May, 1946, with option reserved to plaintiff to redeem said bonds at any semiannual interest paying date on or after the 1st day of May, 1936, the proposed plan is legal. This optional clause was inserted in each bond pursuant to Laws 1912, c. 76, § 4, which provides, in part, as follows: "Provided, the city council or board of town or village trustees shall have the right to pay any such bonds at any time after twenty years from their date."

The complaint states that the refunding bonds will bear interest at the rate of 4½ per cent. per annum, and will save the municipality more than $10,000 in interest charges. In other words, the municipality would have outstanding $100,000 of refunded bonds bearing interest at the rate of 4½ per cent. per annum maturing at equal annual installments over a period of years from 1937 to 1946, and would have outstanding $102,500 of water system bonds maturing on the 1st day of May, 1946, and bearing interest at the rate of 5½ per cent. per annum.

The defendants say that a municipality would not attempt to refund a portion of an issue if it could refund the whole, and that the portion remaining unrefunded would go

into default upon the due date of the bonds. 1929 Comp.Stat. § 90-1102, provides that, "when bonds are issued to refund existing and outstanding bonds which may become due and payable at the option of a governing board as set out in the bonds to be refunded, the date of maturity of such refunding bonds shall not extend beyond the date of final maturity of such bonds to be so refunded."

Defendants further state:

"To attempt to issue $202,500.00 worth of serial refunding bonds to mature in equal annual installments by the end of 1946 would place a burden upon the Town of Alamogordo which it could not possibly meet. But to allow the town to refund $100,000.00 worth of the outstanding issue and to leave unrefunded $102,500.00 will result in part of the bondholders being paid in full for their bonds which were refunded and the holders of the $102,500.00 worth of bonds, which are not refunded, to hold bonds which will certainly default at maturity.

"We submit that since the contractual obligation in the first instance was the same as to all bond holders the town cannot now change this contractual obligation and prefer the holders of $100,000.00 worth of bonds by paying them and allowing the holders of $102,500.00 of bonds to go unpaid at the maturity of the bonds which they hold. We do not suggest that the holders of the $102,500.00 worth of unrefunded bonds will never be paid, but we do suggest without fear of contradiction that it will be impossible for the town to pay them at the maturity of their bonds."

It is also suggested that the holders of the $102,500 bonds of the old issue will be shown a preference, in that their bonds will bear 5½ per cent. interest, while the new issue will bear one per cent. less. We are not persuaded that defendants' objections are applicable under our existing statutes. The Legislature did not see fit to limit the power to refund to an entire issue.

It is also urged upon us that a municipality cannot use its absolute arbitrary discretion in determining which bonds out of the whole issue should be called for refunding. The right of the municipality to exercise its option to redeem the bonds is not questioned, and we are constrained to hold that the bondholder has no right to insist that his bond be called for payment before the due date or that it not be called. The discretion is vested in the municipality by our laws and there is no limitation as to the method by which the bonds redeemed are to be selected. Where the statute is silent the governing body of the municipality is vested with wide discretion in matters of policy. Seward v. Bowers, 37 N.M. 385, 24 P.(2d) 253; State v. City of Carlsbad, 39 N.M. 352, 47 P.(2d) 865.

The obligation to pay the remaining $102,000 of the old bond issue will not be affected in any way by the proposed procedure. Nor is it suggested that there will be less with which to pay. It is not a case of assembling assets of a failing corporation. The municipality may use its absolute

arbitrary discretion in selecting the bonds to be refunded. The fact that corrupt officials may abuse this power does not justify the court in controlling this discretion.

The district court did not err in overruling the demurrer of the Tax Commission.

SADLER, BICKLEY, BRICE, and ZINN, JJ., concur.

64 P.(2d) 387

ABNER MFG. CO. OF WAPAKONETA, OHIO, v. McLAUGHLIN.

No. 4168.

Supreme Court of New Mexico.

Jan. 4, 1937.

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

O. T. Toombs, of Clayton, for appellee.

BRICE, Justice.

This suit was brought by appellant (plaintiff below), a foreign corporation, against the appellee (defendant below) to recover on a promissory note. At the close of the testimony the appellee moved for judgment of dismissal upon the ground that appellant had failed to comply with section 32-206, N.M.Sts.1929, which requires foreign corporations transacting any business in this state to file with the Corporation Commission a copy of its charter and other data, and to designate a principal office in the state and an agent upon whom process against such corporation may be served. It is provided further that, when these requirements have been complied with, the State Corporation Commission shall issue to such foreign corporation a certificate authorizing it to transact business in the state. Section 32-207, N.M.Sts. 1929, reads as follows: "Until such corporation so transacting business in this state shall have obtained said certificate from

the state corporation commission, it shall not maintain any action in this state, upon any contract made by it in this state."

The appellant claims the transaction by which a lighting system was sold, which was the consideration for the note sued on, was interstate commerce, and therefore the statutes mentioned did not apply.

The appellant sold in New Mexico fifty to seventy-five of such plants, together with fixtures and accessories, through agents who took orders signed by the purchaser and to whom the lighting plants were shipped. The manner of making such sales seems to be undisputed, and as testified to by an agent of appellant was as follows: "The agent obtains an order for the plant, its fixtures and accessories, and this order is signed by the proposed purchaser, together with a note for the amount of the purchase. The order and note are then forwarded to the office of the company in Wapakoneta, Ohio, for acceptance. If the Credit Department of the Company finds the purchaser worthy of credit, the order is then accepted by an officer of the company at its office in Wapakoneta, Ohio. After the order is accepted, the goods are shipped from the factory at Wapakoneta, Ohio, consigned to the purchaser. The installation is made by the purchaser and the order given by the purchaser definitely provides that the company is not to install the merchandise."

The district court held that this was "transacting business in the state" within the meaning of the statute mentioned; and thereupon sustained appellee's motion and entered judgment of dismissal against appellant.

It is unnecessary to cite many of the hundreds of authorities on this question. That this and like transactions are interstate commerce is held by all authority, so far as we know, and none have been cited by appellee to the contrary. We call attention to the following: Sioux Remedy Co. v. Cope & Cope, 235 U.S. 197, 35 S. Ct. 57, 59 L.Ed. 193; York Mfg. Co. v. Colley et al., 247 U.S. 21, 38 S.Ct. 430, 62 L.Ed. 963, 11 A.L.R. 611. Also see annotations in 60 A.L.R. p. 994 et seq., and 101 A.L.R. p. 126 et seq., where the authorities are collected.

It is immaterial that the purchaser's note was taken in New Mexico by the agent who made the sale. Caldwell v. State of North Carolina, 187 U.S. 622, 23 S.Ct. 229, 47 L.Ed. 336, and State v. Byles, 22 Wyo. 136, 136 P. 114. Also see annotations in 60 A.L.R. 1018, paragraph (b), page 1020 et seq., and continuations in 101 A.L.R. 126 et seq.

The case will be reversed and remanded, with instructions to the district court to enter judgment for appellant as prayed for.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

64 P.(2d) 388

PIONEER IRRIGATING DITCH CO. v. BLASHEK.

No. 4156.

Supreme Court of New Mexico.

Jan. 7, 1937.

Rehearing Denied Feb. 15, 1937.

G. L. Reese, Sr., of Roswell, for appellant.

Askren & Watson, of Roswell, for appellee.

BRICE, Justice.

This action was brought by the appellee (plaintiff below) against the appellant (defendant below) to enjoin him from diverting water from North Spring river in Chaves county, N. M., to the use of which appellant claims the right. The parties will be styled plaintiff and defendant as in the court below.

At the request of the defendant the court made certain findings of fact and refused certain others requested. From these findings and requested findings we have determined the facts as we think the court should have found.

The plaintiff, together with the Eureka Irrigation Ditch Company, the North Spring River Center Ditch Company, and the North Spring River Ditch Company, entered into a written agreement on April 29, 1905, selecting one Mark Howell as an arbitrator to determine their respective rights to the use of water flowing in the North Spring river. The defendant's predecessor in title was not a party to this agreement, though his rights were determined.

Mark Howell found that the flow of the river (which was seventy second feet) should be divided among the appropriators as follows:

"To the Pioneer Ditch Co., 18/70 of said water.

"To the North Spring River Center Ditch Co., 12/70 of said water.

"To the Eureka Ditch Co., 18/70 of said water.

"To the Roswell Mill Ditch, 14/70 of said water.

"To the North Spring River Ditch Co., 8/70 of said water."

There was nothing to show how much water had been actually applied to a beneficial use. A suit was filed in the territorial district court of Chaves county, entitled "Pioneer Ditch Co. v. George Frank Blashek, No. 870," in which it was determined that the plaintiff's right was prior to that of the defendant's (this defendant's predecessor in title) and that the latter's rights were subject to the rights of the former; and this defendant's predecessor in title had no prescriptive rights; and further: "The court further finds that the proffered apportionment of fourteen second feet of water to the defendant was for an amount equal or greater than the defendant is entitled under the law and the evidence." An injunction was then ordered restraining defendant's predecessor in title from diverting more than fourteen second feet of water from the North Spring river. "And that all the balance of the water in said river at this point be permitted to flow down said river to the Pioneer Ditch." Later this decree was modified so that the amount of water which defendant's predecessor in title could divert was 14/70 of the flow of the river, and no more. The decree provided further that a weir should be built so that no more could be diverted. The modification order, in so far as it is material here, reads as follows: "The court further finds that the proffered apportionment of fourteen-seventieths of the water at all times flowing in North Spring River to the said defendant was for an amount equal or greater than the defendant is entitled under the law and the evidence."

As suggested by defendant in his brief, it would appear that the territorial district court had before it the Mark Howell apportionment as a basis for the decree, as the amount apportioned to defendant's predecessor in title corresponded to that settlement. The parties agree it was the first determination of the rights of the respective parties, and we will so treat it. There was another decree in this same case entered by Judge John T. McClure of the state district court on the 6th day of June, 1912, in a proceedings for contempt, in which it was charged that defendant's predecessor in title had violated the injunction in the earlier decree. The former decree was construed by Judge McClure as follows:

"(1) That the final decree rendered in this action on the 20th day of March, 1909, was based and predicated upon the fact that the flow of water of the North Spring River, from which both parties to this action have a water right, would fluctuate from time to time, that is, that the quantity of water flowing in said river would substantially vary at different times.

"(2) That said final decree provided for said fluctuations in the flow of the water in said river and instead of granting defendant a fixed amount of water from said North Spring River decreed to him a fixed fractional part of said water varying in quantity as the entire flow varied or fluctuated in quantity."

A portion of Judge McClure's decree settling these water rights is as follows: "It is therefore ordered, adjudged and decreed that the dam and headgate or intake of defendant's ditch be without delay and immediately so altered, changed and arranged under the direction and superintendency of the said W. A. Wilson, that the same will divert fourteen-seventieths of the entire flow of the water of said North Spring River and no more, be the amount much or little."

It is clear that Judge McClure did not intend to change the rights of the parties as fixed by Judge Pope's decree; so that at the time of the last decree, the rights of the parties may be stated as follows: (1) The plaintiff's water rights were prior to and superior to those of defendant's predecessor in title. (2) No prescriptive rights up to the 20th day of March, 1909 (the date of the last decree entered by Judge Pope), existed or were running in favor of defendant. (3) On the 6th day of June, 1912, defendant's predecessor in title was entitled to divert 14/70 of the entire flow of North Spring river into his ditch, and no more, "be the amount much or little." At the dates of the several decrees mentioned, the other water right interests in the river, as shown by the Howell apportionment, existed but were abandoned about 1920. The flow of the river now is about 2 second feet, but was 70 second feet at the time of Judge Pope's decrees. Except for the decree of Judge McClure, which seems to have been acquiesced in by all the parties to that suit, the plaintiff, under its prior appropriation, would be entitled to all of the water flowing in the river. But irrespective of existing priorities, Judge McClure's decree seems to have awarded defendant 14/70 of the flow of the river. Such being the case, it may be assumed that the rights of the parties are settled on that basis and are binding now, unless the evidence shows some change in the rights since that decree.

W. A. Wilson testified that by appointment of Judge McClure, he was in charge of the apportionment of the water from the date of the 1912 decree for four or five years; that he made a weir which turned 14/70 of the water of the river into defendant's ditch; that the flow of the river was not 70 second feet at that time nor thereafter; that he continued dividing the water in this proportion for four or five years until the flow had decreased so that the water users could not longer afford to pay his charges. He gave no testimony regarding the apportionment of the water after his official duties expired, except in a general way he said that all of the water users, except defendant's predecessor in interest, had practically abandoned their water rights. He testified to some measurements he had recently made, which showed defendant was using over half the water in the river at his headgate. Defendant's brother, Pat Blashek, testified that his father and he together had for thirty years beneficially used all the water diverted into their ditch. Frank Blashek testified that defendant and his predecessor in title had used all the water diverted into their ditch since the weir was constructed by W. A. Wilson

in 1912. He measured the flow of water in 1931 (this suit was filed on the 19th day of July 1934), which showed there was flowing 360 gallons per minute in defendant's ditch and 1,185 gallons per minute in plaintiff's ditch, measured at its headgate three-quarters of a mile below the Blashek weir. Two other measurements were made that year which showed about the same amount of water flowing in the defendant's ditch. He made no measurements in 1932, but in July, 1934, he and W. A. Wilson made measurements showing the plaintiff's ditch had 742 gallons and defendant's 405 gallons a minute flowing therein. He made a number of other measurements in July and August of 1934, but none of these showed the measurement of the water that went into the river at Blashek's ditch. This testimony only confirms that of the plaintiff to the effect that defendant diverted more than 14/70 of the water at its headgate from 1931 until the trial of the case in 1934. This testimony does not prove an abandonment of plaintiff's water right, nor a prescriptive right (if such a right can be acquired under our law) in the defendant, as there is no proof that prior to 1931 defendant was taking more than 14/70 of the flow of the river. There was introduced in evidence a decree of the United States District Court for the District of New Mexico, establishing a water right in plaintiff in an amount in excess of the flow of the river, but defendant was not a party to that suit and the decree of course is not binding on him. None of the decrees introduced in evidence establish the amount of water the parties have applied to a beneficial use, nor is there any evidence upon which this could be determined. But as plaintiff had appropriated some water the right to the use of which was superior to defendant's water rights, and also to the abandoned rights, and which originally amounted to 18 second feet of water, in the absence of any evidence from which it could be determined the amount of water each of the parties is entitled to receive (and there is no evidence from which this can be determined), the last decree of court must prevail. The defendant therefore is entitled to 14/70 of the water flowing in the river, and the plaintiff to the balance, as the abandoned water is not sufficient to make up the prior appropriation of the plaintiff.

It follows that the decree of the district court is correct, and accordingly it is affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

64 P.(2d) 825

STATE ex rel. TITTMAN v. McGHEE.

No. 4285.

Supreme Court of New Mexico.

Jan. 22, 1937.

Rehearing Denied Feb. 16, 1937.

Edward D. Tittmann, of Hillsboro, for petitioner.

Frank H. Patton, Atty. Gen., and A. M. Fernandez and Richard E. Manson, Asst. Attys. Gen., for respondent.

Fred Nicholas, of Los Lunas, and John Baron Burg, of Albuquerque, for other demurrants.

BRICE, Justice.

Chapter 184 of the New Mexico Session Laws of 1933 is as follows:

"Section 1. Whenever a party to any action or proceeding, civil or criminal, shall make and file an Affidavit that the Judge before whom the action or proceeding is to be tried or heard cannot, according to the belief of the party to said cause making such affidavit, preside over the same with impartiality, such Judge shall proceed no further therein, but another Judge shall be designated for the trial of such cause by agreement of counsel representing the respective parties; or upon the failure of such counsel to agree, then such facts shall be certified to the Chief Justice of the Supreme Court of the State of New Mexico, and said Chief Justice of the Supreme Court of the State of New Mexico, shall thereupon designate the Judge of some other District to try such cause.

"Sec. 2. Such affidavit shall be filed not less than ten (10) days before the beginning of the term of Court, if said case is at issue."

One of the parties to a cause pending in the district court of Sierra County filed an affidavit therein, as provided by the quoted statute, disqualifying the resident district judge. Counsel for the parties having failed to agree upon a judge to try that cause, the facts were certified to the Chief Justice, who designated the Honorable James B. McGhee, judge of the Fifth judicial district, to try it. Thereupon the relator filed a disqualifying affidavit against Judge McGhee, who has announced that he will proceed to try the cause unless prohibited from doing so by this court.

The question presented here is whether this statute authorizes litigants to disqualify more than one judge, or only the resident district judge. It is conceded by the relator that if he is entitled to the writ in this case, then all of the nine judges of the state may be successively disqualified in any cause or proceeding if litigants are willing to file disqualifying affidavits directed at each as appointed by the Chief Justice.

This statute was held constitutional by this court in State ex rel. Hanna et al. v. Armijo, Judge, 38 N.M. 73, 28 P.(2d) 511, and construed in certain particulars in State ex rel. Simpson v. Armijo, 38 N.M. 280, 31 P.(2d) 703; but the identical question here presented has not been before us, although former Chief Justices Watson and Sadler, each (in his ministerial capacity) held that the statute provided only for the disqualification of the presiding judge of the district in which the cause in question is pending.

Section 1 of article 6 of the Constitution vests the judicial power of the state in certain tribunals, among which are the district courts. By section 12 of article 6, provision is made for a division of the state into judicial districts and for the choosing of a judge for each district by its qualified electors.

Section 13 of article 6 provides: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law." District judges alone are authorized to preside in the trial of causes in the district court except as provided by section 15 of article 6 of the Constitution, as follows: "If any judge shall be disqualified from hearing any cause in the district, the parties to such cause, or their attorneys of record, may select some member of the bar to hear and determine said cause, and act as judge pro tempore therein."

It is the public policy of this state, as evidenced by its Constitution and laws, that regularly elected or appointed district judges shall preside over its district courts unless, because of the disqualification of the trial judge, the parties to a suit agree that a member of the bar may try a particular case as judge pro tempore.

No other means is provided for the trial of causes in the district courts of this state. If, therefore, we adopt the construction of the statute contended for by the relator, a party to any suit could disqualify all of the district judges of the state by successively filing disqualifying affidavits against each judge as appointed by the Chief Justice to try a particular case. Assuming that the Legislature could enact such law consistently with the Constitution, we would hesitate long in so construing it if a different construction were authorized that would be consistent with reason and common sense. It is true the legislative intent must be determined, and the act construed accordingly; but in arriving at such intent we can take into consideration the public inconvenience, private hardship, and the absurd consequences of the construction contended for by relator.

The affidavit is authorized to be filed to disqualify "the judge before whom the action or proceeding is to be tried or heard," who originally in every case is the Presiding Judge of the district, if there is such judge. Provision is then made for the parties to agree upon a judge to try the case; or, upon their failure to agree, the facts shall be certified to the Chief Justice who shall designate a judge "of some other district" to try such case. The indication from this language is that one affidavit could be filed, and that only for the purpose of disqualifying the judge "before whom the action or proceeding" would have been tried or heard, except for the filing of such affidavit. That the affidavit was intended to apply only to the judge of the district in which the case is pending, is indicated from the language authorizing the Chief Justice to "designate the judge of some other district to try such cause." This has been the interpretation given this language by Ex Chief Justices Watson and Sadler.

That such was to be the effect of this statute likewise appears from section 2, which requires the affidavit of disqualification to be filed not less than ten days before the beginning of the term of court, if the case is at issue, which indicates but one affidavit was intended.

This conclusion was reached by the Supreme Court of Minnesota in State v. Gardner, 88 Minn. 130, 92 N.W. 529, 531, in construing a statute, to all intents and purposes identical with that here before the court. An affidavit had been filed, disqualifying the Presiding Judge. Thereupon the case was assigned to another judge, against whom an affidavit of prejudice likewise was filed. This affidavit was ignored by the appointed judge, who proceeded to try the case. We quote the following from this case, which is sufficiently explanatory: "In determining whether it was the legislative purpose by this remedial law to place in the hands of a defendant in a criminal case the power to prevent any trial of his case by disqualifying by an affidavit of prejudice every judge in the state who might be secured to try his case, it is proper to take into consideration sec-

tion 7313, Gen.St.1894, which provides for one change of venue of a criminal case, and no more, where it is made to appear that a fair trial cannot be had in the county where the offense was committed. If it is the legislative policy that there shall be but one change of venue in a criminal case, for the reason that, without such limitation, the right might be abused, and the administration of justice greatly embarrassed thereby, why should not the same limitation be applied to a change of judges? Is it reasonable to suppose that the legislature, in remedying a defect in an existing law, intended to give to a person charged with a crime the power, if he is willing to make affidavits to order, to disqualify to try his case one after another all the district judges of the state? If the law so provides in terms so clear as to admit of no other reasonable construction, it must be given effect accordingly; otherwise not. Now, if the statute in question be read in the light of these suggestions, it is reasonably clear that the statute was not intended to permit a party to disqualify more than one judge in the same action by an affidavit of prejudice, and that, in analogy to a change of venue in a criminal case, the defendant's right to have his case transferred to another judge for trial is limited to one transfer. Any other conclusion would, in cases where there was no integrity in the conduct of the trial, lead to gross abuses, and a miscarriage of justice; for, if it be once conceded that the party has the right to disqualify more than one judge, there is no limit to the right. Nor can the court control the matter, for the making and presenting of the affidavit disqualifies the judge without any other act."

We quote from State v. De Shon, 334 Mo. 862, 68 S.W.(2d) 805, 807, which is self-explanatory:

"It is the appellant's contention that under section 3648, Revised Statutes of Missouri 1929 (Mo.St.Ann. § 3648, p. 3202), he had a right to disqualify all the judges of that circuit. The pertinent parts of this section are as follows:

" 'When any indictment or criminal prosecution shall be pending in any circuit court or criminal court, the judge of said court shall be deemed incompetent to hear and try said cause in either of the following cases: * * * When the defendant shall make and file an affidavit, supported by the affidavit of at least two reputable persons, not of kin to or counsel for the defendant, that the judge of the court in which said cause is pending will not afford him a fair trial.'

"It is true that this section does not expressly limit the disqualification to only one judge; there is no section of the statute in criminal procedure which limits the applicant to only one change of venue from one trial judge, but we have consistently ruled that the applicant is entitled to only one change of venue.

"In the case of State v. Greenwade, 72 Mo. 298, loc.cit. 304, in speaking of the right of the defendant to take more than

[redacted]

one change of venue from the trial judge, we said:

"'There is nothing in the statute on the subject, but we cannot suppose that the legislature designed to allow a perpetual round of such motions and affidavits by which a trial could be indefinitely postponed, and, therefore, the application before Judge Wright, under section 1877 was the end of such applications.'"

It will be noted that statutes for change of venue were referred to in the Minnesota and Missouri cases, from which we have quoted, as bearing upon the construction of the statutes for disqualifying judges. The statute of New Mexico for change of venue provides: "A second change of venue shall not be allowed in any civil or criminal case, as a matter of right, but shall be within the discretion of the court." Chapter 6, section 10, Laws 1880, now section 147-107, 1929 Compilation.

The same reasons stated in those cases with reference to the policy of those states as shown by their change of venue statutes have application here.

The question before us was not raised in State ex rel. Simpson v. Armijo, District Judge, supra, though he was not the Presiding Judge of the district in which the case out of which the prohibition proceeding grew, was pending.

We hold that only the Presiding Judge of the district in which the cause was pending can be disqualified under the provisions of chapter 184, N.M. Session Laws of 1933, from which it follows that the application for a writ of prohibition should be, and is, denied.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

[redacted]

64 P.(2d) 1294

McCLOSKEY et al. v. SHORTLE.

No. 4200.

Supreme Court of New Mexico.

Jan. 13, 1937.

Rehearing Denied Feb. 23, 1937.

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See, also, 39 N.M. 273, 46 P.(2d) 50.

T. W. Gibson, of Albuquerque, for appellants.

John F. Simms, of Albuquerque, for appellee.

BRICE, Justice.

This direct action was brought by the appellants (plaintiffs below) against the appellee (defendant below) to cancel a special master's deed, whereby certain real estate was conveyed, in pursuance of a sale made in a foreclosure proceeding, upon the alleged ground that such deed is void. We will refer to the parties as plaintiffs and defendant, as in the district court.

The defendant demurred to the complaint upon the ground that it failed to state facts sufficient to constitute a cause of action in that it showed on its face that all questions raised had theretofore been litigated (or could have been litigated) in a suit between the same parties in the same court. The plaintiffs stood upon their complaint and judgment of dismissal was entered. The contention here is that the court erred in sustaining the demurrer. Facts alleged in the complaint sufficient to determine the case are as follows:

On March 5, 1934, George Savage, a special master, made, executed, and delivered to the defendant a special master's deed by the terms of which there was conveyed to her certain real estate situated in the city of Albuquerque, N. M.; sold under and by virtue of a decree of the district court of Bernalillo county, entered in cause No. 20884, in which the defendant and her trustee were plaintiffs and plaintiffs herein were defendants. The provision in the decree which ordered the sale of the real estate in question was as follows:

"said real estate and improvements are ordered sold according to law and the practice of this Court to satisfy the demands of the plaintiffs unless the defendants, or some one or more of them shall within 90 days from the date of the entry of this Decree pay off and fully satisfy the claim of the plaintiffs as herein adjudged, with interest and costs."

Notice of sale was duly published by the special master appointed by the court to make the sale; and among its provisions were the following:

"Notice is hereby given that the undersigned receiver and Special Master will * * * offer for sale and sell for cash to the highest and best bidder, subject to the approval of the Court. * * *

"Said sale will be made to satisfy a certain final decree made and entered in the above entitled Court and cause on the 21st day of October, 1933, wherein the Plaintiff, Alice M. Shortle, recovered a judgment against Defendants in the amount of Seventeen Thousand Five Hundred Dollars ($17,500.00), together with interest thereon at the rate of eight percent (8%) per annum from the 23rd day of August, 1933, until paid, and the additional sum of One Thousand Seven Hundred Fifty Dollars ($1,750.00) as attorney's fees, and Fourteen Dollars ($14.00) costs, which, on the day of said sale, will amount to the sum of Nineteen Thousand Nine Hundred. Eighty-three and 45-100 Dollars ($19,983.-45), to which shall be added the cost of publishing this notice and such fee for the receiver and special master, as the Court may allow, and upon which shall be credited any sum of money which the receiver may have on hand at the time out of the rents, issues, and profits of the property;

"Said sale will be made subject to the lien of the unpaid taxes, paving liens and the lien of the Middle Rio Grande Conservancy District."

The special master filed his report of sale, in which it was stated:

"That at the hour of ten o'clock a. m. on the 28th day of February, 1934, this receiver and special master attended at the south door of the Bernalillo County Courthouse and made public sale of the property mentioned and set forth in the decree and notice of sale, and the highest and best bid received was from Alice M. Shortle, Plaintiff, who offered the sum of her debt, interest, attorney's fees and costs, together with the cost of publishing the notice of the receiver and special master and such fee as the Court might allow the receiver and special master, on condition that the cash on hand in the amount of Four Hundred Eighty-Three and 51/100 Dollars ($483.51) should first be paid over to her on her debt, and that the receiver collect and pay her the One Hundred Eighty Dollars ($180.00) due from Jesse St. Claire McCloskey as rent aforesaid, and this receiver and special master sold and struck off to the said Alice M. Shortle said real estate and improvements thereon for such price, subject to the approval of the Court."

The sale so made was modified and, as modified, was confirmed by the district court; after which defendants filed a motion in that case to set aside the order confirming the sale. This motion was overruled by the court; "on condition, however, that the purchaser, Alice M. Shortle, defendant herein, remit and waive collection of the amount of $180.00, which was alleged to be due to the Receiver from Jesse St. Claire McCloskey, which condition Alice M. Shortle, purchaser at said sale, complied with."

Thereafter the plaintiffs (defendants in that suit) appealed to this court from the order confirming the sale, which appeal was dismissed because not taken within the twenty days after the entry of such order, as required by the rules of this court.

The grounds of defendant's demurrer were as follows:

"Paragraph '(8)' of said complaint shows upon its face that all the matters alleged in this cause could have been alleged, and all the relief prayed for herein could have been prayed for, in a prior cause litigated before this Court and the Supreme Court of the State of New Mexico, and cannot now be made the subject of another suit against defendant for the reason that they are res adjudicata."

From the opinion of the district court, made part of the record, it would seem that these grounds of demurrer were not urged before the district court, and that by tacit consent the court determined the case upon the ground that the complaint did not contain allegations of facts sufficient to constitute a cause of action in that it appeared therefrom that the district court did not exceed its jurisdiction in confirming the special master's sale of real estate in question. This is the principal, and the decisive, question presented here.

The plaintiff presents it here as follows:

"The sale of the real estate involved herein by the special master as made in cause 20884 on March 5, 1934, was illegal and void. The district court exceeded its lawful jurisdiction, power, and authority in confirming that sale."

His proposition of law in support thereof is as follows:

"If a sale at foreclosure is conducted 'in a manner which would not have been in the power of the court in the first instance to have authorized,' that sale is void."

We take this as a correct statement of the law. Bechtel v. Wier, 152 Cal. 443, 93 P. 75, 15 L.R.A.(N.S.) 549; Freeman on Void Judicial Sales, § 44.

"It is sometimes said that a sale made under a decree must pursue the directions therein contained, that a departure from these directions renders the sale void. But to invoke this rule the departure must be of a very material character, and must, we think, be a departure which has not been approved by a decree of confirmation entered in the court which ordered and had supervision of the sale. In truth, a court is not absolutely bound by the terms of its order or decree respecting the mode of a sale. * * * If the court has power to direct the terms of the sale in the first instance it may change them afterwards, and if an officer or other agent of the law, or of the court in making a sale, departs from the directions of the decree, the court may, nevertheless, by confirming the sale, ratify his action, provided always that the terms so ratified are such as the court had power to impose in the first instance."

Freeman on Void Judicial Sales, pp. 88, 89, § 22.

This case, therefore, depends upon whether the district court had jurisdiction to have provided originally for a sale of the property upon the terms and in the manner in which the land was sold by the court.

The issue is clear-cut, but the authorities are in hopeless confusion; but by keeping in mind that only the lack of jurisdiction to enter a judgment renders it void, we have but little difficulty in arriving at what we believe to be a correct conclusion.

By "power to sell" as used in the authorities cited by defendant, and referred to by us in this opinion, is meant "jurisdiction to sell." Sales may be made irregularly, erroneously, or fraudulently by a court having power to sell, and such sales are not void. See annotation in 1 A.L.R. beginning at page 1431. District courts in this state have the general jurisdiction of chancery courts to sell mortgaged lands in foreclosure suits, to satisfy mortgage debts; and unless such a sale is void under the terms (express or implied) of some statute, the power to sell on any terms, or in any manner, rests in the sound discretion of the court subject to correction for abuse or cancellation upon equitable grounds by direct action for such purpose. It is an abuse of discretion to sell in a manner, or upon terms clearly against the best interest of the parties; or in violation of a positive statute, such as the requirement that notice of sale be published prior thereto, or that it be for cash. But such statutes are not limitations on the power to sell, unless they provide (either expressly or by necessary implication) that sales made in violation thereof are void. This question has been before the courts in a number of cases to which we will refer. We have two statutes material to this discussion, as follows:

"That no lands, tenements, goods or chattels shall be sold by virtue of any execution or other process, including chattel or real estate mortgages, unless such sale be at public vendue, between the hours of nine in the morning and the setting of the sun of the same day, nor unless the time and place of holding such sale and full description of property to be sold shall have previously been published for four weeks preceding said sale in English or Spanish, as the officer conducting said sale in his judgment may deem will give the most extensive notice in the county in which said property is situate, or, if there be no newspaper printed in said county, then in the newspaper chosen as the official paper for said county, and also by posting six such notices printed or written or partly printed or written in six of the most public places in said county." Section 46-106, N.M.Sts. 1929.

"If any sheriff or other person shall sell any lands, tenements, goods or chattels by virtue of any process otherwise than in the manner aforesaid or without such previous notice, the sheriff or other person so offending shall for every offense, forfeit

and pay the sum of fifty dollars with costs of suit in any district court in this territory, to be recovered by the person whose lands are sold." Section 46-107, N.M.Sts. 1929.

Clearly it was intended that all such sales should be made after publication of notice; and it is equally clear that it was not intended that such sales not so advertised should be invalid. There is no provision in either section indicating that a noncompliance therewith would invalidate a judicial sale; but the latter clearly implies that the effect of such noncompliance is only to render the officer making said sale liable to the mortgagor in liquidated damages.

Such sales are irregular and should not be confirmed; but the mortgagor, whose interest it is to secure the highest bid, may waive publication of notice, or even a public sale, by failure to object until after the trial court has lost jurisdiction to set aside its order confirming such irregular sale.

The exact question was decided by the Supreme Court of California. The statutes of that state provided sales under execution should be advertised or posted twenty days before the date of sale. In determining whether a sale not made in conformity therewith was void, the Supreme Court, in Smith v. Randall, 6 Cal. 47, 65 Am.Dec. 475, said:

"Very few of those who become purchasers of land at sheriff's sales, have an opportunity of knowing whether or not the law, with respect to notice, has been strictly complied with, or whether the defendants in execution have personal property at the time of the levy, and if every mistake or neglect of duty, on the part of a sheriff, would operate to invalidate such sale, great injury would result, both to debtor and creditor, for no prudent man would give a fair price for property, if he was liable to be divested of his title by reason of the laches of the officer. Is there any thing in our statutes in conflict with the view above taken?

"The intention of the Legislature, where it can be ascertained, must govern in the construction of a statute. This intention should not be taken from a particular section, but from the whole statute. Section 221 of the 'Act to regulate proceedings in civil cases,' provides that the sheriff shall, before a sale of real estate under execution, give notice of the time and place of sale, for twenty days. If the officer neglects to give such notice the following section provides, not that the sale shall be void, but 'an officer selling without the required notice shall forfeit five hundred dollars to the aggrieved party in addition to his actual damages.' Section 222.

"The statute having thus provided an adequate remedy, by an action against the officer, the party aggrieved can have no other expressio unius exclusio est alterius."

Also see Shores et al. v. Scott River Water Co., 17 Cal. 626.

In Blanks v. Farmers', etc., Co. (C.C.A.) 122 F. 849, 852, the question was whether a judicial sale made of real estate in a mortgage foreclosure proceeding was void. Notice of sale was duly published, as required by Act of Congress, but the highest bid was unsatisfactory. The court announced it would be set aside unless the purchaser would increase the amount of his bid some $2,000. The court opened bids in his courtroom and the purchaser increased his bid to the required amount. On appeal from the order of confirmation, the court stated:

"Every one has had a full opportunity to bid on the property, and the question is not whether the judge could originally have sold the property at chambers and without advertisement, but whether, after the property has been duly advertised and offered for sale, the action of the judge, resulting in the purchaser's increasing the price very largely, should be upset at the instance of the appellants, who were the prime movers in the matter, and participants in the latter bidding. It is clear that if the appellants had succeeded in buying the property they would not be here complaining. Can they be heard to complain because others bought it? We are clearly of opinion that, under the circumstances of this matter, the action of the lower judge should be allowed to stand. That action has resulted beneficially to all parties in interest, including the appellants. The final price obtained exceeds largely the upset price fixed by the court."

But if the court had no power to sell at a private sale, these proceedings, including the order of confirmation, were void.

The same question was decided in Bovay v. Townsend (C.C.A.) 78 F.(2d) 343, 347, 105 A.L.R. 359. Two bridges were sold at public vendue after publication of notice of sale, as the Act of Congress requires. The district judge required as a condition of approving the sale that the successful bidder should double his bid; which was done, and the sale confirmed. On appeal the majority held this to be error, Judge Sanborn dissenting. The question of the validity of the sale was not before the court; though the court in referring to Investment Registry, Ltd., v. Chicago, etc., Ry. Co. (C.C.A.) 212 F. 594, said:

"It therefore may well be that, while full compliance with sections 847 and 849 supra [28 U.S.C.A.], may somtimes be excused by reason of waiver and estoppel on the part of all persons interested and objecting to confirmation, those statutes yet must be observed, as a general rule of conduct."

If the court had no jurisdiction to make or confirm such sale, then neither waiver nor estoppel could supply it. No doubt the statute should be followed, but it was not held to be a matter of jurisdiction.

The Circuit Court of Appeals for the Fourth Circuit, in Cumberland Lumber Co. v. Tunis Lumber Co., 171 F. 352, held that a sale made without advertisement was void. It reaches its conclusion from

the wording of the statute which would not apply here.

See, also, Park v. Conley (C.C.A.) 202 F. 415; State Nat. Bank et al. v. Neel, 53 Ark. 110, 13 S.W. 700, 22 Am.St.Rep. 185; Caudle et al. v. Luttrell, 183 Ky. 551, 209 S.W. 497; Miners' Bank v. Acker (C.C.A.) 66 F.(2d) 850; Noland et al. v. Barrett et al., 122 Mo. 181, 26 S.W. 692, 43 Am.St.Rep. 572; Gordon State Bank v. Hinchley et al., 117 Neb. 211, 220 N.W. 243; Cannon v. Hewitt, 22 Idaho 328, 125 P. 799, 43 L.R.A.(N.S.) 671; Woodhull v. Little et al., 102 N.Y. 165, 6 N.E. 266; Koontz v. Northern Bank, etc., 16 Wall. 196, 21 L.Ed. 465; Abbott v. Curran et al., 98 N.Y. 665; Thompson v. Burge, 60 Kan. 549, 57 P. 110, 72 Am.St.Rep. 369; Freeman on Executions (3d Ed.) § 286.

The court had the power to modify the terms of the bid and approve the sale as modified, or disapprove it altogether and make a new sale on his own terms, however irregular, erroneous, or fraudulent it might be.

As we understand plaintiffs' contention, it is that the sale is void because defendant's bid at the public sale was conditional on the collection and payment on the judgment debt, of $180 alleged to be due the receiver "on an unsettled account for rent, which could not satisfy or partially satisfy the judgment if the sale had been made to any other person than the mortgagee." That also the bid depended upon paying to the mortgagee a sum of more than $400 cash, which the bidder claimed was in the hands of the receiver as rents collected from the property; because "there was no certainty that such cash was in the hands of the receiver or would be after the sale. That the court could not have made such conditions in its order of sale, originally," for the reasons stated; and further "because such conditions would discourage competitive bidding and any order of sale on such terms is in 'excess of the jurisdiction' of the court."

The argument of plaintiffs presupposes that such sales must have been advertised and the property sold at public auction. The law so provides and a sale made otherwise, except possibly under special circumstances, is irregular and erroneous, but not void.

It appears from the record that a receiver was appointed by the court to have charge of the property and collect rents pending foreclosure. We must assume that the placing of such property in the hands of a receiver was a valid exercise of the powers of the court for preservation of the property and the application of rents to defendant's debt. We will further assume that the sum of $483.51 cash in the hands of the receiver and the $180 due the receiver were subject to the order of the court for application to defendant's debt. If the defendant's bid had been $663.51 less than the debt, the court was authorized to pay this out of cash on hand or debts due the receivership for unpaid rents. Such

are the purposes of receivership proceedings in foreclosure cases.

"The object of obtaining the appointment of a receiver is generally to gain a priority of lien on the rents and profits of the premises, so that the court will have the power of directing their application to the payment of the plaintiff's claim; a receiver cannot properly be appointed where the court does not have such power. The immediate and actual cause for the appointment of a receiver in a foreclosure, is to secure the rents and profits of the mortgaged premises in advance of the final judgment, in order that they may be applied towards any deficiency that may exist between the amount of the incumbrances and the amount for which the property may sell under the foreclosure." Wiltsie on Mortgage Foreclosures, p. 1115, § 760.

The court in its decree or order could have provided originally that the funds on hand and rents thereafter to be collected should be paid on the mortgage debt, and the land sold and proceeds of sale used to satisfy the balance, together with costs, expenses, attorney's fees, etc.; and this was the effect of the sale. It is not claimed that plaintiff was injured, or that any one refused to bid by reason of the terms of the sale. The amount of the bid was in reality a sum equal to the amount of the debt, costs, etc., less the two amounts mentioned in the master's report to the court. This could have been easily computed by any interested person.

The sale made by the court could have been provided for in the original order. It was indefinite as to certain items, particularly the receiver's fees, and costs of court, but these are not jurisdictional defects, even if irregular.

In Olcott et al. v. Headrick, 141 U.S. 543, 12 S.Ct. 81, 82, 35 L.Ed. 851, a much more indefinite order of sale was approved. An order was entered by the trial court, providing that the purchaser at a sale of real estate decreed to be sold in a mortgage foreclosure, and as part of the consideration of the purchase (in addition to his cash bid) would pay and satisfy any and all claims then pending against the receiver, which might be thereafter allowed by the court. In holding that a claim of $500 should be paid by the purchaser, the Supreme Court stated:

"Although the decree of sale provided that all claims, debts, and demands accruing during the receivership should be barred unless presented within six months after the confirmation of the sale, yet the decree of confirmation provided that the purchasers should take the property, and that the deed should recite that they took it, subject to all debts, claims, and demands, of whatsoever nature, incurred by the receiver, and which might remain unpaid at the termination of his receivership. It does not appear that the purchasers objected to the terms of the decree of confirmation, or appealed to this court

from that decree. They might have done both, on the ground that the decree of confirmation varied from the terms of the decree of sale under which they had bought, in destroying the six-months limitation."

The terms of the sale in the Olcott Case were much more indefinite than the one under consideration, and while no question regarding its validity was presented in that case, its terms were not criticized as irregular.

While it is the duty of a court of equity in foreclosure suits to sell the mortgaged property in a manner and upon terms (ordinarily for cash) that will be to the best interest of the parties, and particularly in accordance with the statute requiring sales to be at public auctions, yet sales made otherwise are not void for lack of jurisdiction to make them. The remedy of plaintiffs was by appeal or writ of error. Federal Title, etc., Co. v. Lowenstein, 113 N.J.Eq. 200, 166 A. 538, and annotations in 73 A.L.R. beginning at page 612.

We find it unnecessary to pass on the question of res adjudicata raised by defendant's demurrer as filed.

The decree of the district court will be affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

64 P.(2d) 1300

In re MORROW'S WILL.

No. 4252.

Supreme Court of New Mexico.

Feb. 16, 1937.

Hugo Seaberg, of Raton, and Reid & Iden, of Albuquerque, for appellants.

Crampton & Robertson, F. S. Merriau, and Fred C. Stringfellow, all of Raton, for appellees.

PER CURIAM.

The original opinion is withdrawn and the following substituted.

BRICE, Justice.

This is an appeal from a judgment of the district court dismissing a proceeding to contest the last will and testament of Mary J. Morrow, deceased. A motion has been filed to dismiss the case from this court upon the grounds: "That the judgment from which this appeal was taken is not appealable, and that this court is without jurisdiction to review said judgment on appeal because the proceeding in the District Court and in which said judgment was rendered is a statutory proceeding to contest a will. There is no provision, either constitutional, statutory, or by rule of court, granting the right of appeal to this court from a judgment rendered in a district court in such a proceeding. The general statute concerning appeals (Compilation of 1929, Section 105-2501) relates only to 'civil actions.' A proceeding to contest a will is a special statutory proceeding and not a 'civil action.' Hence no right of appeal exists."

The Constitution of New Mexico created this court with general appellate jurisdiction, but left to the Legislature the authority to provide for the exercise of such jurisdiction through proceedings by appeal or error. State v. Chacon, 19 N.M. 456, 145 P. 125. No statute has ever been enacted specifically allowing appeals from judgments of the district court in cases appealed to it from the probate court.

Section 1, Rule V, of this court is as follows: "Within three months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the Supreme Court."

This rule amended section 105-2501, C. L.1929, which is as follows: "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."

The contention is that this case is not a "civil action" within the meaning of the rule and statute, but is a "special proceeding" and that, as no provision has been made by the Constitution, any rule or statute permitting appeals generally in "special proceedings," or specially in proceedings to contest wills, that such cases are not appealable.

That a code of civil procedure was enacted in 1897 (chapter 73, N.M.Sess.Laws, 1897) applying solely to actions originally filed in the district court in conformity to the procedure therein prescribed in which provision is made for their appeal, but which does not apply to appeals from judgments of the district court entered in proceedings to contest a will, or any other

case not coming within the definition of "civil action" in section 1 of the said code.

We will consider the latter contention first, in which, if movant is correct, this court and the Supreme Court of the Territory were without jurisdiction to hear a large per cent. of cases determined by them and recognized from 50 to 75 years as appealable.

Section 105-2501, Comp.St.1929, which was amended by section 1 of Rule V of this court, both previously quoted herein, was section 1 of chapter 43, N.M.Sess. Laws 1917, entitled "An Act Providing Appellate Procedure in Civil and Criminal Cases," etc., and not limited in its scope to "civil cases," as defined by section 105-101, Comp.St.1929. More will be said of this act later: But as property rights may be involved we have concluded to review the law, with reference to the right of appeal to the Supreme Court of the territory and this court, from the adoption of the code in 1897 to this date.

A history of the statutes authorizing appeals to this court, from the adoption of the Kearny Code to that of section 1 of rule V of this court, will throw some light on the question.

Statutes substantially like section 1 of rule V of this court, and section 105-2501, Comp.St.1929, which we have quoted, have been in force in the territory and this state since the adoption of the Kearny Code in 1846, Courts and Judicial Powers, section 9 (see Comp.Laws 1884, p. 94) of which is: "Every person aggrieved by any judgment or decision of any circuit court [district court], in any civil case, may make his appeal to the superior court [Supreme Court]."

The first provision enacted by the territorial Legislature for reviewing cases by the Supreme Court, through either appeals or writs of error, at the election of appellants, is section 1 of chapter 10, N.M. Sess.Laws of 1880 (section 2193, C.L. 1884), which is: "(1) All causes, either in law or equity, finally adjudged or determined in the district courts, may be removed into the supreme court of the Territory for review, either by appeal or writ of error."

The Legislature by section 5 of chapter 66, N.M.Sess.Laws 1891, enacted: "Appeals in equity cases and writs of error in common law cases may be taken at any time within one year from the date of the rendition of final decrees or judgments."

By chapter 73, N.M.Sess.Laws 1897, the code system of pleading was adopted, most of which is the law today. Section 1 of this act is: "There shall be in this Territory 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 a civil action, and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant."

Section 161 of the act is: "Any person aggrieved by any final judgment or decision of any district court in any civil cause, may, at his election, take an ap-

peal or sue out a writ of error to the supreme court of the Territory at any time within twelve months after entry of the same."

Section 1 of the Code of Civil Procedure as adopted in 1896 has never been changed and now appears as section 105-101, C.L. 1929, but section 161 has gone through the following changes:

Section 1, chapter 82, Sess.Laws 1901, provided for appeals and writs of error to review all district court judgments, including those brought to the district court from the probate court or justice of peace court. Also those rendered in special proceedings or upon summary applications and for appeal from certain interlocutory orders and judgments. This act violated the Organic Act and was repealed at the next session by chapter 26, N.M.Sess.Laws 1903. Jung v. Myer, 11 N.M. 378, 68 P. 933.

Here it is well to call attention to a provision in the Act of Congress approved September 30, 1850, establishing the Territory of New Mexico, generally referred to as the "Organic Act," which provided among other things: "Writs of error, bills of exception, and appeals, shall be allowed in all cases from the final decisions of said district courts to the supreme court, under such regulations as may be prescribed by law." Organic Act, § 10.

This was re-enacted by Congress by an Act of April 7, 1874, 18 Stat. 27, and remained in effect until statehood. The Legislature of New Mexico enacted laws in 1862 (Act of January 30, 1862) which appear at pages 110 and 176, C.L.1865, section 13 of which is as follows: "Whenever any suit shall be brought before any judge of probate of this territory in accordance with the power granted by the laws now in force, to said courts and the same shall not be settled and either of the parties shall desire to take an appeal the judge of probate shall grant the same in conformity with the provisions of an act approved February 2, 1860, to the District Court to render final judgment thereon without any further recourse or appeal."

This section of the law does not appear in the Compilations of 1884, and in searching we find printed under the title "List of Laws Enacted by the Legislative Assemblies of the Territory of New Mexico since 1865, including the Revised Statutes of that Year," appearing on page 1399, C.L.1884, the following: "16. *District courts.*—All compiled except section 13, invalid by reason of supreme court decision as to probate courts."

We do not find the decision which held this section invalid, but this is not surprising, as many of the early decisions of the territorial Supreme Court were lost or destroyed. Only about eighty of the opinions written prior to 1880 now exist. The act is clearly in contravention of the provision of the Organic Act, in that it specifially prohibited appeals of probate cases to the Supreme Court, whereas the Organic Act provided that appeals could be taken in all cases from the final decision of the district court. The Legislature was

authorized to provide the regulations, but could not extend or abridge the right granted to take appeals or writs of error in all cases from such final judgments. In Re Attorney General, 2 N.M. 49, it was held: "In a territory the constitution and laws of the United States, and especially the organic act of the territory itself, stand exactly in the relation that a state constitution occupies in a state."

The same question was before the territorial Supreme Court in Jung v. Myer, 11 N.M. 378, 68 P. 933, 934, in which it was held that an act of the Legislature authorizing appeals from certain interlocutory orders was void in that it violated section 10 of the Organic Act which we have quoted. After quoting this provision of the Organic Act, that court said:

"These provisions are limitations on the appellate jurisdiction of this court, and must be considered in connection with the legislative power and authority granted by the organic act (section 7), which are as follows:

"'That the legislative power of the territory, shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act.'

"The language used in the organic act (section 10) regulating writs of error, bills of exception, and appeals, is clear and specific. It provides that they 'shall be allowed in all cases from the final decision of said district courts to the supreme court, under such regulations as may be prescribed by law.'

"The supreme court derives its appellate jurisdiction from the organic act, and by the terms of the act itself it has no appellate jurisdiction except from final decisions of the district courts. * * *

"It will be seen from these quotations from the organic act that the jurisdiction of the supreme and district courts has been specifically defined,—first, that they shall possess chancery and common-law jurisdiction, and that the supreme court shall have appellate jurisdiction, and that writs of error, bills of exception, and appeals shall be allowed in all cases from the final decisions of the district courts to the supreme court. It will be observed that the procedure by which writs of error, bills of exception, and appeals are perfected is left to the legislative assembly by the use of the words 'under such regulations as may be prescribed by law.' It is only the regulation of procedure that is delegated to the legislative assembly, whereas the words used in connection with the jurisdiction of the several courts are of an entirely different purport."

To relieve the effect of the decision of the Territorial Court in Kidder v. Bennett et al., 2 N.M. 37, holding that section 10 of the Organic Act, supra, did not authorize writs of error in chancery cases, the Legislature enacted section 1 of chapter 10, N.M.Sess.Laws 1880 (C.L. 1884, § 2193), supra; Farish et al. v. New Mexico Mining Co., 5 N.M. 234, 21 P. 82. There-

after, and until the enactment of chapter 77, N.M.Sess.Laws 1915, appeals and writs of error were provided for in the same section of the law, each of equal efficacy; but by that act and all amendments they have been separated, and some distinction may be noted in the respective provisions of the statutes relating thereto. The Code of Civil Procedure was not intended to cover all civil cases, as will be seen by reference to sections 105-1003 and 105-1007, C.L.1929, which are as follows:

"The provisions of this chapter shall not apply to or in any wise affect proceedings for habeas corpus, mandamus, prohibition, quo warranto, proceedings in assignment as covered by chapter VII (7-101 et seq.), proceedings for condemnation and eminent domain; but this chapter shall affect and control the procedure in all other civil actions in the district courts in this state." Section 105-1003, C.L.1929.

"The former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intent of this chapter." Section 105-1007, C.L.1929.

The substance of section 9 of the Kearny Code was re-enacted a number of times. See section 1, chapter 57, N.M.Sess.Laws 1907; section 1, chapter 77, N.M.Sess. Laws 1915; section 1, chapter 43, N.M. Sess.Laws 1917; section 1, rule V, Rules of the Supreme Court.

The statutory law involved (also section 1 of Rule V of this court) is exactly the same so far as the issue here is concerned as before statehood, unless it may be said that section 10 of the Organic Act died with the territory, which may be doubted in view of section 105-1007, C.L.1929, just quoted. This section of the Organic Act, while not self-executing, yet provided what cases could be appealed to the Supreme Court. The Legislature might refuse to act but, if it did, it could provide only the regulations whereby appeals, etc., could be prosecuted "in all cases" from final decisions of the district courts. It could neither extend nor abridge the right but was confined to providing the regulations for its exercise. Jung v. Myer, 11 N.M. 378, 68 P. 933.

We may confidently assume that the Territorial Legislature did not intend, by enacting section 161 of the Act of 1897, supra, to abridge the existing right of appeal in civil cases, for the very good reason it was beyond its power. The Organic Act had provided for appeals and writs of error, in all cases, from final decisions of the district court, and it thus remained, at least until statehood.

By section 161 appeal was allowed from any judgment or decision of the district court in any "civil cause," not "civil action," as defined by section 1 of the act in which the latter is given a special meaning much narrower than its general and ordinary meaning. But, if we assume that section 161 has reference to appeals from final judgments in "civil actions" as defined in section 1 of the Code, that is,

[redacted]

those originating in the district court by the filing of a complaint, and not all civil causes as understood in a legal sense, then we must construe with it sections 175 and 179 of the same act, still in substance a part of the Code, as follows:

"Sec. 175. This act shall not apply to, or in any wise affect proceeding for habeas corpus, mandamus, prohibition or quo warranto, and shall not affect actions of replevin or writs of attachment, except as to the form of the action." See section 105-1003, Comp.St.1929.

"Sec. 179. The former practice in law and equity shall be retained in all cases and proceedings not comprehended within the terms and intent of this code." See section 105-1007, Comp.St.1929.

By section 175 it was provided that the Code did not apply to or affect certain proceedings specifically named therein, but that it should apply to all other "civil actions." As a case on appeal to the district court from a justice of the peace court (say to recover on a promissory note) is just as much a civil action as one begun by filing a complaint in the district court, it is evident that reference here is to the meaning of the term as used in section 1 of the act; for "all other civil actions" would include cases appealed from judgments of justice of the peace court.

Now, section 179 of the act just quoted is in the nature of a saving clause. It is not directed alone to the proceedings excluded from the operation of the Code by section 105-1003, Comp.St.1929; but to these, as well as all cases in which the right had theretofore existed, and not comprehended within the terms and intent of the Code; otherwise section 161 of the Code and subsequent territorial amendments were void, if we assume they applied only to cases originally filed in the district court and denominated "civil actions." We may assume that the sections of the Code mentioned, taken together, were intended to and did provide for appeals to the Supreme Court of the territory in all cases in which appeals were allowed by then existing laws, that is, in all cases from final judgments of the district court, and we so hold.

[redacted] We have mentioned the fact that section 1 of rule V of this court is an adaptation of section 1, chapter 43, N.M. Sess.Laws 1917, and never a part of the Code of Civil Procedure. That act was a code of appellate procedure for both civil and criminal cases, and by its terms repealed the portions of the old code that related to its subject. While the compilers of the 1929 statutes substituted a number of its provisions (including section 1) in the place of corresponding repealed sections of the Code of Civil Procedure, as though they were amendments, no such substitution was authorized. The Code of Appellate Procedure as enacted in 1917 was intended to be complete within itself, and is the last act on the subject, as chapter 93, N.M.Sess.Laws 1927, made no change in that regard.

The case of State v. Chacon, 19 N.M. 456, 145 P. 125, 126, is cited by movants in support of their first contention, to wit, that the contest of a will under our statutes is a "special proceeding" and not a "civil action," and there is no authority for its appeal to this court. We quote the following from that case:

"Appeals are creatures of statute, and, when not guaranteed by constitutional provisions, or specifically provided for by statute, no power of review is afforded to a litigant in a cause determined by an inferior court. The Supreme Court of this state has only such jurisdiction as is conferred by the Constitution, and the laws of the state not in conflict therewith. * * *

"But nowhere is a right granted to litigants, by appeal, to avail themselves of the jurisdiction thus conferred upon the court. No procedure is provided by which such jurisdiction is to be invoked, and, as the right of appeal is purely statutory, it is clear that, notwithstanding the fact that a court is created with appellate jurisdiction over all final judgments, such jurisdiction may only be invoked pursuant to a statute conferring the right and prescribing the procedure. This being true, the Legislature may grant or withhold the right; it may grant the right in one class of cases and withhold it in another; it may confer the right of appeal from all judgments rendered upon indictments, and deny it to all other judgments."

Also a number of cases in which we have held that appeals to this court from judgments of the district court in "special proceedings" are not authorized by section 105-2501, Comp.St.1929, or section 1 of rule V of this court. One of these cases, State v. Rosenwald Bros. Co., 23 N.M. 578, 170 P. 42, 43, 45, is an appeal from a judgment in a proceeding to correct taxes by authority of a statute, a part of which is as follows: "'* * * If the treasurer shall discover any errors of other kinds, in said assessment book by which any injustice would be done to any taxpayer, it shall be his duty to report the same to the district attorney, and every taxpayer complaining of any such injustice may submit his complaint to the district attorney; and if the district attorney is satisfied that correction or change should be made so as to avoid injustice to the taxpayer, it shall be his duty to submit the matter to the district court and ask for an order of that court that such change or correction should be made, without cost to the taxpayer injuriously affected.'"

The question was whether an appeal was authorized. We said in part:

"The solution of the question of the right of the state to appeal in this proceeding depends upon a construction of section 1, c. 77, Laws 1915. That section provides that any party aggrieved in 'any civil action' may appeal to the Supreme Court. The section cited amended a portion of the act of 1907 concerning civil procedure. Chapter 57, Laws 1907. A

reasonably thorough investigation made by us discloses that a distinction is maintained by the courts between ordinary civil actions and special proceedings founded upon statute. It has been held that no appeal exists in the latter class of cases, unless the statute specifically grants the same, the courts or tribunals in such cases exercising special and limited jurisdiction. * * *

"No right is given to a taxpayer in this state to have a correction made in his assessment by application to the district court through the district attorney, except by statute. Unlike the ordinary civil action the matter is submitted to the court through the intervention of the district attorney, who must first be satisfied that the relief prayed for in the petition should be granted to avoid injustice to the petitioner. The proceeding is begun by petition, rather than by complaint. No process is served upon the state or any tax official. The court determines the right of the matter in an ex parte hearing. The order or judgment of the court operates upon an official not made a party to the proceeding. No issues are made upon the petition, and in all respects the proceeding is special in nature, the authority to proceed being derived wholly from statute. Although the proceeding is civil in its nature, as distinguished from criminal, it is not a civil action."

The question in Gonzales et al. v. Gallegos et al., 10 N.M. 372, 62 P. 1103, 1106, was whether the procedure provided for trying contested election cases should be strictly followed, and it was held that it must be; that the Code of Civil Procedure did not apply to such special proceedings. The territorial court said: "Thus it would seem clear that it was the intention of the legislature to limit the operation of the Code to the ordinary and usual actions known to the common law, and exclude from its operation all those extraordinary actions and proceedings, providing summary remedies wholly inconsistent with the liberal provisions of the code practice and the delay incident thereto. * * * The statutory proceeding for contesting elections is a comparatively recent and special proceeding of a necessarily summary nature. This proceeding, while in some respects it is similar to the action of quo warranto, does not supersede nor destroy that remedy. It is a contest between individuals, usually, in which the public may have little or no interest, but the public have the remedy of quo warranto, by which their rights may be adjudicated."

We have never held that the mere enactment of a more convenient procedure to enforce an existing right creates a "special proceeding." That would include our actions in ejectment, suits to quiet title, and even "civil actions" as defined by section 105-101, Comp.St.1929; all of which are special and unknown to the English law. This question was very definitely settled by this court in Blanchard v. State ex rel. Wallace, 29 N.M. 584, 224 P. 1047, 1048, a statutory proceeding to obtain custody of children under chapter 85,

N.M.Sess.Laws 1917 (section 22-101 et seq., Comp.St.1929), which provides for the care, custody, and control of dependent and neglected children. The jurisdiction of this court was questioned, as here. Speaking through Chief Justice Parker, we stated: "The first proposition put forward by the defendants in error in the briefs is to the effect that there is no right of review of a judgment of the character entered in these causes under the statute providing the procedure. It is urged that the proceeding is a special proceeding, and, there being no provision made in the statute for the review thereof by this court there is no right to be heard here. In this position, counsel are clearly in error. There was in England, prior to the American independence, a well-established doctrine in equity that courts of equity had jurisdiction over the care, custody, and control of infants and might entertain a proceeding to take such care, custody and control from either parents or guardians and place the same with other suitable persons. The American courts have inherited this jurisdiction, and it is here firmly established."

Our statutes providing for the contest of wills are a part of chapter 90 of N.M. Sess.Laws 1889, entitled "An Act to amend the laws relative to the estates of deceased persons" and have never been changed. The section material to this case is as follows: "When a will has been approved, any person interested may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he shall file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked." Section 154-211, Comp.St.1929.

The remaining provisions provide for process and service, the manner of trial, etc. These statutes are purely procedural and add nothing to the general law, to which we must look to determine the grounds upon which such contest can be invoked. Such laws are common among the American states and are effective in giving a convenient remedy to enforce rights within the English law; under which the validity of devises of real estate were generally contested in actions at law (though there are exceptions) and that of personal property in proceedings to probate in the ecclesiastical courts, which had no jurisdiction over devises of real estate. 2 Pomeroy, Eq. Jur. (3d Ed.) § 913, and English cases cited in notes; 1 Storey, Eq.Jur. (14th Ed.) § 579; Gaines v. Fuentes, 92 U.S. 10, 23 L.Ed. 524; Kieley v. McGlynn, 21 Wall. 503, 22 L.Ed. 599; Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364, L.R.A.1918D, 575; 1 Page on Wills § 542; 28 R.C.L. § 405; 68 C.J. Title Wills, § 668; Newman v. Waterman et al., 63 Wis. 612, 23 N.W. 696, 53 Am.Rep. 310; 28 R.C.L. Title Wills, § 401.

With reference to proceedings in the English courts, see Ellis v. Davis, 109 U.S. 485, 3 S.Ct. 327, 332, 27 L.Ed. 1006.

There are a number of proceedings common to nearly all the states which have in effect simplified the procedure for enforcing ancient rights, such as ejectment, suits to quiet title, and contests of wills. All of these have been enacted as new remedies for the enforcement of rights recognized by the laws of England. The statutory action of ejectment created no new right but simplified the remedy, which, under the common law, was complicated and unsatisfactory. Likewise the statutory action to quiet title took the place of bills of peace and quia timet, as a much simpler procedure to effectuate the same purpose. The action authorized by statute to contest a will is likewise a new remedy for rights that existed under the English law as we have seen. In fact, our various codes of procedure have left but little, if any, of the ancient procedure of the English courts in this jurisdiction. By the process of time many of the rights as recognized by the English law have been modified by courts in the absence of statutes; but the modified right is none the less the subject of a "civil action," in contemplation of section 1 of rule V, supra. In Ormsby et al. v. Webb, 134 U.S. 47, 10 S.Ct. 478, 482, 33 L.Ed. 805, the Supreme Court, through Mr. Justice Harlan, reviewed the nature of such proceeding and determined that it was a "case" within the jurisdiction of the Supreme Court under the federal statute. The court stated:

"So that the only question is whether issues framed by the supreme court of the District, and which involve an inquiry as to whether the decedent was or was not incompetent, from unsoundness of mind or because of undue influence exerted upon him, to make a will,—issues to which there are adversary parties,—constitutes a 'case,' within the meaning of the act of congress defining the jurisdiction of this court over the final judgments and decrees of the court below. If it does not, then it would follow that a proceeding in the supreme court of the District to revoke the probate of a will is a 'case,' the final judgment in which, as held in Carter v. Cutting [8 Cranch, 251, 3 L.Ed. 553], may be reexamined by this court, when the value of the matter in dispute is sufficient; while a proceeding in the same court, involving the validity, as a last will and testament, of an instrument offered for probate, and therefore its admission to probate, is not a 'case,' the final judgment in which can be here reviewed. We cannot assent to this view. The latter proceeding is as much a 'case' as the former. One involves the validity of the probate of a will; the other, the validity as a will of a paper offered for probate. Upon the determination of each depend rights of property, and in each are adversary parties."

The relation of the Supreme Court of the United States to the appellate court of the District of Columbia in the matter of appeals is quite similar to that of this court to our district court; so that the Ormsby Case is much more in point than certain cases cited by appellee construing the provision of section 41 (1) of 28

U.S.C.A. (Judicial Code, § 24 (1), granting jurisdiction to the federal District Courts in "all suits of a civil nature, at common law or in equity * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and * * * is between citizens of different States." The federal courts have held consistently that this statute confers no jurisdiction over strictly probate matters. Broderick's Case, 21 Wall. 503, 22 L.Ed. 599; Atwood v. Rhode Island Hospital Trust Co. (C.C.A.) 34 F.(2d) 18; Ladd v. Tallman (C.C.A.) 59 F.(2d) 732; Sutton v. English, 246 U.S. 199, 38 S.Ct. 254, 62 L.Ed. 664; O'Callaghan v. O'Brien, 199 U.S. 89, 25 S.Ct. 727, 734, 50 L.Ed. 101.

It was held in the Sutton Case that the Supreme Court of Texas had established by repeated decisions that the state district courts had no jurisdiction to annul wills by original proceedings; that under the laws of Texas such proceedings were merely supplemental to the proceedings for the probate of wills and cognizable only by the probate courts; that, as the federal courts have no jurisdiction of strictly probate matters, the cause was not within the jurisdiction of the courts of the United States. It is held, however, that when independent proceedings to contest wills or their probate are authorized by statute, the United States courts have the same jurisdiction as state courts having such jurisdiction. Thompson v. Nichols (D.C.) 254 F. 973; Ellis v. Davis, supra; Gaines v. Fuentes, supra. Such proceedings then are "suits of a civil nature at common law or in equity," etc., according to federal decisions, and those courts have jurisdiction over contests of wills, if proceedings independent of probate proceedings are authorized by state statutes.

O'Callaghan v. O'Brien, supra, was an appeal to review a decree of the Circuit Court of Appeals which remanded, with instructions to dismiss, an action in equity instituted to set aside an order of a state probate court, probating a nuncupative will. The plaintiff below averred that the probate court was without jurisdiction to enter the order. The bill also prayed that the will be adjudged null and void. The Supreme Court of the United States deduced from the cases reviewed the following two propositions:

"First. That, as the authority to make wills is derived from the state, and the requirement of probate is but a regulation to make a will effective, matters of pure probate, in the strict sense of the words, are not within the jurisdiction of courts of the United States.

"Second. That where a state law, statutory or customary, gives to the citizens of the state, in an action or suit inter partes, the right to question at law the probate of a will or to assail probate in a suit in equity, the courts of the United States, in administering the rights of citizens of other states or aliens, will enforce such remedies."

It was held that the setting aside of the probate of a will was a continuation of the probate proceedings ancillary to the original probate. The court stated further: "Thus, if a state law provides for any form of notice on an application to probate a will, and authorizes a contest before the admission of the writing to probate, then it would follow, if the words 'suit or action of inter partes' embraces such a contest, the proof of wills, if contested by a citizen of another state or alien, would be cognizable in the courts of the United States, and hence not under the exclusive control of the state probate court. Again, if a state authorized a will to be proved in common form, that is, without notice, and allowed a supplementary probate proceeding by which the probate in common form could be contested, then, again, if such a contest be a suit inter partes, it would also be a Federal cognizance."

Thus it is, the federal courts hold a will contest becomes "a suit of a civil nature at common law or in equity," if a state statute provides for such contest independently of probate proceedings. The federal decisions do not turn upon any question regarding the object or purpose of the proceedings, but upon their character; whether a part of, or independent of, probate proceedings. The court in that case states the question in the following language: "This requires us to determine whether, by custom or by the statute law of the state of Washington, the courts of that state had the power of administering the relief prayed for on that subject in the bill by an independent suit, as distinguished from the exercise of probate jurisdiction originally or merely ancillary. There is no pretense of any custom in the state of Washington beyond the scope of authority conferred upon the courts of the state by the laws thereof. The question, therefore, reduces itself to a narrow compass; that is, what remedies do the laws of Washington create for the purpose of the probate of wills and the revocation of a probate, and are those remedies exclusively probate in their character or necessarily merely ancillary thereto, or do they confer upon the state courts general legal or equitable authority on the subject merely because of the existence of a controversy? That is to say, Is a will contest under the laws of Washington an ordinary action or suit between parties or a special probate proceeding directly ancillary to or concerning the probate of the will?"

Quite a bit is said in the opinion regarding the suit not being one inter partes; but we apprehend this would not be held fatal to jurisdiction if the statute provided for an independent proceeding in the state district court, though it should be otherwise identical with the present statute.

"The solution of the question is not free from complexities" as stated by Chief Justice White in the O'Callaghan Case; but the language of the statute and rule authorizing appeals has been, with some

variations, the law of the Territory or State for seventy-five years.

By long usage, and acquiescence on the part of the Legislature, the right of appeal in matters of probate and will contests have become so firmly established that such construction of the rule and statutes should not be disturbed unless a contrary meaning is so certain as to be practically without doubt; and we do not find it so.

We conclude that this court has jurisdiction on appeal from the judgment of the district court in this case; from which it follows that the motion to dismiss should be, and is, overruled.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, and ZINN, JJ., concur.

SADLER, J., did not participate.

65 P.(2d) 857

CITY OF SANTA FÉ v. FIRST NAT. BANK IN RATON.

No. 4204.

Supreme Court of New Mexico.

Feb. 17, 1937.

C. R. McIntosh, of Santa Fé, for plaintiff in error.

Crampton & Robertson, of Raton, for defendant in error.

HUDSPETH, Chief Justice.

In this case it appears that the First National Bank of Raton sued the City of Santa Fé, a municipal corporation, and recovered judgment on nine sewer certificates of a large issue uttered by the defendant, City of Santa Fé, for the purpose of paying the cost of constructing sewer improvements in said city, under authority of Comp.St. 1929, §§ 90-2301 to 90-2308. The complaint states that by the terms of said certificates they were to be payable from money received from special assessments levied to pay for said sewer improvements, and that in addition thereto the defendant city further promised and agreed that any deficiency in said fund to pay said certificates or the interest thereon should be paid from the general revenues of the defendant. It was then alleged that the fund from the special assessment levied to pay said sewer improvements was an insufficient amount to pay the said sewer certificates and that there was and is a complete deficiency in said fund.

The defendant answered admitting all of the allegations of the complaint except that contained in paragraph 8, and the answer to that paragraph reads as follows: "That defendant admits the allegations in paragraph VIII of each count, except that defendant denies that there was or is any deficiency in said fund for the sole reason that assessments, sufficient in amount to pay said certificates, were duly and regularly made by the City Council against property sufficient in valuation to discharge the same, and that liens therefor were duly filed and

recorded in the office of the County Clerk of Santa Fé County, and that, when said assessments are collected, there will be a sufficient amount in said fund to pay said certificate."

The answer also raised a constitutional question by alleging that the debt sued upon was not contracted by an ordinance irrepealable until the indebtedness was paid, and which specified the purpose for which the funds to be raised were to be used, and which provided for a levy of a tax to pay the interest and principal thereon as required by section 12 of article 9 of the State Constitution, and further that the question of incurring such debt was not submitted at an election to a vote of the qualified electors of the city, nor had a majority of the qualified electors ever voted creating such debt as required by said section of the Constitution.

For a third and further defense it was alleged that the indebtedness was not paid and it could not be paid out of current revenues and money actually collected during the fiscal years in which said bonds were issued or during the years in which they were matured.

The plaintiff demurred to this answer upon the ground that the law under which the sewer certificates in question were issued does not require the passage of an irrepealable taxing ordinance and does not require the submission of the question of incurring such indebtedness to the electors, and further by reason of section 12 of article 9 of the New Mexico Constitution are not applicable to the character of obligation sued on in this action, and further as to the third separate defense that it was immaterial whether the indebtedness would be paid out of moneys collected during the current year. The demurrer was sustained, and the defendant having elected to stand on its answer, judgment was entered on the pleadings in favor of the plaintiff for the principal amount of the sewer certificates together with accrued interest to the date of judgment. Thereafter the City of Santa Fé sued out a writ of error in this court to review the judgment.

We are urged to pass upon the rights of the certificate holders as well as the constitutionality of the act since these questions are involved in much pending litigation.

Plaintiff in error will be referred to herein as the City and defendant in error as the Bank.

The main point argued is that the indebtedness sued upon is invalid because it was not incurred in accordance with section 12 of article 9 of the State Constitution, which provides as follows:

"Debt Contracting Power of Municipalities—Election—Limitation.

"Sec. 12. No city, town or village shall contract any debt except by an ordinance, which shall be irrepealable until the indebtedness therein provided for shall have been fully paid or discharged, and which shall specify the purposes to which the funds to be raised shall be applied; and which shall provide for the levy of a tax, not exceeding

twelve mills on the dollar upon all taxable property within such city, town or village, sufficient to pay the interest on, and to extinguish the principal of, such debt within fifty years. The proceeds of such tax shall be applied only to the payment of such interest and principal. No such debt shall be created unless the question of incurring the same shall, at a regular election for councilmen, aldermen or other officers of such city, town or village, have been submitted to a vote of such qualified electors thereof as have paid a property tax therein during the preceding year, and a majority of those voting on the question, by ballot deposited in a separate ballot box, shall have voted in favor of creating such debt."

The certificates sued upon are all on the same form, the material parts of which are as follows:

"The City of Santa Fé, * * * for value received, hereby promises to pay to the bearer hereof the sum of Five Hundred Dollars, * * *

"This certificate shall be payable from money received from special assessments levied to pay for sewer improvements, but any deficiency in the fund to pay this certificate or the interest thereon shall be paid from the general revenues of said municipality.

"This certificate is issued for the purpose of paying the cost of constructing sewer improvements in the said City under and by virtue of Sections 3705 to 3712 inclusive, of the New Mexico Statutes, Codification of 1915, and all other laws of the State of New Mexico thereunto enabling, and it is hereby certified and recited that all requirements of law have been fully complied with by the officers of said City in the issuance of said certificates, and that all proceedings and things with reference to making said improvements, to the fixing of the assessment lien against the property improved, and the issuance of this certificate, have been lawfully taken and performed, and the said City has agreed to collect and enforce the payment of said special assessments, and in the event it becomes necessary to foreclose the lien of such certificates to do so at the expense of said City.

"For the collection and enforcement of said assessments and the foreclosure of the lien thereof the City of Santa Fé hereby pledges the exercise of all lawful corporate powers."

The Bank points out that this case falls within what it terms the contingent liability doctrine and maintains that the statute under which the certificates were issued is constitutional, notwithstanding it does not provide for an election, and that the word "debt" as used in section 12, article 9 of the Constitution, does not embrace the kind of obligation sued on in this action. The Bank cites American Company v. City of Lakeport, 220 Cal. 548, 32 P.(2d) 622; 17 C.J. (debt) 1377, § 2; Corey v. City of Ft. Dodge, 133 Iowa, 666, 111 N.W. 6; Lillard v. Melton, 103 S.C. 10, 87 S.E. 421; Brownlee v. Brock, 107 S.C. 230, 92 S.E. 477; McIntyre v. Rogers, 123 S.C. 334, 116 S.E.

277; Comfort v. City of Tacoma, 142 Wash. 249, 252 P. 929; Kelly v. City of Sunnyside, 168 Wash. 95, 11 P.(2d) 230; Wicks v. Salt Lake City, 60 Utah, 265, 208 P. 538; and the dissenting opinion in City of Aurora v. Krauss (Colo.) 59 P.(2d) 79, and other cases.

Several of the cases cited by the Bank involve the validity of statutes creating general guaranty funds to meet deficiencies in special funds authorized for the purpose of discharging city improvement bonds. California has such a statute, and the cited case of American Company v. City of Lakeport, supra, discusses sections of that statute.

In the late case of Kerr Glass Mfg. Corp. v. City of San Buenaventura, 62 P.(2d) 583, 585, the Supreme Court of California comments upon the statute and the Lakeport Case, as follows:

"The respondents aver that the sole reason for the inadequacy of the bond redemption fund is the failure of the landowners in said special assessment district to pay the installments of the assessment levied to discharge the cost of such improvement; that approximately 85 per cent. of the lands in the district are delinquent; that the value of the lands so delinquent is less than the total amount of delinquencies, penalties, and charges accrued against them; that there have been no sales or redemptions of such lands, and there are not likely to be any in the near future; and that the bond redemption fund is therefore insolvent. In its answer the respondent city admits its willingness and offer to pay the petitioner on a pro rata basis, computed on the ratio which the amount due to the petitioner bears to the total amount still unpaid on all outstanding bonds of series E, including also those which have not yet matured.

"The principal question for determination is whether the petitioner is entitled to payment in full from the bond redemption fund, there being sufficient funds for payment to it in full, although not sufficient to pay in full all of the matured claims against said fund; or whether it must accept payment on some pro rata basis to be determined.

"Preliminarily it must be said that the petitioner is not entitled to a direction for a levy of taxes sufficient to pay the delinquencies against the lands purchased by the city at delinquent tax sales which occurred subsequent to the initial delinquencies which compelled the sale. It has so been decided in the case of American Co. v. City of Lakeport, 220 Cal. 548, 563, 32 P.(2d) 622, et seq. That case settled the interpretation of sections 12 and 16(a) of the Improvement Bond Act of 1915 (St.1923, p. 304, § 12; St.1921, p. 230, § 16(a), to the effect that, if there are no surplus moneys available in the general fund, the city is not obligated to levy a tax for the purpose of procuring advances to the bond redemption fund wherewith to meet the amounts of assessment installments falling due on the lands after the sale thereof to the city. The interpretation of those sections of the act by recent decisions limits the mandatory tax levy by the city to the 10-cent levy provided by section 16(a).

American Co. v. City of Lakeport, supra; Union Safe Deposit Bank v. City of Menlo Park, 3 Cal.(2d) 264, 43 P.(2d) 811, and Id. (Cal.Sup.) 45 P.(2d) 347; Southern California Roads Co. v. County of San Luis Obispo, 4 Cal.(2d) 220, 48 P.(2d) 34; Griffith Co. v. County of Los Angeles, 4 Cal.(2d) 222, 48 P.(2d) 35; Sawyer v. County of San Luis Obispo, 4 Cal.(2d) 776, 48 P.(2d) 35; Thompson v. City of Compton (Cal.Sup.) 59 P.(2d) 505; Thompson v. City of La Mesa, 9 Cal.App.(2d) 542, 50 P.(2d) 504.

"More recently in the case of Hammond v. City of Burbank (Cal.Sup.) 59 P.(2d) 495, it was determined that not only was the 10-cent levy the only mandatory levy provided by the Improvement Bond Act of 1915, but that the purpose of the levy as provided by the act is limited and exclusive; that is, that the tax realized from the 10-cent levy may be used only to provide advances to pay the purchase price (the amount of the initial delinquent improvement assessment installment, penalties, and costs) of the lands sold to the city on delinquent tax sales.

"A further review of the cited cases or of the pertinent sections of the Improvement Bond Act involved therein is unnecessary for the purpose of making the observation that the immediate and important result of such recent decisions, viz., that the land in the district is the sole source of payment for the cost of the improvement and that the obligation of the municipality is limited merely to creating a revolving fund by certain authorized advances to the bond redemption fund, has a direct bearing upon the solution of the principal problem presented here.

"Advances to the fund by the city are authorized to be made from two possible sources, one the mandatory levy not exceeding 10 cents on each $100 of taxable property in the city, further limited by the amount required to meet the purchase price of lands sold or to be sold to the city at delinquent tax sales; and, second, the transfer of moneys from the general fund when there are surplus moneys available, as advances on the amount of improvement assessment installments falling due on lands sold to the city subsequent to the delinquent tax sales. That fact, together with the further holding in the case of Hammond v. City of Burbank, supra, that the duty of the city to levy and collect the 10-cent tax is continuing only so long as advances to the redemption fund on account of the purchase price of lands sold to the city have not been made, and that the city may not 'pyramid' the levies omitted in prior years, make manifest the preliminary conclusion that the petitioner is not entitled to have the respondents do more than levy a 10-cent tax each year until such levy has realized moneys sufficient to advance to the bond redemption fund the purchase price of all land sold to the city at delinquent tax sales. This duty the city has performed, and it is not shown that there are surplus moneys in the general fund available for transfer to the bond redemption fund for the payment of assessment installments falling due on

such lands subsequent to the delinquent tax sales. It follows that the petitioner is not entitled to a writ directing the respondents in respect to any tax levy or transfer of funds.

"There remains for determination the principal question whether the petitioner is entitled to a writ directing payment to it in full of the sum of $17,000 due on the bonds held by it. If it is not so entitled, or if it is not entitled to any partial payment in excess of the offer made by the district and refused, its petition in this respect must also be denied. State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753, 68 S.W.(2d) 671, 679.

"The petitioner relies mainly upon the provisions of section 3 of the Improvement Bond Act of 1915 (as amended by St.1929, p. 1823), and upon the decision in the case of Bates v. McHenry, 123 Cal.App. 81, 10 P.(2d) 1038, in support of its contention that it is entitled to full payment from the fund without regard to the probability that there will not be sufficient funds realized from all available sources to discharge in full the principal and interest on all unpaid bonds of the series.

"Section 3 of the act provides that the bonds and interest 'shall be paid at the office of the city treasurer of said municipality who shall keep a redemption fund designated by the name of said bonds, into which he shall place all sums received by him from the collection of the assessments made for the payment of the cost of the work or improvements upon which the said bonds are issued and of the interest and penalties thereon and from which fund he shall disburse and *pay the said bonds and the interest due thereon upon presentation of the proper bonds and coupons;* and under no circumstances shall said bonds or the interest thereon be paid out of any other fund. Said city treasurer shall keep a register * * * and shall cancel and file each bond and coupon so paid.' The petitioner contends that the italicized language of said section compels the same result as in the case of Bates v. McHenry, supra. That case involved section 52 of the California Irrigation District Law (St.1931, p. 172) which provided that upon presentation of *any* bond or interest coupon, payment should be made from the bond fund. In the opinion it was pointed out that the particular language of the act, together with the further provisions that unpaid bonds and interest coupons should be registered and bear interest from the date of registration and creating an unlimited continuing obligation of the district to levy sufficient taxes to discharge the obligation in full, distinguished the facts from such cases as Thomas v. Patterson, 61 Colo. 547, 159 P. 34, and Norris v. Montezuma Valley Irr. Dist. (C.C.A.) 248 F. 369, and compelled a conclusion that payment in full upon presentation was contemplated by the act, even though the fund was at the time insufficient to discharge all the matured claims against it. The same court rendering the opinion in the case of Bates v. McHenry, supra, arrived at a contrary conclusion in the case of Rohwer v. Gibson, 126 Cal.App. 707, 14 P.(2d) 1051,

following the cases distinguished in its previous opinion. The case of Rohwer v. Gibson involved the reclamation district laws of the state. There it was noted that the act involved made no provision for priority of payment where several bondholders were entitled to payment from a fund which was insufficient to pay all. It was further observed that the taxing power and consequently the fund realizable for application to bond principal and interest and out of which payment may be expected were limited to the benefits conferred upon the land assessed. A distinction was made between such a case, that is, where the general taxing power of the district was not made available to increase the fund applicable to discharge the principal and interest of the bonds, and Bates v. McHenry, supra, and such cases as Meyer v. Porter, 65 Cal. 67, 2 P. 884, and Meyer v. Widber, 126 Cal. 252, 58 P. 532, where the general taxing power of the district or other municipal body may be resorted to until all the bonds were fully paid. It was thereupon concluded that, where the sources of the bond redemption fund were so limited and were not fortified by the authority to resort to a general or 'inexhaustible' taxing power, the fund becomes a trust fund to be shared by all who hold claims against it without priority one over the other. Thus it was appropriately held that, where such a fund was insufficient to pay in full all who had claims against it, the petitioner was entitled only to share ratably with the other bondholders. Cases are cited in the Rohwer decision, 126 Cal. App. 707, at page 721, 14 P.(2d) 1051, to the effect that payment in full to the petitioner will not be ordered where it appears that the moneys constitute a trust fund by virtue of the fact that the fund is not replenishable by an unlimited or so-called inexhaustible taxing power, even though the fund at the time of bringing suit is sufficient for such payment but not sufficient to pay all the outstanding matured claims against it. The weight of the authority which recognizes the distinction between the ability to replenish the fund from an inexhaustible or general taxing power and the cases where the taxing power or tax-collecting capacity is limited, unless the statutory provisions are clearly to the contrary, is in accord with the result in Rohwer v. Gibson, supra. Those cases further recognize that such result is proper whenever the fund so characterized as a trust fund is shown to be insufficient, whether or not the district is actually insolvent, and regardless of the fact that previously matured bonds have been satisfied in full. See, also, State ex rel. Gillespie v. Carlton, 103 Fla. 810, 138 So. 612; Moran v. State ex rel. Montgomery, 111 Fla. 429, 149 So. 477; State ex rel. Sturdivant Bank v. Little River Drainage Dist., 334 Mo. 753, 68 S.W.(2d) 671, and State ex rel. Drainage Dist. No. 8 v. Duncan, 334 Mo. 733, 68 S.W.(2d) 679, overruling State ex rel. Bliss v. Grand River Drainage Dist., 330 Mo. 360, 49 S.W.(2d) 121; Groner v. United States (C.C.A.) 73 F.(2d) 126; Norris v. Montezuma Valley Irr. Dist. (C.C.A.) 248 F. 369; Morris, Mather & Co. v. Port of Astoria, 141 Or. 251, 15 P.(2d) 385; Lucas v. First Nation-

al Bank of Pawnee, 171 Okl. 606, 43 P.(2d) 752; Meyers v. City of Idaho Falls, 52 Idaho, 81, 11 P.(2d) 626; Rothschild v. Village of Calumet Park, 262 Ill.App. 96; note, 90 A.L.R. p. 717 et seq. The trust status of the fund has been considered appropriate where it is theoretically replenishable by a so-called inexhaustible taxing power, but the exercise of that power is rendered fruitless by reason of economic conditions resulting in a tax-collecting incapacity. Morris, Mather & Co. v. Port of Astoria, supra; see Moran v. State ex rel. Montgomery, supra, concurring opinion, 111 Fla. 432, 149 So. at page 478; State ex rel. Buckwalter v. Lakeland, 112 Fla. 200, 150 So. 508, 90 A.L.R. 704, opinion of Brown, J. dissenting in part."

We find little support in the California decisions for the proposition that that part of the contract sued upon, which is treated in the complaint as an absolute guaranty by the City, is not violative of the constitutional provision quoted above requiring an approving vote of the taxpayers.

The Bank criticizes the quotation from 19 R.C.L. § 281, p. 985, appearing in Seward v. Bowers, 37 N.M. 385, 24 P.(2d) 253, to the effect that where the municipality is liable *generally* an indebtedness is created within the meaning of the constitutional provision. But we believe that is a correct statement of the law, and it seems to be supported by the weight of authority. City of Aurora v. Krauss, supra; Deter v. City of Delta, 73 Colo. 589, 217 P. 67; Rorick v. Dalles City, 140 Or. 342, 12 P.(2d) 762; Farmers' State Bank of Conrad v. City of Conrad, 100 Mont. 415, 47 P.(2d) 853; Hagler v. City of Salem, 333 Mo. 330, 62 S.W. (2d) 751.

The Supreme Court of Florida, in the case of Brash v. State Tuberculosis Board et al., 124 Fla. 652, 169 So. 218, 219, stated the rule: "Only where it can be clearly demonstrated beyond a reasonable doubt that a contemplated scheme of embarkation upon new capital ventures will not immediately or mediately, presently or in futuro, directly or contingently, operate to impose an added burden on the taxing power, or have the effect of impairing the public credit in futuro, will the consummation of such a debt incurring scheme be held authorized, absent the approving voice of the freeholders, as required by amended section 6 of article 9 of the Constitution, in the case of municipal, county, and district enterprises."

Williams v. Town of Dunnellon (Fla.) 169 So. 631, 635, is on all fours with Seward v. Bowers, supra, and the Florida court reached a like conclusion, but clearly distinguished that case from the general rule, and stated that the payment of the funds borrowed for making the improvements or extensions on the old plant are expressly confined to the net receipts from the operation of the utility—"a tax or property liability or charge being expressly excluded."

Many cases touching upon the constitutional question are reviewed in Seward v. Bowers, supra; State v. Connelly, 39 N.M. 312, 46 P.(2d) 1097, 100 A.L.R. 878;

and Varney v. City of Albuquerque, 40 N. M. 90, 55 P.(2d) 40, 106 A.L.R. 222. We are constrained to hold that the guaranty clause of the contract sued upon, which was entered into after the adoption of the constitution, and which it is admitted by the demurrer did not receive the approving vote of the taxpayers, is rendered inoperative by the dominant legal force of the constitutional provision quoted above.

The next question is whether or not the contract is severable. The severability of contracts is recognized in this state. Hodges et al. v. City of Roswell et al., 31 N.M. 384, 247 P. 310; Fancher et al. v. County Commissioners, 28 N.M. 179, 210 P. 237. The statute under which the sewer certificates were issued authorized the City to fix liens upon the property benefited by the sewer improvements and gave the sewer certificate holders the benefit of these liens. The execution of the power by the City, so far as authorized under the Constitution, is good, and void as to the excess. "The rule is that a lawful promise made for a lawful consideration is not invalid merely because an unlawful promise was made at the same time and for the same consideration. * * *" 13 C.J. 470, p. 512. See, also, 9 C.J. § 48, p. 31; 13 C.J. § 445, p. 502, § 447, p. 505, and § 553, p. 574; McCullough v. Clinch-Mitchell Const. Co. (C.C.A.) 71 F.(2d) 17; Nye et al. v. Chase Nat. Bank (C.C.A.) 34 F.(2d) 435; General Electric Supply Co. v. Youngman Electric Co. et al., 45 Ohio App. 395, 187 N.E. 249; Marshall v. Wittig, 213 Wis. 374, 251 N.W. 439; Henry Pigot's Case, 77 English Reports, Reprint 1177; Denson v. Alabama Fuel & Iron Co., 198 Ala. 383, 73 So. 525.

The rule is stated in 3 McQuillin, Municipal Corporations (2d Ed.) § 1352, p. 940, as follows:

"The well settled rule that where an agreement is illegal in part, the part which is good may be enforced, provided it can be separated from the part which is bad, but otherwise the contract will be declared invalid in toto, applies to contracts made by municipal corporations. A municipal contract void as to an inconsiderable or insignificant part is not invalid in toto, especially where the city has received substantial benefits thereunder and cannot place the other party in statu quo.

"When a part of a divisible contract is ultra vires, but neither malum in se nor malum prohibitum, the remainder may be enforced, unless it appears from a consideration of the whole contract that it would not have been made independently of the part which is void."

In Manning v. Ellicott, 9 App.D.C. 71, it is stated: "This term in the contract is distinct and severable from the rest of the terms therein, and it was not inserted for the benefit of the defendant, but as security for the plaintiff; and it may well be rejected, and the other provisions of the agreement remain good and enforceable."

See, also, Presbury v. Fisher & Bennett, 18 Mo. 50; State ex rel. v. Tampa Water Works Co., 56 Fla. 858, 870, 47 So. 358, 19

L.R.A.(N.S.) 183; Glucose Sugar Refining Co. v. Marshalltown (C.C.) 153 F. 620; Bell v. Kirkland, 102 Minn. 213, 113 N.W. 271, 13 L.R.A.(N.S.) 793, 120 Am.St.Rep. 621; Spier v. Kalamazoo, 138 Mich. 652, 101 N.W. 846; Illinois T. & S. Bank v. Arkansas City, 76 F. 271, 22 C.C.A. 171, 34 L.R.A. 518; Fitzgerald v. Union Central Life Ins. Co. (C.C.A.) 42 F.(2d) 76; Roberts v. H. C. Whitmer Co., 46 Ga.App. 839, 169 S.E. 385; McCutcheon v. Terminal Station Comm., 88 Misc. 148, 150 N.Y.S. 850; Long Island R. Co. v. Sherwood (Sup.) 136 N.Y.S. 752; Whitbeck v. Estate of Ramsay, 74 Ill.App. 524; Mack v. Jastro, 126 Cal. 130, 58 P. 372; State of Ohio v. Findley, 10 Ohio, 51; Loomis v. Newhall, 15 Pick.(Mass.) 159; Miller v. Atchison, T. & S. F. Ry. Co., 97 Kan. 782, 156 P. 780; Livingston v. Chicago & N. W. Ry. Co., 142 Iowa, 404, 120 N.W. 1040; Faist v. Dahl, 86 Neb. 669, 126 N.W. 84.

The guaranty was merely unauthorized but involved no moral turpitude. It could be eliminated from the contract without affecting the right of the holders of the sewer certificates to the proceeds of the liens. The City had power to make a contract without the approving vote of the qualified taxpayers for sewer improvements so long as the obligation was confined to the property benefited by the improvements. A sewerage system in a city as large and thickly populated as Santa Fé is so essential to the public health that its continuous operation is a governmental duty. Const. art. 9, § 13, makes exception of such plants out of the debt limitation thereby imposed. The City could contract for sewerage improvement if it had funds available with which to pay for the same; and it has power to levy taxes. Barker v. State, 39 N.M. 434, 49 P.(2d) 246. The constitutional inhibition goes only to the contracting of a debt without the approving vote of the taxpayers.

In State v. City of Carlsbad, 39 N. M. 352, 47 P.(2d) 865, some of the bonds of the issue were preferred over others, but all the certificates of the issue involved here seem to be of a parity, and where no certificate is given preference over others of the same issue, the trust fund doctrine, stated in Kerr Glass Mfg. Corp. v. City of San Buenaventura, supra, applies, and the certificate holders are entitled to mandamus to compel the enforcement of the liens on the properties benefited by the sewer improvements, and the equitable distribution of the funds derived therefrom. 2 Dillon, Municipal Corporations (5th Ed.) § 893, p. 1387.

The learned trial court erred in sustaining the demurrer. The cause should be remanded to the district court with directions to set aside the judgment and overrule the demurrer, and it is so ordered.

BICKLEY and ZINN, JJ., concur.

SADLER and BRICE, JJ., did not participate.

65 P.(2d) 863

WESTERN LIVE STOCK v. BUREAU OF REVENUE et al.

No. 4210.

Supreme Court of New Mexico.

Feb. 22, 1937.

Frank H. Patton, Atty. Gen., for appellants.

D. A. Macpherson, Jr., of Albuquerque, for appellees.

SADLER, Justice.

The plaintiffs (appellees) sued in the district court of Santa Fé county to recover taxes in the sum of $80.27, paid under protest, imposed by the provisions of chapter 7 of N.M.Session Laws of 1934 (Special Session), based upon the receipts arising from certain advertising. Section 314 of the act extends authority to seek recovery by suit of taxes so paid on conditions therein named.

Judgment was rendered against defendants following their refusal to plead further upon entry of the trial court's order overruling a demurrer interposed by them to plaintiffs' amended complaint, hereinafter referred to as the complaint. They prosecute this appeal to secure a correction of the judgment claimed to be erroneous.

The essential facts, as disclosed by the complaint, are these. The plaintiffs are partners operating under the firm name of Western Live Stock. Their business is the publication of a trade journal or magazine at Albuquerque, N. M., known as

"Western Live Stock." It has a general circulation in New Mexico and other states. It is circulated by means of the United States mails, motortrucks, railroads, and express.

One of plaintiffs' sources of revenue is, of course, advertising. The magazine receives and publishes, under contracts, advertisements of products which are manufactured elsewhere than in New Mexico, such products to be sold, shipped, and transported from the manufacturer to the customer. These foreign advertisements are obtained by plaintiff both through personal solicitation and through what are known as advertising agencies, located in states other than New Mexico. Some of these advertising contracts are made between plaintiffs and the manufacturer, located in a foreign state, while others, as stated, are made between the plaintiffs and an advertising agency, such advertising agency having a different and a separate contract with the manufacturer, and in such cases all dealings in connection therewith are between the plaintiffs and the agency.

In the preparation of the advertisements for insertion in the plaintiffs' magazine, certain advertising cuts, mats, material, information, intelligence, and copy are sent to plaintiffs by said foreign advertisers, and plaintiffs receive compensation pursuant to the contract to carry the advertising from such foreign advertisers, and the receipts arising from such advertising contracts form the measure of the tax imposed in its application to plaintiffs.

This advertising is naturally designed to promote the sale of the advertised products. The advertising contracts so made with residents of other states require an interchange of correspondence between the advertiser and plaintiffs, contemplate the forwarding prior to publication of plats, cuts, mats, engravings, copy, and information from outside the state to plaintiffs within the state, as aforesaid, and the circulation and distribution of such magazines to subscribers and purchasers in New Mexico and other states.

The challenge to the act laid as a basis of recovery is, briefly, that the act, in the respect sought to be enforced against plaintiffs, violates section 8 of article 1 of the Constitution of the United States, known as the "Commerce Clause," by placing an unconstitutional burden on interstate commerce. The gist of the demurrer, likewise in brief, is that under the facts pleaded it does not.

The tax assailed is imposed by section 201 of said chapter 7, Special Session Laws of 1934, reading as follows: "There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:"

As applicable to plaintiffs the measure of the tax is prescribed by subparagraph I of

section 201, reading: "At an amount equal to two per cent of the gross receipts of any person engaging or continuing in any of the following businesses: * * * publication of newspapers and magazines (but the gross receipts of the business of publishing newspapers or magazines shall include only the amounts received for the sale of advertising space)."

The plaintiffs chiefly rest their argument supporting correctness of the trial court's ruling on the demurrer on certain state and federal cases, to wit: Post Printing & Publishing Co. v. Brewster (U.S.D.C.) 246 F. 321; State v. Salt Lake Tribune Pub. Co., 68 Utah, 187, 249 P. 474, 48 A.L.R. 553; Little v. Smith, 124 Kan. 237, 257 P. 959, 57 A.L.R. 100; International Text-Book Co. v. Pigg, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678, 27 L.R.A. (N.S.) 493, 18 Ann.Cas. 1103; Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268, 55 S.Ct. 182, 184, 79 L.Ed. 356, and the case of Fisher's Blend Station v. Tax Commission, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956, decided March 30, 1936.

A careful analysis of these cases in the light of what is said in Blumenstock Brothers Advertising Agency v. Curtis Publishing Company, 252 U.S. 436, 40 S. Ct. 385, 387, 64 L.Ed. 649, and in Paul v. Virginia, 8 Wall. 168, 19 L.Ed. 357, and in other cases cited and relied upon in the Blumenstock Case, fails to persuade us that the advertising contracts themselves, although made between citizens of different states, are transactions in interstate commerce. That they are not so is the first point relied upon by the defendants for reversal. We rule the point in their favor. Indeed, the mere contracts are not commerce at all, neither intrastate nor interstate; no more so than contracts of insurance, and they have been held to be neither. New York Life Insurance Co. v. Deer Lodge County, 231 U.S. 495, 34 S. Ct. 167, 58 L.Ed. 332. Cf. Graniteville Mfg. Co. v. Query et al. (D.C.) 44 F.(2d) 64.

The Blumenstock Case, supra, was a suit by plaintiff, a Missouri corporation, against the defendant, a Pennsylvania corporation, to recover treble damages under the Sherman Anti-Trust Act (15 U.S.C.A. §§ 1–7, 15 note). Section 2 of said act (15 U.S. C.A. § 2) rendered unlawful any monopoly or attempt to monopolize any part of the trade or commerce among the several states. Section 7 of the same act (15 U.S.C.A. § 15 note) authorized the recovery of treble damages sustained by any person in his business or property by reason of anything forbidden or declared unlawful by the act. Sustaining the contention that the petition failed to state a cause of action, the court said:

"Commerce, as defined in the often quoted definition of Chief Justice Marshall, in Gibbons v. Ogden, 9 Wheat. 1, 189, 6 L.Ed. 23 [68] is not traffic alone; it is intercourse; 'it describes the commercial intercourse between nations and parts of nations in all its branches, and is regulated by prescribing rules for carrying on that intercourse.'

"In the present case, treating the allegations of the complaint as true, the subject-matter dealt with was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant. It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals did not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence in such commerce."

The plaintiffs seek to distinguish this case by pointing out that in it the court was dealing with the case of a *refusal* to contract while here is presented the case of *completed* contracts. We see no point to the attempted distinction.

The opinions in Post Printing & Publishing Co. v. Brewster, supra, by the late Judge Pollock of the United States District Court in Kansas, State v. Salt Lake Tribune Pub. Co., supra, by the Supreme Court of Utah, and Little v. Smith, supra, by the Supreme Court of Kansas, carefully appraised, simply hold that state legislation which directly burdens an instrumentality of interstate commence—the publication and interstate circulation of newspapers as it happened to be in those cases—is unconstitutional. Each case involved a penal statute prohibiting the advertising of cigarettes. Fundamentally, the decisions rest upon the interstate character of the business of the newspapers involved. That the publication and interstate circulation of newspapers is interstate commerce may not be questioned. Blumenstock Brothers Adv. Agency v. Curtis Pub. Co., supra; Konecky v. Jewish Press (C.C.A. 8th Ct.) 288 F. 179. But this fact alone does not draw all incidents of such a business within the protection of the interstate commerce clause of the Federal Constitution.

Expressions are to be found in some, if not all, of the three opinions first cited in the paragraph next above reflecting the idea that the advertising contracts themselves are transactions in interstate commerce. This view is directly contrary to the holding in the Blumenstock Case that they are not. It rejects the principle of New York Life Ins. Co. v. Deer Lodge County, supra, declaring mere contracts not commerce at all.

It is interesting to note that the Blumenstock Case had not been decided when Judge Pollock wrote his opinion in the Brewster Case. But it antedates the Salt Lake Tribune Case from Utah by six and one-half years and the decision of the Supreme Court of Kansas in Little v. Smith by more than seven years. Yet in neither of the last-mentioned cases is the decision in the Blumenstock Case noticed. Apparently, the court in neither of these cases had the benefit of that opinion, as certainly Judge Pollock did not in the Brew-

ster Case, in indicating a view that advertising contracts may be deemed transactions in interstate commerce.

In addition to the cases discussed, plaintiffs put great reliance upon two decisions of the United States Supreme Court already cited. They are Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co. and International Text-Book Co. v. Pigg. Indeed, plaintiff's counsel contends the former case, having been decided subsequently to the Blumenstock Case, overrules the latter to the extent of any conflict. When the real basis of the later decision is understood, we think there is no conflict.

The Indiana Farmer's Guide Case was another suit to collect treble damages under the Sherman Anti-Trust Act by reason of a violation of sections 1 and 2 of the act (15 U.S.C.A. §§ 1, 2). The plaintiff was the publisher of "The Indiana Farmer's Guide" at Huntington, Ind., having a circulation of 160,000, of which over two-thirds was in Indiana and approximately 50,000 in other states. The defendants, except Midwest Farm Paper Unit, Inc., were publishers of newspapers, general and not vocational in character, the names of such papers being calculated, however, to develop a circulation among farmers in the six midwestern states where published. The larger part of the circulation of each of these newspapers was in the state where published. Most of the advertisers in all the papers were located in states other than the state of publication, about 90 per cent. of petitioner's advertising coming from points outside Indiana. The combination in restraint of trade was claimed to be by virtue of an arrangement through the Midwest Unit, whose officers and agents were representatives of the other defendants. By virtue of this arrangement, a combination rate of advertising in all seven papers was much less than the total of separate charges for the same advertisement in any six.

In this case the court cites and discusses the Blumenstock Case, distinguishing it upon the ground that the subject matter there dealt with, as recited in the opinion in such case, "was the making of contracts for the insertion of advertising matter in certain periodicals belonging to the defendant"; whereas, said the court: "The business that is here alleged to have been damaged is the publication and circulation of these farm papers. That business includes the obtaining of advertising, the transportation between States of electrotypes sent respectively to petitioner and respondents by their customers to be used in setting up advertisements, and the transportation of substantial quantities of the papers in interstate commerce. Advertising at compensatory rates is an essential element. The opinion in Blumenstock Bros. Adv. Agency v. Curtis Pub. Co. [252 U.S. 436, 64 L.Ed. 649, 40 S.Ct. 385], supra, assumed that a publishing business such as that now under consideration would amount to interstate commerce. There is no ground for the contention that the evidence in this case is not sufficient to go to the jury on the question of interstate commerce." (Citations omitted)

In the case at bar, the subject matter dealt with is the validity of an act imposing a tax measured by receipts arising (in the instant case) from contracts by citizens of other states with plaintiffs for insertion of advertisements in their magazine published in New Mexico. The mere fact that the magazine has an interstate circulation does not give interstate character to the contracts. This was true of defendant's publications in the Blumenstock Case.

The substance of the material allegations in the petition in the Indiana Farmer's Guide Case as recited by the court in its opinion is: "that respondents entered into a contract, combination, and conspiracy *for the purpose of obtaining a monopoly of the farm paper business* including the publication, circulation, and distribution of advertisements of peculiar interest to farmers 'within the territory covered' by their publications; that in furtherance of this contract, combination and conspiracy they conceived a plan and design calculated to break down and destroy 'competition with other farm publications within said territory'; and that in order to effectuate that purpose they agreed upon a combination schedule of advertising rates for all their publications materially below the total of the separate rates of each." (Italics ours.)

The decisive allegation in this pleading is that which charges the doing of a thing declared unlawful by the Sherman Act, to wit, the entering "into a contract, combination and conspiracy for the purpose of obtaining a monopoly of the farm paper business * * * 'within the territory covered' by their publications." Publication and circulation of these farm papers throughout the several states mentioned concededly was interstate commerce. The fact that such business included advertising at compensatory rates, contracts in reference to which were the means employed to effectuate the unlawful conspiracy, did not give interstate character to such contracts, even though between citizens of different states. We do not understand the opinion so to hold. Nor can we see the significance attached by plaintiffs to the court's mention of the farm paper business as including transportation between states of electrotypes to be used by the respondents in setting up advertisements. While not questioning the interstate character of such transportation, it was but an incident to the performance of the advertising contracts. Obviously, it seems to us, the transportation of these articles did not, in the court's mind, give decisive characterization as interstate commerce to the business involved, for at the very outset the court deduced that from the interstate circulation of the farm papers.

The transportation between states of the electrotypes falls within the distinction we draw between the case at bar and International Text-Book Co. v. Pigg, also relied upon by plaintiffs. They argue that, even if such a contract as that disclosed in the Blumenstock Case be not deemed an interstate transaction, nevertheless the interstate movement of advertising cuts,

mats, and copy contemplated by their contracts with advertisers makes such contracts and the performance thereof interstate transactions within the doctrine of the Pigg Case.

But there is this difference between the two cases. In the Pigg Case the continuous movement of textbooks, apparatus, letters of instruction, and the like entered into the very essence of the contract. That movement was in constant execution and fulfillment of the contract itself—not a mere preliminary act incident to preparing one of the parties for performance as in the instant case. If plaintiffs be correct in this contention, a building contract between *two residents of New Mexico* for construction of a building *in New Mexico* will take on the characteristics of interstate commerce and be subject to federal regulation by the mere circumstance that the contract calls for material of a certain kind whose purchase and delivery may involve a movement of goods in interstate commerce.

Furthermore, in view of the dismissal of the petition in the Blumenstock Case for failure to state a cause of action for recovery of treble damages under the Sherman Act, we do not consider well founded plaintiffs' contention that advertising so promotes the sale of the goods advertised as to start their flow in interstate commerce, thereby characterizing same as an interstate transaction. Allegations of similar import appear in the petition in that case. This consideration seems too remote to be decisive and was evidently so considered by the court in the Blumenstock Case.

The most that fairly can be said of the tax here imposed in its relation to plaintiffs' business, it seems to us, is that it indirectly affects interstate commerce. It is only such transactions as directly affect same and impose a direct burden thereon that fall within the interdiction of the commerce clause of the Federal Constitution. A. L. A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 850, 79 L.Ed. 1570, 97 A.L.R. 947, and cases cited. See, also, Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L. Ed. 1160.

In the Schechter Case, one ground urged in support of federal regulation of the live poultry industry of the metropolitan area in and about New York City was the power of Congress over interstate commerce. It was argued that hours and wages affect prices; that payment of lower wages or reducing cost by exacting long hours would enable the operator in the industry so doing to sell at lower prices, since labor represents 50 to 60 per cent. of these costs; that this practice results in a demand for a cheaper grade of goods; and that the cutting of prices demoralizes the price structure. Interstate commerce was thus brought in only upon the charge that violation of certain Code provisions regulating the industry—as to hours and wages of employees and local sales—*"affected"* interstate commerce.

Holding against the contention that the claimed violations directly "affected" interstate commerce, the court, among other things, said: "In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as, e. g., the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people, and the authority of the state over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the state's commercial facilities would be subject to federal control."

At most, the tax challenged affects only indirectly the interstate business of plaintiffs. So does the property tax they pay on tangible property located in New Mexico; and as well the property tax paid by an interstate carrier on its property having permanent situs in the taxing state, even though employed in interstate transportation of freight and passengers. But no more in the one case than in the other does this indirect burden relieve such property from bearing its just share of state taxation.

That the Legislature did not intend to transcend provisions of the commerce clause of the Federal Constitution is shown by express language of the act. Section 202 of chapter 7 thereof reads: "None of the taxes levied by this act shall be construed to apply to transaction[s] in interstate or foreign commerce, or commerce with the Indian tribes."

We are not convinced that the act in its application to plaintiffs imposes an unconstitutional burden on interstate commerce. Controlled as we are by decisions of the United States Supreme Court on such matters, we have carefully weighed decisions cited from that court and believe our conclusion in harmony with them.

It follows that the trial court erred in overruling the demurrer of the defendants. Accordingly, the judgment entered against them following their refusal to plead further will be reversed. The cause will be remanded to the district court of Santa

Fé county, with directions to sustain the demurrer and for further proceedings in conformity with the views herein expressed.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

65 P.(2d) 869

STATE v. TURNEY.

No. 4249.

Supreme Court of New Mexico.

Feb. 23, 1937.

J. Benson Newell, of Las Cruces, for appellant.

Frank H. Patton, Atty. Gen., and Edward P. Chase, Asst. Atty. Gen., for the State.

ZINN, Justice.

The defendant (appellant here), Robert Turney, was charged by information in the district court of Otero county, N. M., with the crime of involuntary manslaughter. The information contained two counts. The first count charging the killing of one Alejandro Montoya, who was traveling in a Chevrolet "pick-up" truck, which Turney struck while operating a Ford sedan. The first count charged Turney with operating his car in a wanton disregard of the rights and safety of others, and without due caution and circumspection. The second count charged Turney with driving the Ford while under the influence of intoxicating liquor. Turney was convicted under the first count, acquitted on the second, and was sentenced to from eighteen months to two years, from which sentence he appeals.

The facts material to an understanding of the charge upon which the defendant was convicted, as adduced by the evidence in this case, are briefly as follows:

The defendant, Robert Turney, in company with two friends, left Las Cruces on the afternoon of July 3, 1935, with the purpose of going to Ruidoso, N. M., to spend the 4th of July. They went by way of El Paso, Tex., and there picked up another friend who accompanied them. They left El Paso about 6 o'clock in the evening. In El Paso they got some ice in a metal kettle and put some whisky on the ice. En route, the defendant had a couple of drinks. He was driving the car during the entire trip. They arrived in Alamogordo between 7 and 8 o'clock. They then drove to the home of a young lady who joined the party. They left Alamogordo going to Ruidoso, with three of the boys sitting in the front seat and the other boy and the young lady sitting in the back seat. The highway from Alamogordo north was black-topped and perfectly straight, but slightly upgrade from the city limits north towards Tularosa. At a point approximately four miles out of Alamogordo, and at a point about 200 yards south of the branch road leading from the main highway, at right angles to the settlement of La Luz, and while traveling at rates of speed variously estimated by different witnesses at from forty to fifty miles per hour, the Ford sedan struck the Chevrolet in which the deceased was riding. The defendant claims that a large truck, bearing neither a tail light nor reflector, suddenly appeared in front of his car, and in an attempt to pass said truck, he turned to the left to go around it, when, for the first time, according to his testimony, he observed the car in which deceased was riding approaching from a northerly direction, with the headlights very dim. The defendant claims he was unable to clear both the truck and car, and his car struck the left front wheel of the Chevrolet, which

merely pushed it partially off of the road, and left it setting with the two wheels on the shoulder or graded portion of the road, and the rear of the car being off the graded portion, and coming to rest at right angles with the said highway. The Chevrolet was not upset, but several of the occupants either fell or were knocked from the car as a result of the collision, and three of them died of injuries sustained in the accident.

Sheriff Howard Beacham and his deputy testified that they came upon the scene of accident while looking for a stolen car. They found the left side of each of the cars smashed where they had collided with each other, a large gouge in the pavement extending from the front of the Chevrolet where they found it to a point fifty-two feet north, which would indicate that the Ford sedan after the crash had proceeded that length before coming to a halt. This gouge was at a point six feet from the left shoulder facing north on a twenty foot black-top road, which would indicate that the Ford sedan was clear over on the left side of the highway. The gouge was caused by the left front hub of the broken wheel of the Ford sedan. The defendant, according to Sheriff Beacham, immediately after the accident told Beacham that he was not driving fast, at a speed of between forty and fifty, and that "I was going up the broad middle of the road when this crash occurred."

None of the survivors riding in the Chevrolet truck were able to give any coherent story of the accident, due probably to the fact that most of them were knocked unconscious and therefore could not relate just what happened at about the time of the collision.

The first error assigned by the defendant is predicated upon the court's refusal to give defendant's requested instructions to the jury. These requested instructions embodied the defendant's theory that the killing occurred as the result of an unavoidable accident. We have carefully read the requested instructions, and the instructions given by the court. We find that the instructions given by the court present and clearly cover the defendant's theory of unavoidable accident. The rule in this jurisdiction is that if the instructions given by the court properly present the law of the case to the jury, it is not error to refuse requested instructions covering the same ground. State v. Bailey, 27 N.M. 145, at page 155, 198 P. 529, and cases therein cited.

The second error is assigned on the court's refusal to direct an instructed verdict in favor of the defendant at the close of the State's case. Error, if any, in denying the defendant's motion for directed verdict was waived when the defendant elected to put in his defense and introduced evidence. State v. Stewart, 34 N.M. 65, 277 P. 22; State v. Analla et al., 34 N.M. 22, 276 P. 291; State v. White, 37 N.M. 121, 19 P.(2d) 192.

The third assignment of error is based on the defendant's claim that the trial court did not compel the State to elect

upon which count the case should proceed after the close of the State's case in chief. The defendant was acquitted on the second count and found guilty upon the first count of the information. This matter has been disposed of by us in the recent case of State v. Jones, 39 N.M. 395, 48 P.(2d) 403, 406. We there said: "Appellants claim error in the refusal of the trial court to compel the state to elect on which of the two counts in the indictment the state would stand. Ordinarily, we might consider whether the trial court had abused its discretion in not compelling an election. Here, however, the appellants were convicted under one count only, namely, the second count. Where defendants are convicted only on one count, though the indictment, in two counts, charges separate offenses, defendants cannot be heard to complain of error which did not operate to their prejudice, having been convicted upon one count only. We cannot see wherein the defendants were prejudiced when they were convicted upon the second count and acquitted on the first count. It cannot be seen how they were hurt by the jury doing the very thing they desired the state to do. 17 C.J. 286, § 3624."

As to the practice question, which counsel for the defendant claims is confusing, we merely desire to point out that section 35-4443, N. M. Trial Court Rules, under section 2 thereof, authorizes the court to direct a severance where there is either a misjoinder of the offenses charged or there exists any uncertainty in the charge as stated, which does not happen to be true in the instant case. If sections 35-4443 and 35-4409 of the N. M. Trial Court Rules are read together, there should be no confusion in the minds of either the prosecuting attorney or attorney for the defendant.

The fourth assignment of error is predicated upon the court's denial of the motion of the defendant at the close of the entire case for an instructed verdict. The defendant claims that the State wholly failed to prove either by circumstantial or direct testimony the material allegations contained in each of the counts of said information.

The defendant was acquitted of the charge contained in the second count. We are not concerned with the evidence offered by the State to substantiate this charge. As to the first count, to wit: "That Robert Turney * * * on the 3rd day of July, A. D. 1935, unlawfully and wilfully did drive and operate a motor vehicle, to-wit: A Ford sedan, in and upon the public highways of Otero County, New Mexico, in a careless, heedless and wanton disregard of the rights or safety of others, and without due caution, and circumspection and in a manner so as to endanger persons and property, and at the time and place aforesaid, while driving and operating said motor vehicle, as aforesaid, unlawfully, feloniously and unintentionally, and while engaged in the commission of the act aforesaid, the same being an unlawful act, not amounting to a felony, did drive and operate said motor vehicle, which he was engaged in driving and operating, as aforesaid, into a motor vehicle in which one

Alejandro Montoya was, then and there, riding, and by thus striking the said motor vehicle so occupied by the said Alejandro Montoya, did, then and there, cause the same to turn over and leave the highway, aforesaid, and by the collision and the overturning of said motor vehicle in which the said Alejandro Montoya was riding, as aforesaid, did inflict in and upon the body of him, the said Alejandro Montoya, divers mortal wounds, of which mortal wounds, he, the said Alejandro Montoya, did, then and there, die," we are forced to rule against the defendant. We have carefully examined a voluminous record. The jury had the right to believe that the defendant was not only driving down the middle of the road, but over on the left side of the road at the time of the collision. The jury had a right to believe from the evidence that the collision was not purely accidental. The jury had a right to believe that the defendant was not only driving down the broad middle of the road, but over on the left side of the road, and that this was not done to avoid a collision with any other vehicle on the road, but that the defendant was driving his Ford sedan in a careless and negligent manner and in wanton disregard of the rights or safety of others and in violation of Comp.St.1929 § 11-803. The jury had a right to disbelieve the defendant's story respecting his attempt to avoid a collision with the truck of one Cadwallader. The evidence which the jury had a right to believe supports the verdict. We cannot disturb the same on appeal.

As to the fifth and last assignment of error, we must likewise rule against the defendant. The court refused to permit witness Cadwallader to testify as to his "impressions" at the time of the accident. An exception was taken to this ruling, but the defendant made no tender of what he expected to prove by the proffered testimony. In the absence of such tender, we cannot ascertain whether the court did or did not err in his ruling. Had a tender been made of what Cadwallader's "impressions" were at the time of the accident, the same might have been admitted. Without such tender no error can be predicated.

Finding no error in the record, the verdict and judgment of the district court must stand. It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

66 P.(2d) 260

MINDLIN v. MINDLIN.

No. 4198.

Supreme Court of New Mexico.

March 17, 1937.

Joseph Gill, of Albuquerque, for appellant.

John F. Simms, of Albuquerque, for appellee.

ZINN, Justice.

On March 7, 1934, Pauline S. Mindlin, the appellant herein, was granted a decree of divorce from her husband, Frank Mindlin, the appellee here. This decree recited that she and her husband had previously made a property settlement which was approved by the court. The question of alimony was not covered or fixed in the property settlement. The court, from the evidence adduced at the divorce hearing, decreed that $60 a month was a suitable allowance and ordered appellee to pay that sum until the further order of the court.

On the 6th of November, 1935, the appellant married one James M. Hill. Appellee, who had at all times complied with the decree by paying the alimony, on December 6, 1935, moved the court to abate the alimony. An order was issued directing the appellant to show cause why the motion should not be granted. She filed a return thereto. She first demurred to the motion, and thereafter set out her marriage to James M. Hill, but stated in the return that on the 12th of December, 1935, she filed a suit for the annulment of her marriage to him on the ground of fraud, or, in the alternative, for a divorce, and made a copy of the complaint in her suit against Mr. Hill a part of the return. Her complaint against Mr. Hill shows that she was led to believe that Hill was worth a large sum of money, the owner of a ranch in Oklahoma valued at $150,000 and that he had been knighted by the King of England for bravery, that he was a graduate of several universities, and she was thereby induced to marry him and did marry him on these representations and those of affection and did live with him for about a month. She discovered that such representations on his part were false and fraudulent, and that he was, in truth and in fact, merely an adventurer.

To her return was also annexed an affidavit of her attorney in the divorce proceeding to the effect that she and her attorney consented to the divorce and the property settlement between the appellant and the appellee when, in truth and in fact, there was no ground for divorce and that the property settlement made at the time of the divorce between appellant and appellee was entirely onesided and unfair to the appellant. At this point we deem it necessary to point out that the decree of divorce was awarded to her on her cross-complaint and her prayer.

At the hearing on the motion to abate alimony, the appellant put her testimony

into the record. As soon as the testimony had proceeded far enough to disclose that its purpose was to reopen all matters settled by the divorce decree and the property settlement, counsel for the appellee objected, and the court ruled that, if the appellant was defrauded in the property settlement, she should not be allowed to go into that matter on the hearing of the appellee's motion to abate alimony, but that she had her remedy by proper action. Appellant's attorney then offered to prove that the $60 a month alimony carried by the decree and omitted in the poperty settlement was part of the consideration for the division of the property, and the court held, over the objection and exception of the appellant, that the property settlement was not before the court on the pending motion. Appellant testified that she is worth about $8,000 and that appellee is worth about $25,000, and that she has no other means of support besides the income from the $8,000 worth of investments and the $60 a month alimony. On cross-examination she admitted that she received $65 a month rent on her house. This house had been put in order by appellee when appellant took it over, and that appellee gave her additional help by way of paying the Home Loan payments on it after the divorce.

She also testified that prior to her marriage to appellee she had secured a divorce in Kansas from another husband and had received about $22,500 from this first husband. Since her divorce from appellee, her second husband, she lost a considerable amount of this money playing the stock market. She and appellee had no children, but she is the sole support of her mother. There is evidence to show that services of counsel in the instant case are worth from $125 to $150.

At the end of appellant's testimony, appellee moved the court for an order sustaining the motion to abate alimony. The trial court sustained the motion to abate the alimony and denied any attorney's fees to appellant, from which judgment this appeal is prosecuted.

Appellant relies upon two points for reversal:

First. The court erred in sustaining the motion to abate on the evidence introduced.

Second. The court erred in refusing to allow attorney's fees to her attorney in resisting the motion to abate.

This brings for our consideration the question of the power of the district courts to abate alimony awarded a wife who remarries.

In the instant case, the original decree of divorce provided as follows:

"(2) That the said cross-defendant Frank Mindlin pay to the cross-complainant Pauline S. Mindlin, the sum of Seven Hundred Twenty ($720.00) Dollars per year, as a suitable allowance for her maintenance and support; that the same be paid in the following manner:

"Sixty ($60.00) on the first day of each calendar month, at the First National Bank in Albuquerque, New Mexico, and that said payment be continued until the further order of this Court."

In this decree we find a specific reservation of the right to make further orders in reference to alimony. This is a right we recognized in Lord v. Lord, 37 N.M. 24, 16 P.(2d) 933. The granting of alimony and the fixing of its amount and duration is a matter peculiarly within the discretion of the trial court. In Lord v. Lord, supra, we said:

"The divorce statute (1929 Comp.St. c. 68, art. 5 [sections 68-501 to 68-511]) does not authorize the court to reserve jurisdiction in the matter of alimony, or to decree concerning it otherwise than finally, except during the pendency of the suit. Neither does the Code of Civil Procedure, so far as we are aware, authorize reservation of jurisdiction in any matter or cause. Yet it is familiar practice in equity.

"The statute does not authorize a court to reserve jurisdiction of the custody, maintenance, etc., of the minor children. The statute itself reserves it. Id. § 68-506. The court could not, if it would, divest itself of such continuing jurisdiction. The fact does not argue against the court's power, in its discretion, to reserve jurisdiction in the matter of alimony. It merely shows that the Legislature did not see fit itself to reserve or continue the jurisdiction."

The court in the original decree decided to fix the alimony at $60 a month until his further order, plainly indicating that circumstances might arise to make the award different or to call for its modification.

The Supreme Court of Washington, in Ruge v. Ruge, 97 Wash. 51, 165 P. 1063, 1065, L.R.A. 1917F, 721, uses this language:

"In such cases the decree is not final and conclusive as a matter of law, because it does not purport to be final and conclusive as a matter of fact. The reservation in the decree plainly indicates an unfinished determination of the judicial mind; that is, the court has not completely disposed of the case. The power of the court not having been exhausted, it reserves to itself the right to exercise the unexhausted portion of its power in such manner as changed conditions and circumstances may indicate to be just."

See, also, 19 C.J. 270, title, Divorce, and cases there noted.

That the court could reopen the case and change the award, either increasing it, diminishing it, or abating it in its entirety, cannot now be questioned.

Holding, as we do, that the trial court has the power to abate, we are left only with a determination of whether such power was abused. Cassan v. Cassan, 27 N.M. 256, 199 P. 1010. There are many cases dealing with the question of abating alimony after the remarriage of the wife. The cases are collected in exhaustive notes in 19 C.J. 275, 276, 293, Cropsey v. Cropsey, 104 N.J.Eq. 187, 144 A. 621, 64

A.L.R. 1266-1273, and Myers v. Myers, 62 Utah, 90, 218 P. 123, 30 A.L.R. 74-79. The law seems to be well settled that the marriage of the wife does not of itself abate the alimony due from her former husband, but that some action of the court which ordered the payment of the alimony is necessary to relieve the former husband. However, it is a cogent reason for abating the alimony. We cite from the text in 19 C.J. at page 275, title, Divorce:

"(Sec. 626) (3) Remarriage of Wife. Although the court may have power to modify, in the absence of a mandatory statute to the contrary, a divorced wife's remarriage to another does not necessarily of itself operate as a release of the former husband's obligation to pay alimony, but simply affords a cogent reason for the court to modify or vacate the order. And hence it may well furnish a ground for discharging him from further payments, or for a reduction of the alimony, especially where the wife marries a man who is able to afford her a reasonable support; and the rule applies to a decree based upon and incorporating an agreement between the parties, as well as to one founded on testimony, unless such decree shows that the award was intended to continue during the wife's life. It has been held, however, that such a remarriage does not call for a modification or vacation of an allowance for alimony, where the alimony was awarded in gross or in lieu of a substitute for all the wife's property rights, nor has the general rule been applied to alimony already accrued."

The case we have under consideration here is one in which the court ordered the payment of alimony at the rate of $60 a month "until the further order of the court." In the decree the court recites that all property rights have been settled between the parties and such settlement was approved by the court. The question of alimony was left to the judgment of the court.

In Cohen v. Cohen, 150 Cal. 99-104, 88 P. 267, 270, 11 Ann.Cas. 520, the California court made a very clear statement of what would seem to be the better rule:

"We believe that the cases wherein the alimony should be continued after the remarriage are extremely rare and exceptional, particularly where there are no children of the former marriage. Good public policy would not compel a divorced husband to support his former wife after she has become another man's wife, except under extraordinary conditions, which she should be required to prove. Unless such conditions are shown by her to exist, the court should, on the former husband's motion, cancel all payments accruing after the remarriage, in all cases where, as here, there are no children and the allowance is based solely upon the husband's probable earning capacity, or upon his breach of the marriage vows, and not upon existing property rights."

See, also, Bowman v. Worthington, 24 Ark. 522; Brown v. Brown, 38 Ark. 324;

Casteel v. Casteel, 38 Ark. 477; Erwin v. Erwin, 179 Ark. 192, 14 S.W.(2d) 1100; Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; Carlton v. Carlton, 87 Fla. 460, 100 So. 745. The cases cited and many others proceed upon the basis that, where the circumstances of a particular case do not show any hardship to the wife, the trial court should consider the situation of the parties and act in accordance with sound appreciation of public policy.

The facts can be faced in the instant case baldly, and from such facts determine whether or not the trial court abused its discretion in the decision appealed from. The record shows that the appellant had received in the settlement of a former marriage the approximate sum of $22,500 in cash and property. That appellant and appellee had lived together as man and wife for about thirteen years, when appellee brought suit for divorce. Appellant cross-complained, and the decree of divorce was awarded her upon her cross-complaint and prayer. With the decree there was adjudged to appellant the sum of $60 per month alimony for her support and maintenance. Prior to the decree there had been a property settlement, which was approved by the court. The husband, appellee, at all times complied with the order of the court, paying the award, and also paid mortgage installments on the home which apparently went to appellant in the property settlement. This place was renting for $65 per month. The appellant had made some bad investments, and her net worth, exclusive of the house, at the time of the hearing on the motion to abate was only $8,000, which amount was invested in mortgages and stock. The record is silent as to her independent income from these investments. The record is silent as to her age, her physical or mental capacity. The record is silent as to her ability to supplement her income from her investments and the rent money by her own efforts. She has no children to support. She is the sole support of her mother.

Under the above facts, if at the time of the granting of the divorce the trial court had refused to award appellant any alimony, or had awarded her $10 per month instead of the $60, could we, in the face of the record as above recited, rule as a matter of law that the trial court had abused its discretion? Clearly not. We cannot assume that her station in life required an award of any alimony in addition to the property settlement. Coupled with the above facts, we find that since the decree of divorce was granted the appellant had remarried.

The appellant had an undoubted right to marry again. Her complaint against her present husband is based on his false representations made to her before marriage as to his supposed wealth and position. The record is silent as to the wealth or position of appellant's present husband. The record is silent as to the truth of the allegations made by appellant against Hill. He may defend and prove the allegations of appellant to be untrue. He may prove himself

to be a man of wealth, titles, degrees, and the possession of "palaces in England." This being true, it would seem to be most unjust and inequitable for appellant to hold appellee for further payments of alimony.

In New Mexico the husband and wife contract toward each other obligations of mutual respect, fidelity, and support. Comp.St.1929, § 68-101. When the appellant remarried, her new husband thereby contracted toward her the obligation of support. The record is silent as to any failure on the part of Hill to fulfill this solemn obligation. The appellant cannot have her cake and eat it too. In the present state of the record, we cannot say as a matter of law that the trial court erred and abused its discretion by terminating the alimony. The appellant cannot question the power of the trial court to decide the matter, and the right and duty of the trial court to decide it according to what it believed under the circumstances to be just and equitable. This right and power is only subject to review because of abuse of that discretion and power. We find no abuse and must permit its ruling to stand.

As to the appellant's claim that the trial court erred in refusing an allowance for attorney's fees, we are of the same mind. The trial court had the power to force the appellee to pay an attorney's fee for the wife's lawyer had she not been able to have her cause presented. In Lord v. Lord, supra, that question was discussed. Where, as in this case, the wife has independent means of her own, and the court did not make an allowance for attorney's fees, we cannot hold as a matter of law that it is an abuse of the discretion of the trial judge to deny appellant's attorney a fee to be paid by appellee.

Finding no error, the judgment of the district court will be affirmed. It is so ordered.

HUDSPETH C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

66 P.(2d) 426

MENDOZA v. GALLUP SOUTHWESTERN COAL CO.

No. 4239.

Supreme Court of New Mexico.
Jan. 26, 1937.

On Rehearing April 6, 1937.

Wheaton Augur, of Santa Fe, and Hugh B. Woodward, of Albuquerque, for appellant.

Herbert C. Denny and H. S. Glascock, both of Gallup, and J. O. Seth, of Santa Fe, for appellee.

BRICE, Justice.

This is a proceeding to recover under the Employer's Liability Act (Comp.St.1929, § 156-101 et seq.) for personal injuries. The parties will be styled plaintiff and defendant, as they appeared below.

The fact that plaintiff was injured in the course of his employment is admitted. The amount of compensation alone is questioned. Compensation is based on the average weekly earnings. A determination of this basic fact is the only question in the case. The plaintiff claims his average weekly earnings were $23.26, whereas the defendant claims they were $4.47. The plaintiff alone testified for himself. At the conclusion of his testimony the defendant's counsel stated: "At this time we ask for judgment in accordance with the prayer of defendant's answer," which was as follows:

"Wherefore, defendant prays that the court fix and determine the amount of compensation which the plaintiff is entitled to receive from the defendant under the terms and provisions of said workman's compensation act of the State of New Mexico and for all such other and further relief as to the court may seem meet and proper."

The court stated:

"The plaintiff's objection to the evidence made earlier in the case will be overruled; the motion of the defendant at the close of the case will be sustained."

Thereupon the court found as facts among other findings:

"2. That at the time of said accident, plaintiff's average earnings as made and defined by said Workman's Compensation Act, were Four & 47/100 ($4.47) Dollars.

"3. That the plaintiff has suffered total loss of earnings on account of said accident, from the date thereof and until the date hereof."

The defendant admitted its liability based upon $4.47 average weekly earnings, and further stated in its answer:

"That the defendant has been and is now ready and willing to pay to the plaintiff, all sums of money which the defendant is obligated to pay to and for the account of the plaintiff under the terms and provisions of said Workman's Compensation Act, on account of said accident."

The motion of defendant at the close of the testimony did not call for a declaration of law as to whether plaintiff was entitled to recover; but admitted liability, and requested the court to determine the amount from plaintiff's testimony and a tabulation of earnings introduced by agreement. Therefore, if there is substantial evidence to support the judgment, the decision of the district court must be affirmed; otherwise reversed.

With this rule in view, the question is whether there is substantial evidence to support the court's finding that plaintiff's average weekly earnings were $4.47. The testimony is substantially as follows:

Plaintiff became an employee of defendant as a coal miner on October 28, 1932,

and he was injured October 3, 1933. His average weekly earnings for the whole time were $4.47. It would appear from the above and from the items of monthly payments, introduced by agreement, which varied from $6.47 to $48.74 per month, that the mine was not operated continuously, as plaintiff worked every day the mine was operated. On August 28, 1933, the employees of the mine struck for higher wages and "everybody walked out," including the plaintiff. A few weeks after the walkout, the miners went back to work and plaintiff worked until the 3d day of October, 1933, on which date he was injured. Plaintiff returned to his old employment just as though nothing had happened. Defendant was paying 68 cents a ton for mining coal before the strike and 5 cents more after the strike. There was no special agreement between plaintiff and defendant when plaintiff returned to work; "just went in with the rest of the men as though he had never quit." He worked six and a half days after the return to work and earned $23.26 to the date of his injury.

Plaintiff contends that the strike terminated his employment; that when he returned to work it was a new employment; that as he worked under such new employment for a full week the statute implies such week's earnings are the basis for measuring defendant's liability. The defendant contends that the "walkout" did not terminate the employment; that even if it did, the plaintiff's average earnings should be calculated upon the basis of the previous year's earnings. Provision is made to determine such average weekly earnings, as follows:

"Whenever in this act the term 'earnings' is used it shall be construed to mean the average weekly earnings of the workman at or immediately prior to the date of the injury. Such average weekly earnings shall be computed by dividing the total earnings of such workman during the period not exceeding one year during which he has been employed in the same capacity by such employer by the number of weeks in such period. However, if the injured workman shall have worked less than one week at the employment in which he was injured his earnings shall be determined by the average weekly earnings of other workmen engaged in like employment in the same locality during the preceding four weeks; Provided, that in case such earnings have been unusually large on account of the employer's necessity temporarily requiring him to pay extraordinary high wages such average weekly earnings shall be based upon the usual earnings in the same community for labor of the kind the workman was performing at the time of the injury. In any event the weekly compensation allowed shall not exceed the maximum nor be less than the minimum provided in section 17 (156-117) hereof." Subsection (m) of section 156-112, N.M. Sts.1929.

This statute was construed in Stevens v. Black, Sivalls & Bryson, Inc. et al., 39 N.M. 124, 42 P.(2d) 189, in which it was

held that the injured employee having worked for over a year immediately prior to his injury, that his average weekly earnings should be determined by dividing his total earnings for the year next preceding his injury by fifty-two, notwithstanding his employment was intermittent. This would be an exact case except for the intervening strike.

To entitle an employee to compensation under this statute, he must be one who is earning money, at or immediately prior to the time of his injury, from an employer as defined by the statute. The basis of compensation is the average weekly earnings of the workman, computed by dividing the total earnings of the workman during the period of not exceeding one year, during which the relation of employer and employee continuously existed and during which the employee worked in the same capacity (though it may have been intermittently), by the number of weeks in such period; provided he has worked for as long as a week. The period must be continuous, for it would not be immediately prior to the date of the injury if the relation of employer and employee had ceased between the original employment and the injury. If there is a break in the employment, then earnings for the time prior to the break cannot be taken into consideration. The question in this case is whether plaintiff's employment ceased at the time of the strike.

Our decision depends on whether the strike terminated the relation of employer and employee. Ordinarily, the purpose of the strikers on a "walkout" is to secure higher wages, or shorter hours, or other like advantage, and force the employer thereby to return them to their employment with this advantage. On the other hand, the employer does not always —nor even usually—accept the "walkout" as a complete termination of all relations between the parties. There is usually a time in which the parties confer and bargain. The workmen during such time hope to resume their employment with increased wages or other advantage, and the employer to retain his experienced workmen. But there is a suspension of the relations of employer and employee. No wages are earned by the employee and the employer is liable for none, and the striker is not subject to the orders of his former employer because of his refusal to work. When the employer loses the authority, for whatever cause, to direct the employee in the labor for which he was employed and the employee ceases to earn wages because of his refusing to perform labor at hand, which, under his employment it was his duty to perform, the relation of employer and employee necessarily ends. This is particularly so under our Workman's Compensation Act because compensation for injuries is based upon the earnings of the employees immediately preceding such injury.

The words "employer and employee" as used in the New Mexico Workman's Compensation Act are used in their natural sense and intended to describe the

conventional relation between an employer who pays wages to an employee for his labor. Hull, Adm'x v. Philadelphia & Reading Ry. Co., 252 U.S. 475, 40 S.Ct. 358, 64 L.Ed. 670.

One of the tests of the relation of employer and employee is that the employer retains the right to direct the manner in which his business shall be done and the result to be accomplished. 39 C.J. p. 35, § 4, Title "Master & Servant," and 71 C.J., Title "Workman's Compensation Acts," p. 416, § 159.

We find but one case on the exact question, by a court in this country. We quote from Brown v. Central West Coal Co. et al., 200 Mich. 174, 166 N.W. 850, 851, as follows:

"When the decedent, a locomotive crane operator, left the employ of the coal company on the occasion of a strike, June 21st, the relations of master and servant, of employer and employee, were at an end. It required a new contract, a new employment, to restore such relations. When he entered the service of the coal company as a mechanic on August 24th, it was under a new contract, a new employment, in a different capacity, at a different wage. It was in this new capacity, this new employment, that he was working when he met his death. He had not worked in this employment 'during substantially the whole of the year immediately preceding his injury.' In fact, he had so worked but a short time. It is clear, therefore, that the decedent belonged to the second class mentioned in the Andrejwski Case, and that compensation should be computed upon the basis of his average daily wage during the days when he was so employed." The court in Jones v. The Ocean Coal Co., [1899] 2 Queen's Bench 124, seems to have arrived at the same conclusion.

In Stevens v. Black et al, supra, it was decided that employment may be intermittent (as in coal mines where they are open only part of the time for work) and the employment still be continuous; but in that case the contract continued in force. The parties understood that the mine could not be worked on full time, and employees worked when called upon.

Some courts hold that a strike terminates the relation of employer and employee under any circumstances. The No. C-4 (D. C.) 300 F. 757; Sarah Roehrig v. Missouri State Life Ins. Co., 251 Ill.App. 434; Geismer v. Lake Shore, etc., Co., 102 N.Y. 563, 7 N.E. 828, 55 Am.Rep. 837. Others, that the result may depend upon statutes or the contract between the parties. Greenfield v. Central Labor Council et al., 104 Or. 236, 192 P. 783, modified opinion in 207 P. 168; Price v. Guest (Eng. House of Lords) [1918] A.C. 760; Duplex Printing Press Co. v. Deering et al. (C.C. A.) 252 F. 722.

But in the absence of statute or contract regulating the relation during a strike, when an employee joins other workmen in a strike he ceases at that time to be an employee. He is no longer under the direction and control of his employer

in relation to the work he was employed to do, and no longer earns money as an employee, because of his refusal to work. If he returns to work, it is a new employment, although he returns to the same character of work. His earnings for the time he worked "at and immediately prior to his injury," if as much as six days (which is a working week), under the New Mexico Workman's Compensation Act is the basis upon which his average weekly earnings are to be calculated. This does not go back of the time work is resumed after a strike.

It follows that the district court erred in considering the earnings of plaintiff for the time he was employed before the strike, as a basis for compensation.

The case is reversed and remanded with instructions to enter judgment for plaintiff consistent herewith.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, AND ZINN, JJ., concur.

On Rehearing.

PER CURIAM.

It having been made to appear to the court that, since the entry of an order herein granting a rehearing, the parties have filed herein a written stipulation signed by their attorneys settling all matters in controversy between them, thus rendering moot the questions presented upon rehearing, the order granting rehearing will be set aside and the motion for rehearing denied without consideration of its merits. And in view of the wishes of the parties, as reflected by said written stipulation, that the cause be remanded to the district court of McKinley county with authority in said court to render judgment, subject to its approval, effectuating the agreement reached by the parties, the order of remand heretofore entered on this appeal will be modified to the extent of authorizing said district court so to act in the premises.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, BRICE, and ZINN, JJ., concur.

66 P.(2d) 967

PETTES v. JONES.

No. 4151.

Supreme Court of New Mexico.

March 29, 1937.

J. Benson Newell, of Las Cruces, for appellant.

Wayne C. Whatley, of Las Cruces, for appellee.

BICKLEY, Justice.

Plaintiff (appellee) sued defendant in the district court of Dona Ana county for damages by reason of personal injuries allegedly sustained in an automobile collision. Trial being before a jury, plaintiff had judgment for $375 on the general verdict in his favor for that amount. Defendant appeals and assigns one error, viz., the refusal of the trial court to render judgment in his favor upon the jury's answer to a special interrogatory submitted at his request which he maintains is in irreconcilable conflict with the general verdict.

The evidence is omitted from the record. We have only the pleadings, instructions, general and special verdicts, motions incident thereto, judgment containing order allowing appeal and præcipe. From so much of the record as is before us, it appears the ground of negligence asserted is the claimed careless act of defendant in propelling his automobile into the rear of plaintiff's car, which was traveling in the same direction, causing the injuries complained of.

The defendant, although admitting that his car struck the rear portion of plaintiff's car, as claimed, denied generally the allegation of negligence made by plaintiff. The collision having occurred in the nighttime, the defendant pleaded contributory negligence on plaintiff's part in this: "That at the time of the accident complained of there was no tail light or rear light exhibiting a red or yellow light plainly visible for a distance of five hundred feet to the rear of said car; and in fact there was no bulb in the tail light on the occasion of said accident."

In so pleading the defendant obviously sought to charge a violation of Comp.St. 1929, § 11-847, requiring the presence of taillights on motor vehicles. The trial court charged the jury that failure to observe a statutory duty or requirement was negligence per se. It defined negligence and contributory negligence and "proximate cause" in the usual form and in a manner satisfactory to the parties. The material substance of the instructions was that if the plaintiff sustained the injuries alleged and established negligence of de-

fendant, and plaintiff was injured as a proximate cause of such negligence, the verdict should be for the plaintiff, unless defendant established that plaintiff was negligent at the same time and that plaintiff's negligence proximately contributed to the collision, and if defendant established these things, the verdict should be for defendant.

At defendant's request certain special interrogatories were submitted, reading:

"Special Findings.

"We, the Jury, find the special findings submitted, as follows:

"(a) 'Was Pettes' Truck equipped with a tail light at the time of the accident which exhibited a red or yellow light plainly visible for a distance of 500 feet to the rear of said Truck?' We find and answer: (Signed) No.

"(b) 'Did the failure of Pettes' truck to be equipped with a tail light contribute to any extent to cause the collision?' We find the Answer: (Signed) Yes.

"[Signed] Pedro Maese, Foreman."

Upon the return of such verdicts the defendant moved for judgment non obstante veredicto. This motion was formally denied in the judgment in plaintiff's favor on the general verdict. Claimed error in its denial, as we have hereinabove pointed out, presents the sole question for decision.

We must determine whether the special findings are inconsistent with the general verdict. If so, the former shall control the latter. "Trial Court Rules," § 70-103. However, before declaring a conflict, an effort should be made to reconcile apparent inconsistency. In order to prevail, the special finding should clearly exclude every reasonable conclusion that would authorize the general verdict. Moreover, no presumptions will be indulged in favor of answers to special findings as against the general verdict. But "the very purpose of special findings is to test the validity of the general verdict by ascertaining whether or not it may have been the result of a misapplication of the law to actual findings in material conflict with the findings which in their absence would be implied from the general verdict. In other words, the response of the jury to the special issues or particular questions of fact may show that no judgment can properly be entered in favor of a plaintiff upon a general verdict because the jury has not found in his favor upon some material issue, or has found against him as to some fact fatal to his cause of action." Plyler v. Pacific Portland Cement Co., 152 Cal. 125, 92 P. 56, 59.

Bearing in mind these applicable rules of construction, we are forced to the conclusion that there is here shown such inconsistency as will vitiate the general verdict. The plaintiff is found negligent through failure to comply with the statute requiring taillights. But before that negligence, under instructions given, should bar recovery, it must be such as "combined and concurred with the defendant's neg-

ligence, and contributed to the injury as *a proximate cause* thereof, and as an element without which the injury would not have occurred"; in other words, plaintiff's negligence must have proximately contributed to his injury in order to defeat his recovery.

The general verdict inferentially carried the finding of defendant's negligence and that such negligence was a "proximate cause" of plaintiff's injuries. That inference is no stronger than that the special findings that the failure of Pettes to have his truck equipped with a taillight was negligence and that such failure contributed to the collision carried a finding that such negligent failure of the plaintiff to comply with the statute was a "proximate cause" of such injuries. Neither the general nor special verdict employed the phrase "proximate cause."

So we have a case where it will be important to understand the meaning of the phrase "proximate cause" and the methods of ascertaining its existence in a particular case.

It seems so obvious that the special findings are inconsistent with the general verdict that no argument should be necessary. Since all are not in agreement, it seems advisable to invoke support for our conclusion.

First, there is abundant precedent to support it and none against it. The Supreme Court of Kansas in Lathrop v. Miller (1931) 132 Kan. 425, 295 P. 722, 723, dealt with a similar case. The action was brought by Mary Lathrop against Burke Miller to recover damages sustained to her when an automobile driven by defendant was run against her. She recovered damages and the defendant appealed. With the verdict in favor of plaintiff, there were a number of special findings returned by the jury. One of these was as follows:

"8. Do you find that plaintiff by her own negligence contributed to the injury complained of? A. Yes. * * *

"Upon the evidence the jury has expressly found that plaintiff by her own negligence contributed to her injury. So often has it been decided that special findings in conflict with the general verdict control the general verdict, that citations of authority are hardly justified. * * *

"Assuming that there was negligence, on the part of the defendant, and that the ordinary negligence of the plaintiff contributed to her injury, there is no escape from the conclusion that it bars a recovery of damages for the injuries she sustained. Plaintiff contends that, while the jury found contributory negligence on her part, the finding does not necessarily mean that her negligence was the proximate cause of the injury. Even if [it] was not the primary cause, but did contribute in a degree, it must be interpreted as a proximate and not a remote cause. * * * The effect of the finding is that her acts and omissions contributed directly to the injury, and, where the negligence of the injured person is in part a contributing cause, it is to be regarded as a proximate cause."

In the case at bar, in order for the general verdict to stand, we would have to conclude that the negligence of the defendant was the sole proximate cause of the collision. The jury by its special findings has said that such is not the case.

If the jury believed from the evidence that the defendant was driving so negligently and carelessly that the collision would have occurred even if the plaintiff's truck had been properly equipped with taillights, they would have answered the second interrogatory in the negative. They said that the acts of the defendant and the omission of the plaintiff concurred in causing the collision. To say that the omission of plaintiff with respect to taillights contributed to the collision and concurred with defendant's negligence to cause the injury is to repudiate the idea that the collision would have happened if the plaintiff's truck had been equipped with taillights, so we must conclude that the special verdict carried a finding that but for the negligence of the plaintiff, together with the negligence of the defendant, the collision would not have occurred.

In line with the decision of the Supreme Court of Kansas in Lathrop v. Miller, supra, we find a decision of the Commission of Appeals of Texas, Hines v. Foreman, 243 S.W. 479, 483. Foreman sued Hines as Director General of Railroads to recover damages because of a collision between an automobile driven by plaintiff and one of defendant's trains. Among other defenses, the railroad interposed the defense of contributory negligence on the part of plaintiff based on the allegation that plaintiff was driving his car without having a muffler cut-out thereon as required by law. The court said:

"The first question of importance raised by plaintiffs is embodied in the contention that the finding of the jury upon the use of the muffler cut-out is insufficient to defeat plaintiff's right of recovery because there was no finding that such act was a proximate cause or a proximate contributing cause of the accident. The specific finding is that the running of the car without a muffler 'caused or contributed to cause the injury.' * * * We have reached the conclusion, however, that as applied to the facts in the present case this contention cannot be sustained. The province of the jury is to determine the controlling facts upon which there is a controversy in the evidence. If under the facts of a case the violation of a statute might reasonably be a cause of the accident, but not necessarily a proximate cause thereof, then a jury finding to the effect only that it was a cause, in the absence of a finding that it was a proximate cause, would be wanting in an essential element as a finding of contributory negligence. We are unable to conceive, however, of any theory upon which the jury could find that the failure to use the muffler could cause or contribute to the injury in the present case without doing so proximately. The only possible way in which such failure could contribute to any degree

in causing the injury was in preventing the occupants of the car from hearing, and therefore from discovering, the approach of the train in time to avoid the collision. It is plain from plaintiff's testimony that he neither saw nor heard the train until the car was upon the crossing, when it was too late for him to avoid the accident. The conclusion is irresistible that, if plaintiff had discovered the train in time to have stopped his car, he would have done so and the accident would not have happened. Speculation upon this question would be useless. Furthermore, the finding itself eliminates any question which might arise in this regard. If plaintiff would not have stopped his car even if he had heard the train in time to have done so, then his failure to hear it was a wholly immaterial matter and could not have been in any sense a contributing cause to the injury. *It seems clear to us that the finding that the failure to use the muffler caused or contributed to the injury necessarily includes a finding under the peculiar facts of this case that it was a proximate contributing cause,* and being a violation of a positive statute upon the subject, and therefore negligence per se, contributory negligence of the plaintiff would follow as a matter of law from this jury finding." (Italics ours.)

These observations are very cogent and touch our case in several places. The instinct of self-preservation suggests that defendant did not run into plaintiff intentionally and wantonly, and it is not charged that he did so, and we might paraphrase the language of the Texas Court thus: "If defendant would not have stopped his car even if plaintiff had had tail lights on his automobile, then plaintiff's omission to have such lights was a wholly immaterial matter and could not have been in any sense a contributing cause to the collision." And further paraphrasing: "The only possible way in which plaintiff's omission could contribute in any degree to the collision was in preventing defendant from discovering the presence of plaintiff's car as soon as it might have been discovered if it had been equipped with lights." Drawing upon the most elemental of human experiences pertaining to motor vehicle travel at night, the relationship between darkness and danger, and the relationship between light signals and safety which is so readily apparent to us, must be assumed to have been within the understanding of the jurors as reasonable men and so the special finding must be interpreted in the light of such universal knowledge.

In Foster v. Beckman, 85 S.W.(2d) 789 (the facts being different from those in the case at bar) the Texas Court of Civil Appeals distinguished Hines v. Foreman, but they did not, as they could not, overrule that decision.

In Behymer v. Mosher Mfg. Co. (Tex. Civ.App.) 192 S.W. 1148, the court decided: "An affirmative answer by the jury to a special issue submitted, whether plaintiff's contributory negligence 'caused or contributed to cause' injury, bars plaintiff's recovery, although such special issue did not use the word 'proximately'; proxi-

mateness of the cause being necessarily implied."

The court quotes from an earlier decision (Ratteree v. Galveston, H. & S. A. R. Co., 36 Tex.Civ.App. 197, 81 S.W. 566) the following: "We cannot conceive of negligence that 'caused or contributed' to an injury not being such negligence as must have 'proximately contributed' to the injury." See, also, Anderson v. Southern Kansas Stage Lines Co., 141 Kan. 796, 44 P.(2d) 234; Riley v. Guthrie, 218 Iowa, 422, 255 N.W. 502; Wall v. Cotton et al., 22 Ala.App. 343, 115 So. 690. And see Russell v. Davis, 38 N.M. 533, 37 P.(2d) 536, as to standards of conduct and reciprocal duties of those who travel the highways.

In Bullard v. Ross (1933) 205 N.C. 495, 171 S.E. 789, and Crane v. Carswell (1932) 203 N.C. 555, 166 S.E. 746, the court, dealing with situations almost identical with the case at bar, decided as we do. See, also, Baker v. Wilmington & W. R. Co., 118 N.C. 1015, 24 S.E. 415, a leading case cited in the foregoing North Carolina decisions where the court goes more into detail in stating the reasons for the conclusion, and is of great importance in our considerations because it explains why some courts have expressed opinions which seem at variance with those we here express, the reason in many instances arising from their system of permitting application of the last clear chance doctrine without being pleaded in plaintiff's complaint. Some of the expressions in the opinion are: "Where nothing more appears from the verdict of the jury, or by way of admissions in the pleadings, or in the record or statement of the case on appeal, than that the injury of a complainant was caused by the negligence of the defendant, the plaintiff may of right demand judgment for the damages ascertained by the jury, and for costs. Where it is found, in addition, that the plaintiff's own carelessness contributed to bring about the injury, the court, in the absence of any further finding, must assume that the contributory negligence was a concurrent cause, and give judgment for the defendant."

We venture some further support to our conclusion and the decisions cited drawing upon the principles involved in the method of proving proximate cause.

In our consideration, we eliminate as valueless decisions from jurisdictions where the comparative negligence doctrine prevails, it being inapplicable here; and those jurisdictions where violation of a safety statute is only prima facie evidence of negligence. In New Mexico violation of a safety statute *is* negligence; and also decisions of the courts of those states where the "last clear chance" doctrine is available to plaintiff without being pleaded in his complaint, and must also eliminate decisions from jurisdictions where degrees of negligence are recognized. In Thayer v. Denver & R. G. R. R. Co., 21 N.M. 330, 154 P. 691, it was decided that in this state there is no warrant for classification of negligence into de-

grees, viz., slight, ordinary, and gross, and also that the doctrine of "last clear chance" if relied upon by plaintiff must be pleaded in his complaint.

Prof. Leon Green, author of the work on "Rationale of Proximate Cause," in an article appearing in Vol. 1, Texas Law Review, pp. 243, 423, entitled "Are Negligence and 'Proximate' Cause Determinable by the Same Test?" makes the following statement:

"Our courts and text writers have repeatedly declared in negligence cases, *no fixed standard of conduct having been prescribed,* that the conduct of an ordinarily prudent person under the given circumstances is the standard by which negligence of a particular defendant is to be determined. And that what an ordinarily prudent person would have done under given circumstances is determined by what he should have foreseen as the probable consequence of his conduct. In other words, if an ordinarily prudent person under the given circumstances would have foreseen as a probable consequence of his conduct, hurt to the plaintiff, or some one similarly situated, then defendant owed the duty to exercise care, and failing to do so, is guilty of negligence. (Italics ours.)

"With equal consistency the courts have declared in negligence cases that a defendant is only liable in damages for those consequences that he, as an ordinarily prudent person, should have reasonably foreseen as a probable result of his conduct, and that if given consequences or consequences similar in character, could not have reasonably been foreseen, such are not 'proximate' consequences and cannot be recovered for. In other words the 'probability,' 'foreseeability' or 'anticipation' test is seemingly used both in determining the *existence* of negligence, and in determining *for what consequences* of such negligence a recovery may be had. It might be more accurate to say that our courts have apparently treated the *existence* of negligence and *causal relation* as the same problem, to be solved by the same formula."

We think this is a correct statement of the prevailing rule. See Gilbert v. New Mexico Construction Co., 39 N.M. 216, 44 P.(2d) 489, as to foreseeability as a test of proximate cause.

"Negligence is the proximate cause of an injury when it appears that the injury was the natural and probable consequence (result) of the negligence or wrongful act, and it ought to be foreseen." See Decennial Digests, Negligence, ⚷56(1) et seq.

In Melkusch v. Victor American Fuel Co., 21 N.M. 396, 155 P. 727, 729, we said: "It is well settled that one whose injuries are the proximate result of his violation of a statute is, as a matter of law, guilty of contributory negligence which precludes a recovery for the negligence of another which contributed to the injury."

In Union Stockyards v. Peeler (Tex. Com.App.) 37 S.W.(2d) 126, 128, "proximate result" was thus defined: "Finding that injury was 'proximate result' of act

of negligence requires showing that injury was natural and probable consequence and should have been foreseen."

In Kelsey v. Rebuzzini, 87 Conn. 556, 89 A. 170, 52 L.R.A.(N.S.) 103, the court said: " 'Cause' and 'consequence' are correlative terms, one implying the other, and when an event is followed in natural sequence by a result it is adapted to produce, or aid in producing, that result is a consequence of the event, and the event is the cause of the result."

We quote from Moore v. Lanier, 52 Fla. 353, 42 So. 462, 465, as follows: "Proximate cause is that which naturally leads to or produces, or contributes directly to producing, a result such as might be expected by any reasonable and prudent man as likely to * * * follow and flow out of the performance or nonperformance of any act."

"When there is danger of a particular injury which actually occurs, we must surely say that it is the usual, ordinary, natural, and probable result of the act exposing the person or thing injured to the danger." 22 R.C.L., Proximate Cause, § 12.

"The meaning of proximate cause in this connection (causal relation) has been explained as follows: If the injury complained of is a natural and probable consequence of a violation of the statute, then that violation is correctly taken as the proximate cause of the injury. If the very injury has happened which was intended to be prevented by the statute law, that injury must be considered as directly caused by the nonobservance of the law." 20 R.C.L., Negligence, § 37.

Prof. Green's objection to the application of the probable consequence rule as a test of accountability is to those decisions which attempt to *limit* a plaintiff's recovery to "probable" consequences. He says:

"The affirmative aspect of the rule, viz., that a defendant is responsible for the foreseeable consequences of his wrong is admittedly correct. The negative aspect, viz., that a defendant is not responsible for the unforeseeable consequences of his wrong is thought to be unsound and is the part of the rule which is thought to justify discussion."

He quotes Shearman and Redfield, Negligence (6th Ed.) Vol. 1, par. 29a, as follows: "The affirmative of the rule of foreseen consequences is doubted by none, that is, that every one guilty of the violation of legal duty to another is liable for all the consequences of such violation of duty as could have been foreseen by a person of ordinary prudence in the defendant's position at the time as probable."

Let it be remembered that we have heretofore been referring to the method of ascertaining the existence of negligence and proximate cause *when no fixed standard of conduct has been prescribed.*

The violation of a statutory standard of conduct is negligence per se. By this expression is not meant that a new kind of negligence has been created. It is a process by which the existence of negligence is to be ascertained. This thought is elaborated

in Platt v. Southern Photo Material Co., 4 Ga.App. 159, 60 S.E. 1068, 1070: "Every violation of any of those duties of omission or commission, which, arising from man's state as a social being, have received recognition by the law of the land, either generally or specifically, is an act of negligence. So long as these duties remain undefined or defined only in abstract general terms a breach is not properly denominated negligence per se; but when any specific act or dereliction is so universally wrongful as to attract the attention of the lawmaking power, and this concrete wrong is expressly prohibited by law or ordinance a violation of this law, a commission of the specific act forbidden is for civil purposes correctly called negligence per se. In those jurisdictions in which the application of the facts to the law rests with the jury, the court cannot primarily declare that any particular concrete act or state of circumstances amounts to a breach of duty unless the law so expressly declares. This finding is left to the jury; but, if the law itself puts its finger on a particular thing, and says, 'This is wrong,' the court may also (for there is no question as to a fact which the law says exists) put its finger on that same thing and say, 'This is negligence—negligence per se.' This artificial distinction between negligence per se and negligence not per se respects, therefore, merely the method by which the existence of negligence is to be ascertained in particular instances."

Not every violation of a legislative enactment will create civil liability. The rules for determining civil liability from the violation of a statute are thus set forth in Restatement of the Law, Torts, Negligence:

"§ 286. The violation of a legislative enactment by doing a prohibited act, or by failing to do a required act, makes the actor liable for an invasion of an interest of another if:

"(a) the intent of the enactment is exclusively or in part to protect an interest of the other as an individual; and

"(b) the interest invaded is one which the enactment is intended to protect; and,

"(c) where the enactment is intended to protect an interest from a particular hazard, the invasion of the interests results from that hazard; and,

"(d) the violation is a legal cause of the invasion, and the other has not so conducted himself as to disable himself from maintaining an action."

It will frequently be a question of mixed law and fact whether the violation of a statute creates civil liability in a particular case.

"Two factors enter into the question of law and fact; first, whether the particular act has been performed or omitted; second, whether the performance or omission of such act was a legal duty, the first of which is a question of fact, the second, a question of law." Thompson on Negligence, § 7408.

The instructions of the court will necessarily be adapted to the facts in testimony. Properly the trial court considered the only question of fact relative to plaintiff's negligence in the case at bar for the jury's deter-

mination was whether he had violated statutes properly to be invoked as material in the case. This was the trial court's view, unobjected to.

How was the court to determine whether it was proper to submit the instruction that if either party had violated a statutory standard of conduct that he was guilty of negligence as a matter of law? Manifestly the judge must consider the statute and the facts in testimony and determine whether (a) the enactment is exclusively or in part to protect an interest of the parties in the case on trial, and (b) whether the interest claimed by the parties, or either of them, was one which the enactment is intended to protect.

How is the judge going to determine these factors except by drawing upon his knowledge of human experience and by the process of applying the test of whether the event which has happened is of the kind designed by the statute to be prevented and is the probable consequence of a violation of the statute? But it was properly submitted to the jury whether, if the jury found that the plaintiff violated a statute, such negligence caused or contributed to cause the collision. It being found by the jury that the violation of the statute did contribute to cause the collision, and the court having already determined that the statute was designed to prevent just that sort of collision, then using the same process the court was circumstanced to find that the quality of proximateness attached to the cause. The jury, having found that the violation of the statute contributed to cause the collision, would not be permitted to say that the quality of proximateness did not characterize the "cause" where the dereliction has been considered so universally wrongful as to attract the attention of the Legislature to the end that it has been enacted that such dereliction is a criminal act, and the court is able to see by applying the statute to the wrongful act that a civil liability has been created. In other words, the court, having found that if the plaintiff violated the statute, he was under the facts guilty of negligence as a matter of law, was by the same token able to say that the quality of proximateness attached to the cause.

Upon the record before us, it was the plain duty of the trial court to sustain defendant's motion for judgment notwithstanding the verdict.

The failure of the minority to duly appreciate that the determination of "proximateness" as a characterization of "cause" requires the determination of the quality of conduct involved is we believe the reason for their inability to agree with us. Proximateness is qualitative and not quantitative.

The question is asked: "Is there, then, one rule for the plaintiff and another for the defendant in this character of case?" We go no further than to say that in the sanctuary of the law a violator of the law seeking relief from the consequences of his own act does not stand in high favor. The reason for this policy of the law has been variously stated as that the plaintiff is a joint tort-feasor seeking to recover indemnity for his own wrong, and that the plain-

tiff falls under the maxim "volenti non fit injuria," and that he who comes into court must come with clean hands, and still another statement is that plaintiff has assumed the risk of his own wrongdoing. Mr. Street in his "Foundations of Legal Liability," Vol. 1, page 163, says: "The idea involved in the maxim (volenti non fit injuria) is evidently a part of the same scheme of legal ideas as contributory negligence, and occupies an analogous place."

The plaintiff is told that if he goes on the highways in the nighttime with his motor vehicle without taillights he will not only violate the penal code, but he will run the risk of collisions from overtaking cars. Notwithstanding this caution, he says: "I will drive on the highway at night without tail lights, and I will risk the consequences." If a collision occurs to which his dereliction contributed, and he is injured, and comes into court seeking indemnity, he ought to be held to the duty of showing that his dereliction had nothing to do with the injury.

From these considerations arises the principle that if plaintiff's negligence proximately contributes to his injury, the extent or degree of the contribution is immaterial. The reason for this rule is that there can be no apportionment of the damages, and not that the negligence of the plaintiff justifies or excuses the negligence of the defendant. It merely allows the defendant to escape judgment because, from the nature of the case, it is unable to ascertain what share of the damage is due to his negligence. We think this is the reason which prompted the Circuit Court of Appeals of the Eighth Circuit, in Atchison, T. & S. F. R. Co. v. Merchants' Live Stock Co., 293 F. 987, 990, to say: "It is, however, the general rule of law that one whose negligence directly contributes to his injury cannot recover damages of another whose negligence substantially contributes to cause it, even though the carelessness of the latter was the more proximate or the more effective cause of it."

Among the cases cited in support of the foregoing is Spence v. El Paso & S. W. Co., 28 N.M. 132, 207 P. 579, 580.

In our neighboring state of Oklahoma, the Supreme Court in Hailey-Ola Coal Co. v. Morgan, 39 Okl. 71, 74, 134 P. 29, 30, said: "The law will not weigh or apportion the concurring negligence of a plaintiff and defendant. There can be no recovery by a plaintiff who has been guilty of contributory negligence. [Citing cases.] Hence follows, logically, the idea that in case of an injury proximately caused by want of ordinary care on both sides, however slight such want of care may be on the part of the injured party, in the law it is damnum absque injuria. In other words, the doctrine of comparative negligence has no place in our system."

One other question requires consideration. It is suggested that since the evidence is not in the record, then, for all we know, the collision may have occurred under some of the conditions heretofore mentioned where the presence of taillights on plaintiff's car would have been of no benefit to defendant in enabling him to avoid

the collision. Aside from the answer Judge McClendon made to such a query in Hines v. Foreman, supra, that the finding itself eliminates such a question, we find another answer. In Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 815, it appears that plaintiff was driving in a buggy at night without lights. The defendant was charged with negligence and plaintiff was charged with negligence in traveling at night without lights. The defendant requested a ruling that the absence of a light on plaintiff's vehicle was "prima facie evidence of contributory negligence." This instruction was refused. The plaintiff then requested a charge that "the fact that the plaintiff's intestate was driving without a light is not negligence in itself," and to this the court acceded. Judge Cardozo, writing the opinion for the court, said: "We think the unexcused omission of the statutory signals is more than some evidence of negligence. *It is negligence in itself.* Lights are intended for the guidance and protection of other travelers on the highway. Highway Law, § 329a. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another that he may be preserved in life or limb, is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform."

Judge Cardozo, after discussing the difference between what is negligence in itself and what is merely evidence of negligence, went on to say:

"We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals. [Citing cases.] If nothing else is shown to break the connection, we have a case, prima facie sufficient, of negligence contributing to the result. There may, indeed, be times when the lights on a highway are so many and so bright that lights on a wagon are superfluous. If that is so, it is for the offender to go forward with the evidence, and prove the illumination as a kind of substituted performance. The plaintiff asserts that she did so here. She says that the scene of the accident was illumined by moonlight, by an electric lamp, and by the lights of the approaching car. Her position is that, if the defendant did not see the buggy thus illumined, a jury might reasonably infer that he would not have seen it anyhow. We may doubt whether there is any evidence of illumination sufficient to sustain the jury in drawing such an inference; but the decision of the case does not make it necessary to resolve the doubt, and so we leave it open. It is certain that they were not required to find that lights on the wagon were superfluous. They might reasonably have found the contrary. They ought, therefore, to have been informed what effect they were free to give, in that event, to the violation of the statute. They should have been told, not only that the omission of the lights was negligence, but that it was 'prima facie evidence of con-

tributory negligence'; i. e., that it was sufficient in itself unless its probative force was overcome (Thomas, J., in court below) to sustain a verdict that the decedent was at fault."

During our research in this case we have been impressed by the large number of statements of the courts to the effect that the violation of a safety statute is contributory negligence, and by others that it is equivalent to contributory negligence.

"The weight of authority holds that a plaintiff's breach of a criminal statute is equivalent to contributory negligence." 27 Harvard Law Review 93.

And see Padilla v. Atchison, etc., Railway Co., 16 N.M. 576, 120 P. 724, stating: "Failure on the part of deceased so to exercise due care *amounts to contributory negligence.*"

And see Melkusch v. Victor American Fuel Co., 21 N.M. 396, 155 P. 727, 729, where it was said: "It is well settled that one whose injuries are the proximate result of his violation of a statute is, as a matter of law, guilty of contributory negligence which precludes a recovery for the negligence of another which contributed to the injury."

We think that when the courts used that form of expression they meant more than that the violation of such a statute was negligence, and when they say that the violation of such a statute by the plaintiff was contributory negligence, there is embraced a presumption of causation with an absolute finding of negligence. It seems to us that Judge Cardozo thus appreciates the situation when he said: "To say that conduct is negligence is not to say that it is always contributory negligence."

This is eminent authority for the suggestion that the phrase "contributory negligence" embraces more than the word "negligence." We think the explanation is to be found in Judge Cardozo's argument in Martin v. Herzog, supra, as follows: "We think, however, that evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals."

That is, as we have heretofore said in the case of the violation of such a safety statute as we here have under consideration, the "probable consequence" rule does the double duty of stamping the violation eventuating into a result sought by the statute to be avoided as negligence and also establishing prima facie causal relation between the collision and the neglect of duty by the plaintiff.

In Encyclopedia of Evidence, Vol. 2, p. 947, "Cause," it is said: "Where a cause is shown which might produce an accident and an accident does happen, the presumption is that the accident was due to such cause." See, also, Corcoran v. Traction Co., 15 N.M. 9, 13, 103 P. 645; Puget Sound Traction, Light & Power Co. v. Hunt, 223 F. 952 (C.C.A.)

In Vol. 8, Standard Encyclopedia of Evidence, "Negligence," discussing presumptions, stating that there are none from mere fact of injury, it is stated at page 870: "Where, however, an act or omission of the defendant that is negligent in itself as matter of law constitutes a part of the res gestae, it will be presumed that it was also a proximate cause thereof."

It is suggested that though Justice Cardozo stated a just rule in Martin v. Herzog, that it is not applicable here because it is the law in this jurisdiction that contributory negligence being an affirmative defense, the burden of proving it rests on the defendant. Padilla v. Atchison, etc., Railway Co., 16 N.M. 576, 120 P. 724. (This may be true and yet not applicable or decisive in the case at bar), whereas the statement of Justice Cardozo is in harmony with the practice said by some to prevail in New York, which casts upon the plaintiff the burden of establishing his freedom from negligence. In the first place, Mr. Blashfield, in § 6130, Vol. 9, of Cyclopedia of Automobile Law and Practice, Permanent Edition, does not so understand it, and, after referring to the rule that the person seeking to recover on account of the negligent acts of another has the burden of proof to establish negligence and also causal relation of negligence to injury, takes up the question of "shifting of burden as to proximate cause" and says:

"If an automobile collision should occur on the highway, plaintiff could make out his case after proving the fact of collision, followed by injury, by showing that the speed was above the rate permitted by statute, and the burden would then be upon defendant to prove that the excessive speed was not the cause of the injury; and similarly, where the burden rests upon the defendant to show that negligence of the injured person in the premises was a proximate cause of the injury, the burden may shift.

"Thus, where one riding in a buggy operated without lights was injured in a collision with an automobile under circumstances warranting the inference that the lack of lights was the proximate cause of the collision, the burden was on plaintiff to show that the other lights on the highway, or other circumstances, were sufficient to rebut the presumption." Citing Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814.

If the practice in New York casts upon the plaintiff the burden of establishing his freedom from negligence, there would seem to be no occasion to say that the burden shifts to the plaintiff from the defendant.

However that may be, discrimination must be exercised in using the terms "burden of proof" and "weight of evidence." While burden of proof remains on the party affirming a fact in support of his case, and is not changed in any aspect of the case, except by legal presumption, the weight of evidence shifts from side to side in the progress of the trial, according to the nature and strength of the evidence offered in support or denial of the main fact to be established. During the progress of a trial it often appears that a party gives evi-

dence tending to establish his allegation, sufficient, it may be, to establish it prima facie, and it is sometimes said that the burden is then shifted. All that is meant by this is, that there is a necessity for evidence to answer the prima facie case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial. See Jones on Evidence (2d Ed.) § 483.

In the sense that the burden rests upon the defendant of ultimately producing conviction, the statement in Padilla v. Atchison, etc., Railway Co., supra, is satisfactory. But where defendant introduces evidence sufficient to make out a prima facie case of contributory negligence by reason of the violation of a safety statute and it is plain to be seen that the injury or consequence was of the kind anticipated by the Legislature from a violation of the statute, it would seem practical and appropriate to require of the wrongdoer that he show excuse or justification for his conduct if that be material, and also that his unlawful act in no way contributed to his injury.

The general rule announced in Padilla v. Atchison, etc., Railway Co., supra, that the burden of showing contributory negligence is on defendant is based upon presumptions. The argument runs thus: It is the duty of a traveler upon a public road approaching a railway crossing to exercise care for his own safety; failure on the part of an injured person so to exercise due care amounts to contributory negligence on his part and will bar a recovery; in the absence of evidence to the contrary, there is a presumption that the injured person stopped, looked, and listened; this presumption is founded on the law of nature, that is the instinct of self-preservation; in the absence of any evidence as to what the injured person did just prior to the accident, it is not to be presumed that he did not stop, look, and listen; therefore the burden of showing that the injured plaintiff did not exercise the care the law requires of him is on the defendant. See 45 C.J., Negligence, §§ 740 and 741.

When the defendant has discharged this burden, what then? In Padilla v. Atchison, etc., Railway Co., supra, the court did not have under consideration the situation existing in the case at bar. It is doubtless proper at the commencement of a trial to clothe the plaintiff with the presumption of exercise of due care arising from the presumptions of right acting and that every person performs his duty and the instinct of self-preservation and the desire of men to avoid danger. The burden was on defendant to produce evidence to overcome this presumption. That much was required of the defendant in Martin v. Herzog, supra. As heretofore pointed out, we think upon reason and common sense and precedent that the inference which arises from the violation of the safety statute at the very moment of the plaintiff's injury requires, as Justice Cardozo said in Martin v. Herzog, "the offender to go forward with the evidence," and prove that his offense had no

bearing upon the collision. In other words, the presumption that the plaintiff was in the exercise of due care having been overcome, the vitality of the rule has been spent, and does not carry over to other phases of the case where the reason for the rule does not exist. While the reasons for the rule that there is a presumption that a plaintiff has been in the exercise of due care are forceful, there is no presumption that his proven negligence eventuating into a result consistent therewith did not proximately contribute to the result. Considerations of common sense, logic, convenience, and precedent are to the contrary and strongly support the view that the negligence and a consistent result being shown, the presumption is that the result was proximate.

In the case at bar, however viewed, the defendant discharged the burden of establishing that the plaintiff was guilty of contributory negligence. The court charged the jury that the violation of the saftey statute requiring a person operating an automobile on the highway in the nighttime to have the same equipped with proper taillights was guilty of negligence as a matter of law. The jury answering interrogatory (a) in the affirmative found the plaintiff to be guilty of contributory negligence. It further found the causal relation between the negligence and the collision. If the plaintiff brought forward any evidence to show that there were other lights on the highway or other circumstances which would render the absence of taillights immaterial, the jury evidently did not think such evidence produced conviction because they found that the absence of the taillight contributed to cause the injury. If there was any such evidence of an excusatory nature, appellee has failed to bring it into the record.

In Blashfield's Cyclopedia of Automobile Law and Practice (Permanent Ed.) § 6130, it is said: "The burden of producing evidence to show the causal relation between the negligence charged and the injury may shift during the trial. Proof of the violation of a law or ordinance, giving rise to the presumption that such violation proximately caused the injury, causes the burden to shift to the other party to overcome such presumption." Citing Moore v. Hart, 171 Ky. 725, 188 S.W. 861.

Blashfield at § 6127 says: "While the plaintiff's negligence may consist in the violation of a rule of the road embodied in a statute or ordinance, he may avoid the defense of contributory negligence by showing that his disobedience in no way contributed to his injury." Citing Benson v. Anderson, 129 Wash. 19, 223 P. 1063, 1065.

The Oregon Supreme Court in Landis v. Wick, 57 P.(2d) 759, indicate that it has been the uniform practice in Washington to place the burden on the defendant of proving contributory negligence of the plaintiff if it is relied upon by defendant. Notwithstanding this, the Washington court in Benson v. Anderson, supra, a case in which the plaintiff was shown to be violating a statutory rule of the road at the time of the injury, held that the plaintiff could not

therefore "recover for the injury he suffered while so violating the statute in the absence of proof showing that his act did not contribute to his injury."

The court said:

"The Legislature has enacted certain 'rules of the road' for the government of the conduct of persons using the highways of the state, and has declared that it shall be the duty of every person to observe them. * * *

"In Johnson v. Heitman, 88 Wash. 595, 153 P. 331, we said that this court 'is definitely committed to the rule that "a thing which is done in violation of positive law is in itself negligence," in the absence of pleading and proof of such peculiar facts as would tend to justify the violation.' * * *

"The statutory enactments regulating traffic upon the public highways are made to be obeyed. They are the outgrowth of necessity. On the observance of them depends the safety of the users of such highways. Failure to obey them not only endangers the safety of the person guilty of the disobedience, but it endangers the safety of others using them in a lawful manner. Courts, therefore, should not look lightly upon infractions of these regulations. One injured while in the act of disobedience of them should be compelled to show with clearness that his act in no way contributed to his injury." See, also, Schick v. Jenevein, 145 La. 333, 82 So. 360.

We are distinctly in sympathy with the thought expressed in Wall v. Cotton et al., supra. Defendant was guilty of negligence in failing to have his car equipped with lights while operating same in the nighttime. On the other hand, the court said it was clear that plaintiff was himself guilty of negligence for a violation of the same statute violated by defendant, and that this negligence and violation proximately contributed to the injury to his property. The court further said: "The lawful traveler has a right to assume that the entire width of the roadway is free from unlawful obstruction. So, while it is clear that defendant's truck was being operated unlawfully and struck plaintiff's car and as a proximate result injured it, it is equally clear that the injury would not have occurred if plaintiff had not been guilty of a violation of a similar statute which contributed proximately to the injury. Both parties were guilty of negligence and of a misdemeanor under the statute. Code 1923, § 3333. As a proximate result both parties were injured by having their cars smashed. They stand before the court 'in pari delicti.' Here the law finds them, and here the law leaves them."

The jury having found a causal relation between the negligent act of plaintiff and the collision, and it appearing that the collision is a natural and probable result of the negligent act, and it conclusively appearing that the plaintiff ought to have foreseen consequences of that kind, then, as a matter of course, the cause was proximate. See Thurman v. Chandler, 125 Tex. 34, 81 S.W.(2d) 489.

In view of all of the foregoing, it is our conclusion that the judgment must be reversed and the cause remanded with direction to enter judgment for the defendant.

And it is so ordered.

HUDSPETH, C. J., concurs.

ZINN, Justice (specially concurring).

The law as enunciated by Mr Justice SADLER is sound law, but he fails to apply it properly to the facts in the instant case.

Ordinarily, if the negligence of the plaintiff contributed "in any degree" or "to any extent," such negligence, when so found by a jury, would be an insufficient finding of contributory negligence to bar recovery for the negligence of the defendant. Ordinarily, such a specific finding could be reconciled with the general verdict. A finding by the jury that the negligence of the plaintiff contributed "in any degree" or "to any extent," in this jurisdiction, does not mean that the negligence of the plaintiff was the efficient or proximate cause of the injury of which he complains.

However, I base my concurrence in the result arrived at by Mr. Justice BICKLEY in this case on the law of negligence as held by our own court. We enunciated the rule in Thayer v. Denver & R. G. R. Co., 21 N.M. 330, 154 P. 691. If the negligence of the plaintiff, which continues concurrently with the negligence of the defendant, contributed proximately to the injury of which the plaintiff complains, he, the plaintiff, cannot recover. In the case of Mayfield v. Crowdus, 38 N.M. 471, 35 P. (2d) 291, we held that *any* negligence of the plaintiff which contributed proximately and directly to cause the injury of which the plaintiff complains will bar recovery.

Here the jury brought in a verdict that the absence of the plaintiff's taillight contributed to the injury of which the plaintiff complains. The absence of a taillight which contributes to a rear-end collision is not a remote or probable cause, but is a proximate cause of the injury complained of. In other words, either the presence or absence of the taillight can either make no difference whatsoever in contributing to the injury complained of by the plaintiff, or it was the proximate cause. There can be no remote or probable cause as applied to the facts here. If its absence contributed to the injury at all or to "any extent" as found by the jury, then it contributed proximately and not remotely or probably.

For example: The absence or presence of a taillight on the car of the plaintiff could make no difference to a drunken or grossly negligent defendant. Its absence or presence in a case of that kind could not contribute in the slightest degree to the negligence of the defendant.

On the other hand, the driver of an automobile at dusk, without a taillight, invites rear-end collisions. The absence of a taillight, under such circumstances, when the jury says that it contributed in some degree to the injury complained of by the plaintiff, must be deemed the proximate cause or not at all.

In this jurisdiction the negligence of the plaintiff must enter into and form a part of the efficient cause of the injury before it will bar an action. Either this court must shut its eyes and say we do not know that which the average human being knows, or else take judicial notice of the fact that the absence of a taillight on an automobile driving at dusk is tantamount to a "keg of dynamite" on the highway, not only dangerous to the owner and occupant, but to every motorist on the highway, and is an invitation to collision and disaster. The absence of such taillight may not be the direct and only cause of the injury, but if its absence enters into and forms a part of the efficient cause of the injury complained of, it is a bar to recovery. To my mind the specific and general verdicts are irreconcilable.

By way of analogy, the pulling of the trigger on a loaded gun may be found by a jury to contribute in some degree to the death of a person struck by the bullet. The jury might say that the leaden ball entering the vital organ is the direct and positive cause of the death. Ought we to shut our eyes and say that the pulling of the trigger (though found by the jury to have contributed in some extent only) does not enter into and form a part of the whole efficient cause of the death.

The minds of reasonable men cannot differ in holding that the plaintiff, a driver of an automobile in the dusk of evening, on a much traveled highway, driving without a taillight, is guilty of conduct which falls below the standard to which he should conform, not only for his own protection, but which conduct is a legally contributing cause, co-operating with the negligence of the defendant, in bringing about the injury of which the plaintiff complains. The absence of a taillight under such circumstances is a substantial factor in bringing upon him the calamity for which he seeks money damages. If it is a factor in "any" degree, it is nothing else but a substantial factor, a proximate cause, and not a remote or probable cause.

To my mind this is sound law irrespective of any statutory ban against driving without a taillight, which statutory prohibition makes driving of a car without a taillight negligence per se. To my mind when a jury brings in a verdict that the absence of the taillight contributed in "any extent" to the injury complained of, such "any extent" means proximate cause. I cannot conceive of a case where the absence of a taillight which contributes to the injury complained of does not enter into and form a part of the efficient cause of the injury.

In the instant case, inasmuch as to my mind the special and general verdicts are irreconcilable, I concur in the result of the opinion of Mr. Justice BICKLEY.

SADLER, Justice (dissenting).

While it is not easy to determine the exact theory of the majority opinion, written by Mr. Justice BICKLEY, it fairly appears that it is predicated upon one or the other of two views, either of

which is untenable if long established governing principles are to be preserved. One view relates to the construction of general and special verdicts; the other has to do with proximate causation in the law of negligence.

The question of causation as presented in this case in reality involves the settlement of a single issue; namely, whether negligence is actionable if it contributes "to any extent" or "in any degree" to cause an injury. It is only in its implications that the prevailing opinion takes the affirmative of this proposition generally. But its whole weight is cast in support of such a proposition in its application to the facts of this case. For of what avail is it to concede that proximate causation must exist to render given negligence actionable; that its contribution merely to some extent, or in a slight degree, will not suffice; if in the same breath it is declared it cannot contribute to any extent without having contributed proximately.

In what thus far has been said I have spoken generally of the law of negligence without differentiating between "negligence" and "contributory negligence." I think the majority agree that there is no substantial difference between them as respects the application to either of controlling principles. A relationship of proximate cause, shown by the evidence, between the negligent act and the injury always has been held absolutely essential to recovery. If contributory negligence be not involved, a defendant's negligence must be established as *the* proximate cause to warrant a recovery. If involved, it must appear as *a* proximate cause concurring with that of defendant to produce the injury complained of before operating to bar recovery. So that as respects causal relationship between the act and the injury there is no essential difference.

In Anderson on "An Automobile Accident Suit," § 745, pp. 896, 897, the author states: "The great weight of authority holds that before contributory negligence will operate to bar a recovery it must have been an efficient or a proximate cause of the injury; and whatever language is used with respect to contributory negligence it will be seen, when it is analyzed, that in order for contributory negligence to operate as an efficient bar to the plaintiff's recovery it must have been a proximate cause of his injury."

And on page 898 of the same text, the author says: "Some courts, by reason of a mis-use of language, have stated the law to be that there can be no recovery if the negligence of the plaintiff contributed in the least degree to the accident. But it does not take an extended analysis or examination to reach the conclusion that such statement is unsound, since negligence and contributory negligence are not essentially different."

In Foster v. Beckman (Tex.Civ.App.) 85 S.W.(2d) 789, 793, in which a writ of error was refused by the Supreme Court of Texas, a very recent case of which I shall have more to say later, because it deals with findings claimed to be in con-

flict in exactly the same respect here urged, the court said: "Suppose the findings for the appellee had been that the appellant was negligent, and that such negligence contributed to appellee's injuries but was not the proximate cause of same; could it be seriously contended that any court would order a judgment entered for plaintiff upon such findings? Is there, then, one rule for the plaintiff and another for defendant in this character of case? The above quotations demonstrate that there is not, if such a plain proposition needs any demonstration."

In the jurisprudence of our own state we have always recognized the rule, regarded as elementary, that the act relied upon as negligent must appear as the proximate cause of the injury complained of before a plaintiff can recover. In Maestas v. Alameda Cattle Co., 36 N.M. 323, 14 P.(2d) 733, 735, we quoted approvingly from the early case of Lutz v. Atlantic & Pacific R. Co., 6 N.M. 496, 30 P. 912, 16 L.R.A. 819, a definition of proximate cause as that "cause which, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred." And because a relation of proximate cause between the alleged negligent act of the defendant and decedent's death was not shown by the pleading involved in the Lutz Case, our Territorial Supreme Court held a demurrer thereto was properly sustained. Our adherence to the doctrine of proximate cause as an essential to recovery in negligence cases is reaffirmed as lately as the case of Gilbert v. New Mexico Construction Company, 39 N.M. 216, 44 P.(2d) 489.

Nor have we ever recognized any distinction in its application to cases involving contributory negligence. In Thayer v. Denver & R. G. R. Co., 21 N.M. 330, 154 P. 691, 695, we said:

"Where an action is predicated upon an omission of duty, in such a case it properly belongs to and is classified in the field of negligence. To such an action contributory negligence on the part of the plaintiff, which continues concurrently with the negligence of the defendant and contributes *proximately* to the injury, is a valid defense." (Italics mine.)

See, also, Thompson v. Albuquerque Traction Co., 15 N.M. 407, 110 P. 552; Spence v. El Paso & S. W. Co., 28 N.M. 132, 207 P. 579; Mayfield v. Crowdus, 38 N.M. 471, 35 P.(2d) 291, 294.

In the case last cited, Mayfield v. Crowdus, decided very recently, we said: "For the reason indicated and for the purposes of this case it must be considered that any negligence of plaintiff contributing directly and *proximately* to cause the injuries complained of will suffice to defeat recovery." (Italics mine.)

I stand now where this court always has stood, unswerving in adherence to the doctrine that proximate causation between the act or omission and the injury is indispensable either to sustain recovery in the ordinary negligence case or to bar

it where contributory negligence is interposed as a defense.

The "any degree" theory in the law of contributory negligence is condemned by a learned writer on the subject. In 1 Thompson's Commentaries on the Law of Negligence, § 170, pp. 167–169, the author has this to say: "According to the rule which prevails in Courts of Admiralty especially in case of collision, if both vessels are in fault, the loss is divided between their respective owners, according to their respective measure of negligence; but, according to early statements of doctrine in the English Court of Queen's Bench, still frequently repeated in American courts, but really no longer law, in courts of common law, except in two or three jurisdictions, the plaintiff has no remedy if his negligence, that is, if his want of ordinary care, *in any degree* contributed to the injury. Some of the cases say that if the negligence of the plaintiff, or the person killed or injured, contributed in any degree, *how ever slight,* to produce the injury, there can be no recovery. But this doctrine, which visits upon the plaintiff or person injured all the consequences of the defendant's negligence, although the plaintiff's negligence may have been slight and trivial, and that of the defendant gross and wanton, is cruel and wicked, and shocks the ordinary sense of justice of mankind. Such a rule finds no proper place in an enlightened system of jurisprudence."

Nor is it accurate, as Mr. Thompson points out, to say that if a plaintiff by his conduct "contributed" to his injuries, he cannot recover.

"This statement of the principle is incorrect. In many cases where the plaintiff's conduct was to some extent contributory to his injury he has been allowed to recover. In fact, it would be difficult to conceive of any case in which the conduct of the party injured might not, in some sense, be said to have 'contributed' to his injuries." Id. § 218, pp. 212, 213.

"The plaintiff's fault does not affect his right of action unless it *proximately* contributed to his injury. It must be a proximate cause in the same sense in which the defendant's negligence must have been a proximate cause in order to give any right of action." 1 Sherman & Redfield on the Law of Negligence (6th Ed.) § 94.

In this connection we refer also to the illuminating opinion of the Supreme Court of South Carolina in the case of Jeffords v. Florence County, reported in 165 S.C. 15, 162 S.E. 574, 81 A.L.R. 313.

Notwithstanding these statements from texts of the highest standing, as pointed out by Mr. Thompson, decisions are to be found declaring that if plaintiff's negligence contributed "in any degree," or "in the least degree" to cause the injury, he cannot recover. See Goldschmidt v. Schumann, 304 Pa. 172, 155 A. 297; Merrihew's Adm'r v. Goodspeed, 102 Vt. 206, 147 A. 346, 66 A.L.R. 1109. Whereas other decisions representing the great weight of authority hold it to be an erroneous statement of the law to instruct or assert that a plaintiff is

barred of recovery if his own negligence has contributed "in any degree," or "in the least degree," to the injury.

"It is not sufficient to bar an action that contributory negligence may contribute 'in the least degree' or 'in any degree' or that it merely 'contributes' to the accident or happening. It must enter into and form a part of the efficient cause thereof before it will bar an action if one otherwise could be maintained." (Citations omitted.) Carr v. City of St. Joseph (Mo.Sup.) 225 S.W. 922, 923.

See, also, Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988; Smirnoff v. McNerney, 112 Conn. 421, 152 A. 399; Fulton v. Chouteau County Farmers' Co., 98 Mont. 48, 37 P.(2d) 1025; Liske v. Walton, 198 N.C. 741, 153 S.E. 318; Sharp v. Russell, 37 Ohio App. 306, 174 N.E. 617; Chapman v. Blackmore, 39 Ohio App. 425, 177 N.E. 772; Price v. Gabel, 162 Wash. 275, 298 P. 444.

It is, no doubt, this wealth of eminent authority rejecting as unsound the "any extent" or "slightest degree" doctrine of causation in the law of negligence, whether primary or contributory, to which the prevailing opinion adverts in conceding that "some courts have expressed opinions at variance with those we here express." If so, I do not deem convincing the reason advanced for eliminating "as valueless decisions from jurisdictions where * * * the 'last clear chance' doctrine is available to plaintiff without being pleaded in the complaint." Any implication that a lesser degree of causation than that of proximateness is effectual in states such as New Mexico which require last clear chance to be specially pleaded in the complaint than prevails in states permitting the issue to arise under merely general allegations of negligence and a denial thereof, rests on a false assumption. This court, as shown from the earliest cases dealing with the subject, has supported the rule of proximate causation. And as may be ascertained by a mere reference to them, the following decisions from other states listed in 45 C.J. 1102 as in line with New Mexico in the requirement of specially pleading last clear chance in the complaint, cling with steadfastness to the requirement of proximate causation, to wit: Fulton v. Chouteau County Farmers' Co., 98 Mont. 48, 37 P.(2d) 1025; Chapman v. Blackmore, 39 Ohio App. 425, 177 N.E. 772; Sharp v. Russell, 37 Ohio App. 306, 174 N.E. 617; Rice v. City of Portland, 141 Or. 205, 7 P.(2d) 989, 17 P.(2d) 562; Foster v. Beckman (Tex.Civ.App.) 85 S.W.(2d) 789; Southland-Greyhound Lines, Inc., v. Richardson, 126 Tex. 118, 86 S.W.(2d) 731.

No doubt, as stated by Mr. Thompson, much of the confusion encountered is due to a failure to mark the distinction between negligence of the plaintiff and its causal connection with the result.

"The foregoing cases conduct the mind to a distinction, a failure to regard which has constantly confused the minds of counsel, judges and juries. It is, that the *neg-*

ligence or fault of the plaintiff or person injured is one thing, and the *causal connection* between that negligence or fault and the catastrophe is another." 1 Thompson on Negligence, § 229.

In so far as the phase of the doctrine here involved is concerned, we think the formula given in Restatement of the Law, under the subject, "Torts," is sound and represents as satisfactory a statement of the true rule as is to be found. In section 463 of this text contributory negligence is defined in the following language, to wit: "Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the plaintiff's harm."

And at section 465 of the text just cited, the principle governing causal connection between harm and negligence is succinctly stated, as follows: "The plaintiff's negligent exposure of himself to danger or his failure to exercise reasonable care for his own protection is a legally contributing cause of his harm if, *but only if,* it is a *substantial factor* in bringing about his harm and there is no rule restricting his responsibility because of the manner in which his conduct contributed to his harm." (Italics mine.)

The rules determining whether plaintiff's conduct is a substantial factor in bringing about his harm are set out in sections 432 and 433 of the same work. Of course, the jury which heard the case at bar was not instructed in the language of this formula. It was properly instructed, however, upon the law of contributory negligence and had "proximate cause" correctly defined for its guidance as noted in the majority opinion. No exceptions were saved to such instructions.

The prevailing opinion challenges the application of these authorities to the present case in a dual fashion. First, it says the question of "proximateness" was settled by the Legislature in the enactment of the statute requiring taillights, under the so-called "probability" test in its relation to causation. Second, that absence of the taillights could not have contributed at all to cause the accident without having contributed proximately. Thus is proximateness brought to the aid of the special finding; under the first view, as a judicially declared though unexpressed legislative intention; under the second view, by sheer process of judicial interpretation. Its presence is laid upon the shoulders of the Legislature under one view. The court must accept responsibility for it under the other. The jury whose peculiar province it is to settle the question is ignored under both views.

The first view, in my opinion, rests upon a misuse of the probability test in determining legal causation. The second overrides controlling principles applicable in determining whether general and special verdicts are in irreconcilable conflict. I shall deal with these questions in the order of their statement.

If I correctly understand the prevailing opinion, its reasoning runs thus: Where no fixed standard of conduct is prescribed, the test of negligence is the conduct of an ordinarily prudent person under the circumstances. How the average man would have reacted to the same circumstances is determinable by what he should have foreseen as the probable consequences of his conduct. Under proper instructions, with this test in mind, the issue of negligence will be submitted to the jury for its determination.

But, says the prevailing opinion, "foreseeability" or "probability" is not alone a test of negligence. Under what it pleases to term the prevailing rule, it is a test also of proximate causation. Therefore, when the jury convicts the defendant of negligence, thereby resolving the "probability" test in plaintiff's favor on that issue, by the same token it has resolved the question of "probability" in his favor on the issue of proximate causation. Hence, where the act or omission charged is the violation of a statutory duty, amounting to negligence per se, and the jury finds that injury of a kind sought to be prevented did happen, and was contributed to, however slightly, by the claimed violation, the issue of negligence being settled by the Legislature, the issue of proximacy of causation is likewise decisively resolved and will be so declared as a matter of law. It is this specious line of reasoning alone which, attaching "proximacy" to the degree of contribution otherwise intended by the special verdict, lifts it to a position of irreconcilable conflict with the general verdict. The conclusion announced is without support in reason and logic.

The fallacy of the argument consists in the second application of the test of "probability" upon the issue of proximate cause. As a test of negligence, it has exhausted its decisive character and may not properly be re-employed with like force in settling the issue of proximate causation. Eminent writers upon the subject under discussion present this position with such forceful logic that I shall be content with a few quotations from them.

Judge Jeremiah Smith, in one of the most analytical and best reasoned articles yet written upon the subject, "Legal Cause in Actions of Tort," 25 Harvard Law Review 241, et seq., says:

"In every action for negligence, upon the same state of facts two distinct issues may arise: one, 'the preliminary issue of negligence *vel non*'; the other, if negligence is found to exist, the issue as to the causative effect of that negligence. * *

"A probability that some harm may happen, not necessarily the specific harm which did actually result, is legally essential to raise a duty of care and thus establish the existence of negligence. But, if negligence is thus made out, such probability is not a legal requisite to establish the existence of causal relation between defendant's negligent conduct and plaintiff's damage.

"It is not generally requisite to show for any purpose the probability of the specific damage which actually resulted. It is not

necessary to show a probability of some damage except when the charge is one of negligence; and then it is necessary *only for the purpose of establishing negligence.* It is not an essential legal element in the succeeding steps, (1) of establishing the occurrence of damage, and (2) of establishing the existence of causal relation between defendant's negligence and plaintiff's damage. Such probability is no more essential to the existence of causal relation in negligent torts than in intentional torts. As to both intentional torts and negligent torts, in making out the existence of causal relation, probability is a circumstance which may be weighed by the jury, in connection with the testimony, in passing upon the question of fact—whether the causal relation existed. And probability or improbability might sometimes have practically a decisive effect. But it would not be a *legal* test; would not, as a matter of law, be decisive. * * *

"Because probability is to a certain extent essential to establish the existence of negligence, it seems supposed by some persons that it must also of necessity be essential to establishing the existence of causal relation between defendant's negligence and plaintiff's damage. But the tortious nature of defendant's conduct and the causative effect of that conduct *are entirely distinct matters;* and what is a requisite element as to the first subject is not necessarily so as to the second." (Italics mine.)

Mr. Albert Levitt, in his article on "Cause, Legal Cause and Proximate Cause," 21 Mich.Law Rev., at pages 42 and 43, says: "A negligent act is one which is likely to result in some sort of an injury according to the time, place and circumstances where the act is performed. Negligence is forbidden by common law; but nothing is negligent unless it was foreseeable, at the time of acting, that the act was of a harmful type. If harmful, then it was forbidden; if not harmful, then it was not forbidden. Foreseeableness determines *prohibition;* it does not determine causation; nor does it determine proximate causation."

In the much-quoted case of Christianson v. Chicago, St. P., M. & O. Ry. Co., 67 Minn. 94, 69 N.W. 640, 641, Mr. Justice Mitchell gives a terse statement of the true rule. He says: "What a man may reasonably anticipate is important, and may be decisive, in determining whether an act is negligent, *but is not at all decisive* in determining whether that act is the proximate cause of the injury which ensues." (Italics mine.)

Perhaps no clearer expose of the false logic in employing "probability" as a decisive test upon the question of proximate causation is to be found anywhere than in treatments of the subject by Prof. Leon Green who is quoted from in the prevailing opinion. In his article "Are Negligence and 'Proximate' Cause Determinable by the Same Test?" appearing in volume 1 of Texas Law Review, page 243 et seq., Prof. Green becomes the severest critic of the premise upon which rests

almost the entire argument of the prevailing opinion on the question of proximate causation. Among other things, he says, at page 246:

"It is submitted that the confusion to be found in the opinions of our own as well as those of other courts has arisen from a failure to recognize affirmatively that in negligence cases there are at least two distinct problems. First, the negligence itself, the wrongful conduct of the defendant, must be made to appear. Ordinarily this is done by use of the universal common law test of negligence, i. e., should the defendant as a probable result of his conduct have foreseen harm to the plaintiff. If so, and the defendant failed to use reasonable care to prevent the hurt, the wrong of defendant has been established. This is the legitimate use of the 'probable consequence' rule. By this use of the test plaintiff makes out the first element in his case. After this is established there still remains the second problem, that is, *what harm has plaintiff suffered from defendant's wrong.* To attempt to make a second use of the 'probable consequence' rule in order to determine this issue is to pervert its use. It was not designed for double duty. It has only one proper use."

For a further discussion of this subject by Prof. Green, see section 5 of chapter 4 of his work, "Rationale of Proximate Cause," page 122 et seq.

The sole reason put forward in the prevailing opinion for rejecting or disregarding these destructive criticisms against use of the "probability" test in determining proximate causation is that they were provoked by objections to the *limit* it placed on plaintiff's recovery; that it is a good test for the affirmative of the proposition, i. e., that a defendant is responsible for the foreseeable consequences of his wrong, and should be retained for such cases, even though it be discarded on the negative side, i. e., nonliability for unforeseeable consequences.

This argument overlooks the fact that by reason of its inherent unsoundness the writers quoted discard "probability" in entirety as a decisive test, notwithstanding it would in the majority of cases function satisfactorily on the affirmative of the proposition. Prof. Green says: "If the test as usually stated is in fact only *half* a test; if its range is too short to cover a large class of cases where justice would demand a recovery, then it should be discarded and some test adopted which will not fail in those cases most difficult of determination." 1 Tex.Law Review, 246.

The reason underlying rejection of the "probability" test in causation is its unreliability. After the event, it sometimes was seen that unforeseeable harm resulted in an unbroken chain of causation from a given act, so that all question of proximacy was removed. And yet, applying the test, recovery was denied. Likewise, however probable a given result might have seemed before the event, it was not always the result which actually did

happen. Quoting the language of Judge Jeremiah Smith in the article above mentioned: "Where there is a conflict of direct testimony, jurors, as sensible men, may allow some weight to probabilities in coming to a conclusion as to whether a certain fact really happened. But there is no rule requiring them, *as matter of law,* to find that the result which was the more probable was the result which actually occurred. They are at liberty to find, and may sometimes be fully justified in finding, that an improbable story is true, or that a probable story is false." 25 Harv. Law Rev. 244.

It thus appears that as a decisive factor (the effect given it here by the majority) the probability test is rejected in its entirety. And why not? If the test be bad as imposing an unwarranted *limitation* on plaintiff's recovery in those cases in which the "improbable" does happen, is it not equally bad in *charging* the defendant in those cases where the "probable" does not happen? The question furnishes its own answer. The critics of the test do not say that "probability" may not play an important part in the *jury's* consideration of proximate causation. As Judge Jeremiah Smith points out, *with the jury* it may "have practically a decisive effect." 25 Harv. Law Rev. 243. It is its province to say whether it shall have such effect.

"Before the question of causation can be submitted to the jury, there is a preliminary question to be decided by the judge; namely whether upon the evidence twelve honest men can reasonably find the existence of the causal relation. It is for the judge to say whether the jury *can* reasonably so find; and then, if he decides in the affirmative, it will be for the jury to say whether they *do* so find. The judge has to say whether on the evidence causal relation *may be* reasonably inferred; the jurors have to say whether from the evidence, if submitted to them, the causal relation *is* inferred by them." Judge Jeremiah Smith in 25 Harvard Law Review, 306.

This court, in Gilbert v. New Mexico Construction Co., 39 N.M. 216, 44 P.(2d) 489, seemingly relied upon in the prevailing opinion as lending approval to the probability test in determining proximate causation, goes no further than to speak of it as a proper matter for inquiry by the jury.

The majority opinion willingly accepts it as the prevailing rule to treat the *existence* of negligence and *causal relation* as the same problem, to be determined by the same formula. The more important inquiry is whether it is the true rule. I think its unsoundness has been demonstrated. And failure of American Law Institute in its Restatement of the Law of Torts, §§ 433 and 435, to incorporate the "probability" test casts doubt on it as the prevailing rule. In so far as it gives effect to the natural and probable consequence formula at all in determining whether the actor's conduct is a substantial factor in producing the harm, it

is from the standpoint of what Prof. Green was pleased to term "hindsight" rather than "foresight." 1 Tex.Law Rev. 248.

Before leaving discussion of "probability" as a test of proximate causation, one other matter requires consideration. The prevailing opinion says: "The failure of the minority to duly appreciate that the determination of 'proximateness' as a characterization of 'cause' requires the determination of the quality of conduct involved is we believe the reason for their inability to agree with us. Proximateness is qualitative and not quantitative."

This may be accepted as a partially accurate statement of one reason for disagreement with the prevailing opinion. I do not think the issue of proximate causation or "proximateness" is qualitative at all. On the contrary, I submit that the determination of legal causation presents a *quantitative* rather than a *qualitative* issue. The correctness of this conclusion is affirmed by the very nature of the inquiry putting the issue: What is the extent of causal relation between the act and the harm? In other words, *how much* did the act contribute to bring about the harm? Was its contribution "appreciable," "substantial"? Obviously, such an inquiry is quantitative. It is declared so by Prof. Leon Green. In his Rationale of Proximate Cause, at page 122, he says: "Determining whether a rule covers a loss is a wholly different process from that of seeking cause and effect, and one which is inescapable in any case, under whatever guise it may be considered. One is qualitative, the other quantitative. Neither can be translated into terms of the other, however persistently it may be attempted."

Again at pages 140 and 141 of the same work, Prof. Green says: "The 'average man' and the 'substantial factor' tests allow the widest range—limited only by the court's power to bound their extremes—but present ideas sufficiently concrete to enable the jury to grasp their meaning and to make use of them in determining the respective problems of culpability and causation. Neither has any place other than in its own formula. They are not convertible terms. The 'average man' does well enough as a means for determining the *quality* of defendant's conduct. The 'substantial factor' will do equally as well for determining the *extent* of such conduct. One is a qualitative measure; the other a quantitative measure; just as the fact of wrongdoing is one for qualitative analysis, while the fact of causation is one for quantitative analysis. The two problems are on different planes; they have resemblances, but they are not identical."

In order that this discussion may not seem purely academic, the exact point at which the majority are led into error by this misapprehension will be pointed out. The prevailing opinion says: "It being found by the jury that the violation of the statute did contribute to cause the collision, and the *court* having already determined

that the statute was designed to prevent just that sort of collision, then using the same process the *court* was circumstanced to find that the quality of proximateness attached to the cause. * * * In other words, the *court,* having found that if the plaintiff violated the statute, he was under the facts guilty of negligence as a matter of law, was by the same token able to say that the quality of proximateness attached to the cause." (Italics mine.)

If the majority had correctly conceived that the true inquiry at this point is quantitative rather than qualitative, an ascertainment of the degree or extent of causation rather than an inquiry touching quality of conduct, the use of a measuring rod to determine extent rather than a microscope to detect kind, I believe they would view it as a question of fact for the jury rather than one to be resolved by the court as a matter of law.

In the use made of "probability" as a decisive test on the question of proximate causation, the prevailing opinion follows to an extent easily discernible the doctrine of Johnson v. Boston & Maine R. R., 83 N.H. 350, 143 A. 516, 61 A.L.R. 1178. It was there held in effect that a statute prohibiting any person, not licensed, from operating a motor vehicle upon the state highways, rendered unlicensed drivers entitled to no other right than exemption from reckless, wanton, and willful injury. Such a doctrine carries no humanitarian appeal. It is classified as a minority doctrine which has been severely criticized both by text-writers and the courts of other states. It is sometimes mistakenly referred to as the "Massachusetts doctrine." For criticisms of the doctrine, see 27 Mich.Law Rev. 966; 24 Ill.Law Rev. 481; Wilson v. Rogers, 140 Kan. 647, 38 P.(2d) 124; Gilman v. Central Vermont R. Co., 93 Vt. 340, 107 A. 122, 16 A.L.R. 1102, and case note at page 1108.

The objection to the doctrine is both its harshness and that it declares an unexpressed legislative intention. The prevailing opinion does not go so far as the New Hampshire court in saying what the Legislature has not expressly said, that the violator of the statute is denied civil relief for a relevant injury except where wantonly or willfully inflicted. That is to give full effect to the statute as declaring causation. But it does say and hold that if causation in fact "to any extent" be found, any want of required proximity may be deduced from the statute itself, as a matter of law. This proposition I unhesitatingly and vigorously challenge.

Turning now to the treatment in the prevailing opinion of the general and special verdicts. In the beginning, I stated the majority opinion rested upon one of two views, one having to do with proximate causation, the other relating to the interpretation of the general and special verdicts. An application to the case before us of principles controlling the latter question necessarily involves an inquiry whether the jury's special finding that plaintiff's negligence contributed to some extent

must be interpreted as a finding that it contributed proximately to cause the injury.

The first pertinent inquiry presenting itself under this phase of the case is: Does the special finding disclose irreconcilable conflict with the general verdict? Unless it does, the latter controls. Leyba v. Albuquerque & Cerillos Coal Co., 25 N.M. 308, 182 P. 860; Thayer v. Denver & R. G. R. Co., 25 N.M. 559, 185 P. 542; Rheinboldt v. Fuston, 34 N.M. 146, 278 P. 361. Otherwise, the former is decisive and judgment should be entered pursuant thereto. "Trial Court Rules", § 70-103. Of course, no conflict should be declared until effort has been made to reconcile seeming inconsistency. The special finding must exclude every reasonable inference authorizing the general verdict. 64 C.J. 1177, § 965, "Trial." National Metal Edge Box Co. v. The Hub, 89 W.Va. 101, 108 S.E. 601; City of Wabash v. Bruso, 186 Ind. 637, 117 N.E. 867. Moreover, no presumptions will be indulged in favor of answers to special findings as against the general verdict. Iowa City State Bank v. Biggadike, 131 Ark. 514, 199 S.W. 539; Kingan & Co. v. Albin, 70 Ind.App. 493, 123 N. E. 711.

All that is required to demonstrate the fallacy of the majority view in this case is to apply to it the very principles touching construction of general verdict and special findings approved in the prevailing opinion. The majority correctly state that the special finding controls the general verdict if in irreconcilable conflict with it; but that before declaring a conflict, due effort should be made to reconcile apparent inconsistency; and (quoting the majority opinion) they continue: "In order to prevail, the special finding should clearly exclude every reasonable conclusion that would authorize the general verdict."

An affirmative answer by the jury to the special inquiry whether plaintiff's negligence contributed to *any* extent to cause the collision certainly does not exclude the reasonable conclusion that the extent of contribution intended was simply as a "remote cause"; as "merely an antecedent occasion, condition or attendant circumstance of the injury." 45 C.J. 975. This must be so in view of the general verdict in plaintiff's favor under instructions defining with care the meaning of proximate cause and charging the jury that no verdict in plaintiff's favor was warranted if his negligence be found *proximately* to have contributed to cause the injury, and as an element without which the injury would not have occurred.

The instructions, in charging the jury that plaintiff's negligence must have contributed proximately to cause the injury before operating to defeat recovery, and in defining proximate cause, in effect told the jury that any causal connection between plaintiff's omission and the injury which did not attain the degree of proximacy was ineffective to defeat recovery. Fulton v. Chouteau County Farmers' Co., 98 Mont. 48, 37 P.(2d) 1025. The general verdict in plaintiff's favor said, in legal effect, as

unmistakably as if expressly declared: "We find defendant's negligence *the* proximate cause of the injury and plaintiff's negligence, although causal, not proximately so, as that term has been defined to us." Unquestionably such is the effect of the general verdict. Such an answer as that here given to the special interrogatory submitted conceivably rests within a general verdict in plaintiff's favor in *every* negligence action to which contributory negligence is pleaded as a defense. Fulton v. Chouteau County Farmers' Co., supra.

Here, before coming in conflict with the general verdict, the special finding must have supplied for it the word "proximately" as the extent of contribution intended. How is it to get this word except by implication or presumption? There is no other means of supplying it. The jury did not say it. And in saying it for the jury, the court performs a jury function. Defendant's counsel was content to submit his question without embracing this indispensable element. The majority, although finding no fault with the well-recognized rule of interpretation that no presumptions will be indulged in favor of answers to special findings as against the general verdict, in reaching the conclusion announced necessarily do the very thing which the rule forbids. This is so because the word "proximately" is either added to the special finding as a factual implication or presumption, or it is held to belong there as a matter of law. However viewed, the word can only get into the special finding by presumption and the rule mentioned denies it access in any such manner.

Other authorities than those cited, sustaining the correctness of rules announced by the majority for interpreting seemingly conflicting special and general verdicts, which rules they approve but do not follow, are: Koskela v. Albion Lumber Co., 25 Cal.App. 12, 142 P. 851, 857; Conwell v. Tri-City Ry. Co., 135 Iowa, 190, 112 N.W. 546; Haddon School Tp. of Sullivan County v. Willis (Ind.Sup.) 199 N.E. 251; Samson v. Zimmerman, 73 Kan. 654, 85 P. 757; Lesher v. Carbon Coal Co., 127 Kan. 34, 272 P. 155; Benedict v. Carter State Bank, 54 S.D. 14, 222 N.W. 500, 505.

In Koskela v. Albion Lumber Co., supra, is found a very clear statement of the principle for which I contend. The court said:

"There was a general verdict for plaintiff and against defendants. The rule is that the general verdict imports a finding in favor of plaintiff on all the averments of the complaint material to his recovery. Merritt v. Wilcox, 52 Cal. 238, 242.

" 'The presumption is that the general verdict covers findings in plaintiff's favor upon all the facts necessary to be proved under the issues not covered by the findings.' Clementson on Special Verdicts, p. 135.

"And all presumptions are in favor of the general verdict for the plaintiff, and it must control if the special verdict is not absolutely irreconcilable therewith. * * * Obviously, as the general verdict is an ex-

press finding for plaintiff on all material issues, it should not be overthrown unless the special findings are utterly at war with it."

In Benedict v. Carter State Bank, supra, the court said: "Here likewise we are unable to see any inconsistency between the fact specially found by the affirmative answer to this interrogatory and the general verdict, particularly in the light of the clear rule of law that no presumptions will be indulged in favor of inconsistency, and that, as stated by the California court: '* * * *We do not think the court should strain the language of a finding to make out a case of conflict.* The finding should be reconciled if it can be reasonably done, and be so construed ut res magis valeat quam pereat.' [Italics mine.] Alhambra, etc., Co. v. Richardson (1887) 72 Cal. 598, 14 P. 379."

In support of the contention that contributory negligence need not be specially found to have contributed proximately to cause the injury to overthrow a general verdict in plaintiff's favor, if it be found to have contributed at all, the majority rely upon Lathrop v. Miller, 132 Kan. 425, 295 P. 722; Behymer v. Mosher Mfg. Co. (Tex.Civ.App.) 192 S.W. 1148; Hines v. Foreman (Tex.Com.App.) 243 S.W. 479; Bullard v. Ross, 205 N.C. 495, 171 S.E. 789 and Crane v. Carswell, 203 N.C. 555, 166 S.E. 746. The North Carolina decisions may be dismissed with the statement that the point is decided without even discussing it. In addition to what is later said about the Texas cases, it may here be noted that the doubt expressed in the quotation in the prevailing opinion from the Behymer Case, whether negligence could contribute at all without contributing proximately to an injury, on its face is pure dictum, the court saying that, regardless of that question, the case was ruled by another point.

In Lathrop v. Miller, supra, the Supreme Court of Kansas with but slight discussion holds that a special finding that plaintiff's own negligence "contributed to the injury complained of" overcomes a general verdict in her favor. Mr. Thompson in his Commentaries on the Law of Negligence, Vol. 1, § 218, says of such a declaration: "This statement of the principle is incorrect. In many cases where the plaintiff's conduct was to some extent contributory to his injury he has been allowed to recover."

In the Kansas case the court was able to find conflict between the special finding and the general verdict after, but only after, interpolating the word "proximately" into the special finding, just as the majority have supplied it here. The conclusion that the court was warranted in supplying this word seems thoroughly out of harmony with other decisions of the same court holding that all facts in issue which are not specially found shall be presumed to have been determined in accordance with the general verdict. Samson v. Zimmerman, supra, and Lesher v. Carbon Coal Co., supra.

Whatever support the majority may consider is afforded by the Texas cases, Behy-

mer v. Mosher Mfg. Co., supra, and Hines v. Foreman, supra, is withdrawn, I think, by the opinion in the very recent case of Foster v. Beckman (Tex.Civ.App.) 85 S.W. (2d) 789, 791, heretofore cited, in which the Supreme Court of Texas denied a writ of error. In this case the defendant's negligence was in driving his motortruck on the wrong side of the road and at an excessive speed. The plaintiff's contributory negligence was in driving his truck with only one headlight burning. This constituted violation of a statutory duty and was negligence per se. The points raised and determined are identical with those presented in the case at bar. Hence, I quote from the opinion at some length:

"The jury in answer to special issues found that appellant was driving his truck on the wrong side of the public road at forty-five miles per hour. The testimony of appellee was that in passing, appellant's truck 'side-swiped' his own, striking appellee's arm which was resting on the side of the truck cab and injured it so severely he lost it by amputation. One of the defensive theories pleaded and proven was that appellee at the time of the accident was driving his truck at about dark with only one headlight burning. The court gave appellant's special requested charge, which was as follows:

" 'Gentlemen of the Jury:

" 'You will answer the following questions "yes" or "no" from a preponderance of the evidence.

" '(a) At and immediately prior to the time of the collision in question did the plaintiff, Joe Beckman, have only one headlight burning on the truck he was driving?

" '(b) If you answer the preceding question "yes," then answer the following question:

" 'Was the act of plaintiff, Joe Beckman, in driving his truck at the time and place in question with only one headlight burning, negligence as that term is defined in the Court's main charge?

" '(c) If you answer the preceding question "yes," then answer the following question:

" 'Was such negligence on the part of Joe Beckman a proximate cause of his injuries?

" '(d) Did the act of Joe Beckman in driving his car with only one headlight burning, at and immediately prior to the time of the collision, if you have answered he was so doing, contribute to his injuries?'

"The jury answered subdivisions (a) and (b) 'yes,' (c) 'no,' and (d) 'yes.' The appellant contends here that such answers entitled him to a judgment. We quote from his brief:

" 'Violation of a positive statutory rule is, of itself, contributory negligence.'

" '* * * it is not necessary to defeat recovery on the ground of contributory negligence to show that the plaintiff's negligence was a proximate cause of his injury. This may sound like an unusual statement, but we have ample authority to support it.'

"To assert that proximate cause is not an element of contributory negligence is indeed

an unusual statement, but not quite so remarkable as the fact that appellant cites expressions from authorities which on their face support his theory. We do not think there is any doubt that the Supreme Court has pointedly and repeatedly held contrary to appellant's contention, and that such holdings comport with sound reason and the most elementary principles of justice and right. * * *

"Nor do we think that said findings were conflicting, as contended by appellant, when given their proper legal effect. True, the jury found that appellee's negligence 'contributed to his injury.' *This charge was cast into language selected by appellant. He requested it. He deliberately chose to ignore the issue of proximate cause, sincerely believing then, no doubt, as his counsel yet do, that such was not a necessary element to be submitted.* The language of Judge Short in Koons v. Rook (Tex.Com.App.) 295 S.W. 592, at page 597, completely answers this contention. We quote: 'However, even though the conduct of the plaintiffs amounted to negligence and contributed to the injuries received by them, yet, unless this conduct was a proximate cause of the injuries inflicted upon the plaintiffs by the defendant, it would not defeat a recovery.'" (Italics mine.)

The opinion in this case interprets the opinion of the Texas Commission of Appeals adopted by the Supreme Court of that state in Hines v. Foreman, a case strongly relied upon by the majority. If the Texas Court of Civil Appeals had misinterpreted the opinion in the Hines Case, since the interpretation of it was decisive, the Supreme Court would have granted a writ of error. Hence, the opinion in Foster v. Beckman, as approved by the Supreme Court through its denial of application for writ of error, is the latest intimation of views by that court on the subject and, in my opinion, affords a complete answer to the contentions sustained by the majority in the case at bar.

This case, the nearest in point found in the books, dealing with the precise point, presented in the exact way it here arises (upon asserted conflict between the general verdict and a special finding), decides the question in accordance with the contention here made. Its reasoning is unanswerable. It is dismissed by the prevailing opinion with a statement that its facts are different. There is this difference. In Foster v. Beckman the contributory negligence relied on was violation of a statute requiring headlights. In the case at bar, it is violation of a statute requiring taillights. Truly, this circumstance can make no difference in the application of controlling principles.

Other "taillight" cases, supporting the views here expressed, although arising where the issues were presented under a general charge, are Tendoy v. West, 51 Idaho, 679, 9 P.(2d) 1026; Landis v. Wick (Or.) 57 P.(2d) 759, 761; Gleason v. Lowe, 232 Mich. 300, 205 N.W. 199; Martin v. Herzog, 228 N.Y. 164, 126 N.E. 814, 816; Woodley & Collins v. Schuster's Wholesale Grocery Co., Inc., 12 La.App. 467, 124 So. 559, affirmed Woodley & Collins v. Schusters'

Wholesale Produce Co., 170 La. 527, 128 So. 469. These authorities emphasize that the question whether plaintiff's negligence contributed proximately to cause the injury is essentially a jury question.

The error into which the majority have fallen may be rendered obvious by reversing the position of the parties now before us in a supposed case growing out of this very accident, Let us suppose the present defendant sues plaintiff for injuries suffered when he, defendant, propelled his car into that of the present plaintiff. The negligence charged is absence of taillights. The plaintiff (now a defendant) does not interpose a plea of contributory negligence, simply denying, contrary to the proof, that his car was without taillights. The trial court, over his specific objection that the instruction should charge that his negligence must be found to have been the proximate cause of the collision, instructs: "Gentlemen of the jury: You are instructed that if you believe from the evidence that the absence of tail lights on defendant's car, if you find such absence, *contributed to any extent to cause the collision,* you will return a verdict in favor of the plaintiff."

The plaintiff recovers and defendant appealing to this court assigns a single error, to wit, the trial court's ruling on his objection to the supposed instruction, quoted above. This court, now holding through the majority that the identical language italicized in the supposed instruction appearing in the special finding before us is operative to defeat recovery as the parties are now aligned, of necessity would be compelled to hold it sufficient to sustain recovery when the positions are reversed as in the supposed case.

"Is there, then, one rule for the plaintiff and another for defendant in this character of case? The above quotations demonstrate that there is not, if such a plain proposition needs any demonstration." Foster v. Beckman, supra.

The judgment of the lower court would have to be affirmed. This is true, whichever way we view the proposition. For, if negligence contributing to any extent to cause an injury is efficacious, the supposed instruction is correct. If the degree of causation required to render it so is "proximate," any error in the instruction is harmless under the facts here shown, because the majority are holding this same negligence cannot have contributed at all to cause the injury, without having contributed proximately to such end.

Let us pursue this thought a step further. The jury answered affirmatively the inquiry whether absence of the taillights contributed "to any extent" to cause the injury. Suppose the added inquiry "to what extent?" had been put and the jury's answer had been "as a remote cause" (Fulton v. Chouteau County Farmers' Co., supra); as "merely a contemporaneous condition" (Landis v. Wick, supra); or "as merely an antecedent occasion, condition or attendant circumstance of the injury" (45 C.J. 975). Would the majority still affirm the right to disregard the general verdict

finding defendant's negligence *the* proximate cause? Or would they, in the face of such irrefutable proof of what the jury meant by the special verdict, disregard it as immaterial and heed the general verdict? I can only believe they would do the latter. In legal effect, as the matter stands, the jury no less certainly has answered the special interrogatory in the manner supposed.

The majority will concede that a rear-end collision, such as that here involved, could have occurred under such circumstances as to render immaterial the special finding made, even in the face of the views entertained by them. Suppose, for instance, the collision occurred underneath a powerful arc light at a street intersection on a well-lighted city street. The plaintiff's car was without taillights, to be sure. But that would afford no excuse for defendant running into him, for he could see him notwithstanding absence of the taillights. Under such a state of facts, the majority would unquestionably interpret the special finding to mean no more than that absence of the taillight contributed as a remote cause, "merely as a contemporaneous condition," Landis v. Wick, supra, not as a proximate cause, cf. Larsen v. Webb, 332 Mo. 370, 58 S.W. (2d) 967, 90 A.L.R. 67.

For aught we know, a case analogous to that supposed may have been before the jury. The evidence is not before us. We review the case on the record proper. The evidence may disclose a night when the moon shone so brightly as to have enabled defendant to see plaintiff's car ahead of him much in excess of the distance of visibility required of the statutory taillight. Again, the evidence may carry an admission by defendant that he observed plaintiff's car while 500 feet to the rear of it, or at such a distance short of 500 feet as to render it obvious that absence of the taillights was not a proximate cause of the collision. We are ignorant of what the evidence discloses because, as stated, it is not before us.

Even if defendant had seen fit to bring up the evidence, it could not aid him in this particular. It may not be looked to for determining inconsistency between the general verdict and a special finding. 64 C.J. 1182. Although of no aid to defendant, the plaintiff is assisted by what it may show. The court can and should "consider in aid of the general verdict, all the material facts which were provable under the issues, and will presume they were proved." Id. 1182. If such facts as those supposed were before the jury (and they are within the issues), the majority would be compelled to withdraw the presumption indulged in favor of the special finding.

The case of Padilla v. Atchison, T. & S. F. Ry. Co., 16 N.M. 576, 120 P. 724, is reviewed in the prevailing opinion in its relation to this case. It holds the burden of proof is on the defendant to establish contributory negligence on plaintiff's part. Operative contributory negligence means more than mere negligence. The term

often is used merely to indicate that it is negligence of a plaintiff that is meant. Such was its obvious use in the sentence quoted from the Padilla Case in the prevailing opinion. "Proof of negligence in the air," as said in Martin v. Herzog, supra, will not do. So that, the Padilla Case, as heretofore understood by the bench and bar of this state, holds not alone that the defendant has the burden of proving negligence on plaintiff's part, but that such negligence contributed to the injury as a proximate cause thereof.

The reasoning employed by the majority to explain the Padilla Case as effectually overrules it in its relation to cases involving statutory violations by a plaintiff as if the court had expressly so declared. For of what avail to tell a plaintiff his adversary has the burden of proving him contributorily negligent, if he must also be told that because the injury to him is of a kind the statute violated was designed to prevent, a presumption of proximateness between the violation and such a result arises under the statute as a matter of law, and that he, the plaintiff, must proceed to show the violation did not so contribute. The opinion says: "While the reasons for the rule that there is a presumption that a plaintiff has been in the exercise of due care are forceful, there is no presumption that his proven negligence eventuating into a result consistent therewith did not proximately contribute to the result. Considerations of common sense, logic, convenience and precedent are to the contrary and strongly support the view that the negligence and a consistent result being shown, the presumption is that the result was proximate."

Obviously, this puts the burden on the plaintiff to establish that his negligence was not a proximately concurring cause. For, how can defendant have the burden if he is to prevail on the mere absence of negative presumptions? It may be admitted there is no presumption that proven negligence of the kind mentioned did not proximately contribute to the result. This does not aid defendant in sustaining his burden, for certainly there is none that it did so contribute.

Some of the remarks in Martin v. Herzog, supra, are explained by the Supreme Court of Oregon in Landis v. Wick, supra, as due to the fact that in New York, contrary to the rule in Oregon and as well in New Mexico, the burden is on plaintiff to establish his freedom from contributory negligence. The Oregon court also points out in the Landis Case that in support of the statement from 9 Blashfield, Cyclopedia of Automobile Law (Permanent Ed.) § 6130, quoted in the prevailing opinion, only two cases are cited, one of which is Martin v. Herzog. All that Judge Cardozo holds in this case is that proximately causal connection between a collision and lack of lights may be inferred *by a jury* where nothing more appears in the evidence than a collision occurring more than an hour after sunset between a car traveling in a certain direction and an unseen car ahead proceeding in the same direction, without

lights; not that the jury *must* so infer. 25 Harvard Law Review, 306; Hepp v. Quickel Auto & Supply Co., 37 N.M. 525, 25 P.(2d) 197.

For the reasons given, I dissent.

BRICE, J., concurs.

66 P.(2d) 992

JOHNSON v. ARMSTRONG & ARMSTRONG et al.

No. 4170.

Supreme Court of New Mexico.

March 30, 1937.

George A. Shipley, of Alamogordo, for appellant.

Hurd & Crile, of Roswell, for appellees.

BRICE, Justice.

The appellant was plaintiff below and will be so referred to in this opinion. The appellees Armstrong & Armstrong will be referred to as the employers; the appellee United States Fidelity & Guaranty Company as insurer; and Willie Bartlett, deceased, as employee.

The facts alleged by plaintiff include the following: The plaintiff is a physician and surgeon and maintains a hospital. The employers are contractors for the construction of roads, highways, etc. The insurer is a corporation authorized to do business in New Mexico, and had insured the employers, as required by the New Mexico Workmen's Compensation Act (Comp.St.1929, § 156-101 et seq.), for the protection of their employees. On the 4th of August, 1934, the employee was employed by employers and while engaged in the duties of his employment received injuries of a serious nature, and was taken by the agent of the employers to plaintiff's hospital for treatment. The plaintiff amputated the employee's legs and otherwise treated him until he died. The value of his services therefor was $310.

That Clara Bartlett, widow of the deceased, brought an action against the employers and the insurer for compensation under the Workmen's Compensation Act of New Mexico, which was settled by an agreed judgment based upon a stipulation filed in that cause. That one of the terms of the stipulation was as follows:

"That in addition to the compensation herein provided for, the defendant shall pay medical and surgical treatment of the deceased due to the injuries received in said collision, not to exceed the sum provided by law, to-wit, $350.00."

Plaintiff also prayed for $125 attorney's fees.

As we read the employers' answer, it admits liability for reasonable surgical and medical treatment, not to exceed $350, and

alleges that plaintiff had been paid $112.50 on such account, by the insurer; and denies that they owe any attorney's fees. The insurer admits that it issued a liability policy to the employers under the Workmen's Compensation Act, but claims that its liability is secondary and not primary. It denies its liability for the sum of $350, "but admits its responsibility to indemnify its principal herein for reasonable surgical attention." It denies that the operation was performed on the employee, as stated in plaintiff's complaint, and denies that the services were worth $310.

By way of new matter, it alleges that it had paid the plaintiff $112.50, which was tendered in full settlement of all services, and that it had been accepted in full settlement by the plaintiff.

The cause came on later for trial and the employers and the insurer filed a joint pleading denominated "A Plea to the Jurisdiction of the Court," in which it was alleged that the plaintiff had not legal capacity to sue, and the court had no jurisdiction to render judgment in behalf of the plaintiff "under and by virtue of chapter 105, §§ 411 and 415, 1929 Code," because the Workmen's Compensation Act "is for the exclusive benefit of workmen and their dependents." The effect of such plea is that the New Mexico Workmen's Compensation Act is for the benefit of employees and that it does not give the right to a physician or surgeon to bring a suit for medical or surgical attention against an employer or his surety. This plea was sustained and the proceeding dismissed. The plaintiff asked permission to amend his complaint by interlining the following:

"That the services herein rendered and the services sued for herein were performed, and the operation herein performed was at the request of the employer, Armstrong & Armstrong."

This the court refused because "the complaint upon its face was based upon the Employer's Liability Act."

There are certain features of the pleadings which we will refer to in greater detail.

It is stated in paragraph 7 of the complaint:

"That heretofore, to-wit, on or about the 4 day of August, 1934, the aforesaid Willie Bartlett, while engaged in driving a truck for the defendant Armstrong & Armstrong, and hauling gravel to be used in the construction of the aforesaid highway and overpass at or near Carrizozo, New Mexico, received injuries of a serious character, to his legs and body; and was immediately taken, by the agent of said Armstrong & Armstrong, to the hospital of the plaintiff for emergency treatment and operation by the plaintiff. That said Willie Bartlett was so injured in an accident arising out of and in the course of his employment by the defendant Armstrong & Armstrong, as aforesaid."

The employers in answering this paragraph denied that the injury arose out of and in the course of, or as a result of, deceased's employment, and denied that the

reasonable value of plaintiff's services was $310, but denied none of the other allegations quoted. They did not deny that they had stipulated to pay for the medical and surgical treatment which had already been furnished, nor did they deny the following allegation from paragraph 9 of the complaint:

"That the aforesaid sum of $310.00 is due to the plaintiff from the defendants, and that due demand has been made for payment thereof; and payment has been refused.

"That the sum herein sued for is a part of the compensation required by law to be paid by the defendants by reason of the aforesaid injuries to the said Willie Bartlett."

We have, then, a charge that the employee was injured in the course of his employment; that the agent of the employers took him to plaintiff's hospital for treatment; that the employers were required by statute to furnish such treatment; that they agreed with the beneficiaries to pay such medical and surgical service; that the insurer had paid $112.50 on such medical and surgical services.

The general rule is that where a person calls a physician to render professional services to a third person there is no legal obligation upon him to pay for it unless his relations to such person imports an obligation to pay therefor. 21 R.C.L. 412.

No provision is made by the Workmen's Compensation Act for compensating physicians and surgeons for services in caring for injured employees. They must protect themselves under the common-law rules. Ferren v. Warren Co., 124 Me. 32, 125 A. 392; Noer v. Jones Lumber Co., 170 Wis. 419, 175 N.W. 784; St. Mary's Academy v. Railways Ice Co., 138 Kan. 340, 26 P.(2d) 278; Mayor, etc., of Jersey City v. Hudson County Nat. Bank, 116 N.J.Law, 593, 186 A. 33.

That part of section 156-118, N.M. Sts.1929, which is as follows, "After injury, and continuing so long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, medical and hospital services and medicine, not to exceed the sum of three hundred fifty ($350.00) dollars, unless the workman refuses to allow them to be furnished by the employer," imports more than a mere passive willingness or duty to furnish medical and surgical aid when called upon. It allows the employer to select his own physicians and surgeons for the care of his injured employees, but imports that arrangements should be made in advance, or that some one should be at hand in authority to provide medical and surgical care in cases of emergency like the one here considered. Case of Ripley, 229 Mass. 302, 118 N.E. 638; In re Panasuk (In re American, etc., Co.), 217 Mass. 589, 105 N.E. 368.

But the fact that plaintiff alleged an agent of the employers directed the taking of the employee to plaintiff's hospital for treatment; that liability was not de-

nied, except it was denied that the employee was injured in the course of his employment; that insurer admitted it had paid a portion of plaintiff's bill which it claimed was accepted in full settlement; are circumstances to be considered, which, in the absence of any denial of the authority of such agent, authorized the court to infer that he acted within the scope of his authority in sending the employee to plaintiff's hospital for surgical and medical treatment at the charge of the employers. The following cases are relevant: Case of Ripley, 229 Mass. 302, 118 N.E. 638; Collins v. Joyce, 146 Minn. 233, 178 N.W. 503; Swift & Co. v. Industrial Comm., 288 Ill. 132, 123 N.E. 267; State Hospital v. Lehigh Valley Coal Co., 267 Pa. 474, 110 A. 255; Hodgen v. Bitely et al., 239 Mich. 516, 215 N.W. 37.

But there is another feature of this case that renders the employer and the insurer liable for these medical and surgical services. They entered into a stipulation with the insured's beneficiaries in which they agreed, as a part of the consideration in the settlement of the compensation suit, to pay the medical and surgical services rendered the employee. There was no other medical and surgical service rendered than that by plaintiff. The promise to pay the medical and surgical services was a contract for the benefit of a third person (the plaintiff). Whether such services were owed by the estate of the employee or could have been enforced against the promisor is immaterial. It was a part of the settlement of the compensation. Whether plaintiff is a donee beneficiary (2 Williston on Contracts [Revised Ed.] § 357) or a contract beneficiary (do. § 361) (and he is one or the other) an action lies against the promisor (employer) by the beneficiary (plaintiff) to recover the amount promised. These views are expressed in Restatement of the Law of Contracts, §§ 133 and 136. Also see Williston on Contracts (Revised Ed.), title "Contracts for the Benefit of Third Persons," c. XIV, beginning at page 1029, and the same title under c. LXXIII, Page on The Law of Contracts, and c. 6, Restatement of the Law of Contracts; where the subject is fully treated. While the plaintiff was not named specifically as the beneficiary, the pleadings show clearly there was no other person except plaintiff entitled to pay for medical and surgical services. We think the better rule is that a contract made upon a valid consideration between two or more parties for the benefit of a third may be enforced by such third party if he accepts it after it is made, though he is not named in the contract or may not have known of it at the time. Beattie Mfg. Co. v. Clark et al., 208 Mo. 89, 106 S.W. 29; Burton v. Larkin, 36 Kan. 246, 13 P. 398, 59 Am.Rep. 541; Weld v. Carey, 122 Kan. 666, 253 P. 235.

If it be said that an acceptance by the plaintiff of the benefit of the contract was necessary to create liability, the answer is the bringing of this action was a sufficient acceptance. Whitehead v. Bur-

gess, 61 N.J.Law, 75, 38 A. 802; 4 Page on Law of Contracts, § 2392; Tweeddale v. Tweeddale, 116 Wis. 517, 93 N.W. 440, 61 L.R.A. 509, 96 Am.St.Rep. 1003; Gilbert Paper Co. v. Whiting Paper Co., 123 Wis. 472, 102 N.W. 20.

The pleading entitled "Plea to the Jurisdiction" should have been overruled. The court had jurisdiction of the person and the subject-matter of the suit. At most, the plea was a demurrer upon the ground that the complaint was based on an assumed right to recover for services and hospitalization claimed to have been performed and furnished by authority of the Workmen's Compensation Act, and that the act provided no right or remedy in favor of those furnishing such services, etc., to injured employees. The fact that he had no cause of action by virtue of any provision of that act did not deprive him of his common-law remedies. Some of the allegations of the complaint indicate he was suing on a supposed statutory liability; but be that is it may, he, in a meager way (supplemented by the pleadings of the employer and insurer), has pleaded a common-law action against the employers; and as the insurer admits its secondary liability, also against it.

Plaintiff is not entitled to recover attorney's fees, though this question is not raised in the "Plea to the Jurisdiction of the Court."

The cause will be reversed and remanded to the district court with instructions to permit the parties to amend their pleadings as they may be advised, and proceed with the trial of the case consistent with this opinion.

It is so ordered.

SADLER, BICKLEY, and ZINN, JJ., concur.

HUDSPETH, C. J., did not participate.

67 P.(2d) 235

In re CANDELARIA'S ESTATE.

CANDELARIO et al. v. DE LUCERO.

No. 4178.

Supreme Court of New Mexico.

April 6, 1937.

Mechem & Hannett and Donald B. Moses, all of Albuquerque, for appellants.

George R. Craig, I. V. Gallegos, and Elfego Baca, all of Albuquerque, for appellee.

HUDSPETH, Chief Justice.

This is an appeal from the judgment of the district court of Bernalillo county, appointing Juanita Candelaria de Lucero administratrix of the estate of Juanita Candelaria, deceased. The appellants are collateral kin of the deceased, who at the time of her death was a widow without lineal descendant. The appellee claimed the appointment as an heir by adoption. The cause originated in the probate court where appellee's petition was denied. Under stipulation, the testimony taken in the probate court was read before the chancellor who also heard other witnesses. The district court made findings of fact, reversed the judgment of the probate court, and issued an order declaring her to be the adopted daughter of deceased.

The appellee is the natural and legitimate daughter of Sofia and Donato Duran. When the appellee was about seven months old she was placed under the care, custody, and control of Trinidad Garcia Candelaria, the mother of decedent. The mother of appellee, Sofia, is a blood relative of deceased and also claims to be an adopted daughter of the deceased. She was placed in the custody of the deceased upon the death of her mother when she was twelve years of age

along with her sister and brothers. They became members of deceased's household, and all were reared by deceased and her mother, Trinidad. Deceased applied for and was granted letters of guardianship over Sofia. After Sofia's marriage she and her husband, Donato Duran, continued to live with the deceased and her mother for about three years. They were all living in a small house when the appellee was turned over by her parents to Trinidad.

The evidence supports the finding that there was a complete and absolute surrender of the child to Trinidad. When appellee was about seven years of age, Trinidad died and left a purported will, of which the following is part: "* * * leave in the possession of my daughter Juanita Candelaria two tracts of real estate, one in the old Town of Albuquerque, and the other situated in Los Barelas; the one at the Old Town so that it be delivered by my said daughter to Gregorita Romero, and the other one for the purpose of turning it over to Juanita Duran, both of which I raised ever since their infancy." Appellee also bore the name of Juanita Candelaria, and after the death of Trinidad the appellee continued to live with deceased, who treated her as a daughter, educated her, and supported her without aid from her natural parents. Her natural parents were poor, and received aid from appellee's foster mother. The evidence fully supports the findings that the deceased treated appellee in every way as a daughter, had great affection for her, referred to her as her adopted daughter, and repeatedly stated to her friends and neighbors that all of her property would go to the appellee at her death.

A short time before her death, the deceased summoned Ismael N. Duran, a notary public, before whom she executed a warranty deed conveying the land situate in Los Barelas, referred to in the purported will of Trinidad, to appellee. Ismael N. Duran, appellee's witness, testified in part, as to the conversation between him and deceased, as follows:

"Q. And what was the conversation you had with her at that time? A. Out of curiosity, I mentioned to Mrs. Candelaria, the deceased, I, myself, realizing that our folks hardly ever settle their affairs before they die, I said 'Mrs. Candelaria, have you got your affairs settled, have you ever made a will' I says 'you have got quite a bit of property and you got some relatives' and these are the words she used, I can remember, she said 'Yes, I haven't got no will made yet' but because I mentioned to her, I says 'remember, you have got some relatives here and you have got some relatives in Santa Fe' she said 'no, no, no, no, there is only one heir that I have' and she pointed to Juanita Candelaria Lucero, her husband was there, she pointed to her and she says 'I have got it in mind to call you in ten days or two weeks, I want to get everything straightened out' she says, but she never did.

"Q. Did she say anything about drawing a will? A. Yes, she said she was going to draw a will, she told me she was going to call me to draw a will; those are the words she used."

The deceased left property of the estimated value of $2,500, and depended upon the appellee as her aid in business matters, and had a card in the savings department of a local bank upon which was the memorandum "one adopted daughter, Juanita Candelaria Lucero, dated 6–17–29."

Immediately after the death of the deceased, the father of appellee aided her in procuring counsel in her efforts to establish her heirship, but testified, as did her mother, one of the protestants in this case, that there was no agreement or contract of adoption between the deceased and the natural parents of appellee. Sofia testified: "I left her there for company as I used to go there all the time myself to visit them."

It is admitted that there was neither statutory adoption of appellee by the deceased nor a written agreement to adopt the appellee. There is no direct evidence of an agreement or contract of adoption.

Appellee relies upon the rule in Roberts v. Roberts (C.C.A.) 223 F. 775, 776, in proving the adoption contract. That court said:

"We are satisfied from the evidence that Charles J. Roberts was the father of plaintiff. This, together with the conceded fact of his childless married life, gave to him a natural motive and imposed upon him a moral duty to plaintiff and her mother, to make plaintiff his child in law as she was in nature. These two facts enter into all of plaintiff's evidence, giving to it reasonableness and probative force. The record at the time the plaintiff was taken by Mr. and Mrs. Roberts states: 'Infant indentured to C. J. Roberts.' * * *

"The argument by which we are asked to reverse the decree is that there was no direct and clear evidence of an agreement to adopt at the time Myra J. Roberts was received into the family of Charles J. Roberts. There is good reason why such evidence is wanting. All of the parties to the transaction are dead, and Myra J. Roberts was herself a babe at the time of the adoption. It seems to us that in such a case it is not necessary that the court first have direct proof of the making of the contract, and then proceed forward from the contract thus established to the conduct evidencing its existence. We think it is possible to reverse that process, and if the statements and conduct of the adopting parents are such as to furnish clear and satisfactory proof that an agreement of adoption must have existed, then the agreement may be found as an inference from that evidence."

Appellee also relies upon a finding and conclusion by the court that Sofia and Donato Duran, parents of appellee, were estopped from objecting to the appointment of appellee as administratrix. Sofia, a party in the court below, did not appeal.

The main question in the case is whether or not the evidence established the contract of adoption. The rule seems fairly well established that: "If the alleged contract is oral, or alleged to have been lost, the proof of it must be so clear, cogent, and convincing as to leave no reasonable doubt

as to its existence and terms, and the proof must show not only that a contract existed but that the particular contract alleged existed." 2 C.J.S., Adoption of Children, § 26, p. 396.

Appellee cites Barney v. Hutchinson, 25 N.M. 82, 177 P. 890; Wooley v. Shell Petroleum Corp., 39 N.M. 256, 45 P.(2d) 927, and numerous Missouri decisions and other cases collected in annotation in 27 A.L.R. 1325, some of which are suits involving agreements as to inheritance rather than as to adoption. In Iowa, New York, and other states, the only mode of adoption is statutory, but their courts enforce contracts with respect to the right of the child to property of the foster parent. Morris v. Trotter, 202 Iowa 232, 210 N.W. 131. The Missouri courts have apparently gone further in upholding oral contracts of adoption than those of any other state. See Shelp v. Mercantile Trust Co., 322 Mo. 682, 15 S.W.(2d) 818. Prior to the year 1909 the consent of the parents was not essential in that jurisdiction, Beach v. Bryan, 155 Mo.App. 33, 133 S.W. 635, but in the late case of Kidd v. St. Louis Union Trust Co., 335 Mo. 1029, 74 S.W.(2d) 827, 830, the court quoted with approval Judge Valliant in Wales v. Holden, 209 Mo. 552, 108 S.W. 89, 96, as follows: "When a court of equity is invoked to enforce an oral contract void under the statute of frauds on the ground of part performance, it recognizes and appreciates the danger that the statute was designed to avoid, and grants relief only when it is sure, beyond a reasonable doubt, that to refuse its aid would result in allowing the statute to be made in that case an instrument to protect fraud. A court of equity therefore requires that a part performance relied on to take the case out of the statute should be of a character, not only consistent with the reasonable presumption that what was done was done on the faith of such a contract, but also that it would be unreasonable to presume that it was done on any other theory. Can it be said that the mere fact that an orphan child, in indigent circumstances, was taken into the family of comparatively wealthy people, reared and educated even on an equality with their daughter, is reasonably consistent only with the theory that she was an adopted child—consistent only with the theory that at his death his own daughter should make equal division with her of the estate which was the product of his whole life's work? If that is so, how dare a man take such a child into his family?" And in this same opinion quoted Asbury v. Hicklin, 181 Mo. 658, 81 S.W. 390, 393, as follows: "When, as in this case, and in consonance with this doctrine, a court of equity is called upon to establish and enforce a contract of this character in the teeth of the statute of wills and of the statute of frauds and perjuries, and to set aside a disposition of valuable property made in conformity with the requirements of those statutes, there is devolved upon the chancellor the greatest responsibility, perhaps, that ever attaches to his high office. And nothing short of the inherent justice of the claim, supported by evidence that can be relied upon with the utmost confidence, proving existence of the contract, its terms and conditions, and a sub-

stantial and meritorious compliance therewith, with such certainty and definiteness as to leave no room for reasonable doubt, can ever justify the exercise of such an extraordinary prerogative."

In Benjamin v. Cronan (Mo.Sup.) 93 S. W.(2d) 975, 979, that court stated: "It is true that plaintiff, when of tender years, was taken into the Benjamin home, but such is not necessarily consistent only with an agreement to adopt. Sitton v. Shipp, 65 Mo. 297; Wales v. Holden, supra. Neither is adoption effected necessarily by recognizing and referring to a child as an adopted child. 1 C.J. 1373, and cases cited in note 34. Nor will adoption necessarily be effected by the alleged adoptive parent, in an application for life insurance, naming the alleged adopted child as the beneficiary and designating such child as son or daughter as the case may be."

The question as to the necessity of consent of the parents to adoption resolves into a matter of statutory construction. Our statute, 1929 Comp.St. § 2-104, provides that "a legitimate child cannot be adopted without the consent of its parents, if living together." The construction of such statutes seems uniform. It is stated in Roberts v. Cochran (Miss.) 171 So. 6, 7, as follows: "Our adoption statute had its origin in the civil law, not in the common law. There was no such proceeding known to the common law. Consent of the parents, if living, lies at the foundation of our adoption statute. Jurisdiction of the subject matter cannot be acquired without it. The first step is the filing of a petition in the proper court. The petition is jurisdictional in character and must state the facts required to give jurisdiction. 2 C.J. Secundum, Adoption of Children, pp. 417–419, § 37. Willis v. Bell, 86 Ark. 473, 111 S.W. 808; Furgeson v. Jones, 17 Or. 204, 20 P. 842, 3 L.R.A. 620, 11 Am.St.Rep. 808; In re Cozza, 163 Cal. 514, 126 P. 161, Ann.Cas.1914A, 214; In re Lease, 99 Wash. 413, 169 P. 816; Truelove v. Parker, 191 N.C. 430, 132 S.E. 295; Chance v. Pigneguy, 212 Ky. 430, 279 S.W. 640; Keal v. Rhydderck, 317 Ill. 231, 148 N. E. 53; Luppie v. Winans, 37 N.J.Eq. 245."

The parents of appellee have never been separated. They testified, without objection, that there had been no consent given by them, in fact that there had been no discussion of the matter of adoption between them and the deceased at any time.

Trinidad did not adopt the child. If she had done so, appellee and deceased would have been sisters. She referred to her in her purported will as Juanita Duran. She had reared other children not her own and it does not appear that she adopted any of them. The parents of the appellee were members of the household at the time of the surrender of the child. We know historically that it was and still is the custom with many of the native people to turn the first born over to the care, custody, and control of its grandmother. The mother of appellee claims that she was adopted by the deceased, and if that were true Trinidad would occupy the position of a grandmother to the appellee. It

would appear that the testimony of the parents of appellee to the effect that there was no contract of adoption is not improbable, and being uncontradicted should be given some weight as against an inference based upon the conduct of the parties and statements of the other party to the supposed contract. Walker v. Smith, 39 N.M. 148, 42 P.(2d) 768, Arnall Mills v. Smallwood (C.C.A.) 68 F.(2d) 57.

There are several Missouri cases holding that under certain state of facts the foster parents and their heirs are estopped to assert that the parents did not adopt the child in the manner provided by law, but we have found no case holding that a parent of the child who asserts no consent by him was given and no contract of adoption was entered into by him with the alleged adopting parent is estopped from asserting that fact. "The measure of the operation of an estoppel is the extent of the representation made by one party and acted on by the other." 2 Pomeroy's Equity Jurisprudence (3d Ed.) p. 1445. Under the theory of equitable estoppel the ultimate fact to be established is the status of the child alleging adoption. The burden of proving this fact was upon the appellee and it was necessary for her to establish it by evidence so clear and convincing as to satisfy the chancellor beyond a reasonable doubt. Shelp v. Mercantile Trust Co., supra.

The following appears among the finding of fact: "That it is the custom among the native people of this State to take children into their homes by and with the consent of their natural parents and care for, educate them, treat them as their own children, and to consider them as adopted children who would inherit as though they were their own children." Witnesses, upon whose testimony this finding was based, also testified to knowledge of adoption of children by native people by the usual statutory proceeding. It also appears that there was some confusion in the minds of these witnesses as to the meaning of the word adoption. Desiderio Montoya, one of the witnesses, testified: "A. I can't say but it seems to me that many people that raise children now, of course it is different now, years ago they raised a child, they kept him with them until he got to be the age of 21 or 25 until he got married and they always helped him out some way or another."

The largess of the foster parent or the bestowal of a reward for services performed is not the same as the conferring of a right to inherit a child's part. Moreover the power and duty to determine by whom property passes by a will or descends by inheritance is vested in the courts. If the trial court's finding quoted above should become the rule of decision in this jurisdiction, it would seriously affect the titles to real estate and introduce many elements of danger.

The relinquishment of the control of the child by its parents, especially to a blood relative, is not tantamount to an

agreement that the child may be adopted. In re Lind's Estate, 90 Wash. 10, 155 P. 159. "The mere fact that a child of another is received into a home, cared for, and educated cannot indicate that such a child has further claims upon those who took it in, and that there is an implied agreement to adopt the child." 2 C.J.S., Adoption of Children, § 26, p. 398.

Much of the testimony tendered by appellee is of the same character as that by which nuncupative wills were established before the repeal of our verbal will statute. Laws 1921, c. 83.

In Plomteaux v. Solano, 25 N.M. 24, 176 P. 77, 79, Mr. Justice Parker, after his long residence among the native people of New Mexico, speaking for the court, said: "The inhabitants of the then territory of New Mexico were largely of Mexican parentage, and it would seem but natural to adopt the law of wills which theretofore governed them. The language of the treatise is sufficiently clear to disclose beyond doubt that verbal wills were as efficacious at that time to pass title to real property as were written wills. In fact it appears that the practice of making verbal wills was more common than the practice of executing written wills, which was perhaps due to the lack of the general knowledge of letters. The act of 1852, while subject to criticism in some particulars for lack of definite expression, was declaratory of the law theretofore in force in said territory and of the civil law of Spain."

The Legislature saw fit to overturn a long-established custom and declare a new public policy as regards one method by which owners of property control its disposition at their decease. Adoption of a child is another method of affecting the descent of property, and in considering the rule as to the character of proof required of agreements to adopt we are not unmindful of the public policy established by the Legislature in the case of verbal wills. The testimony quoted indicates that the deceased was of the opinion that a will was necessary in order to carry out her desire that appellee have all her estate. Our statute of descent provides that an only child shall inherit all of the property of a widowed mother.

It appears to us that the probate court was right in holding that appellee failed to establish the agreement to adopt by the character of evidence required under the rule hereinbefore stated. Pantel v. Bower, 104 Kan. 18, 178 P. 241; Arfstrum v. Baker (Mo.Sup.) 214 S.W. 859; Haubrich v. Haubrich, 118 Minn. 394, 136 N.W. 1025.

Another point relied upon for reversal is that appellee failed to show that it would be a fraud upon her not to enforce the alleged agreement of adoption. Wooley v. Shell Petroleum Corp., supra. Her natural parents were poor and had five other children. Appellee greatly profit-

ed by what deceased did for her in affording her a home, educating and rearing her. She sacrificed nothing by remaining with the deceased. She married at nineteen and continued to receive help from her foster mother. "Where the promisee shows no substantial change for the worse in his position in consequence of the agreement, relief will be denied." Winkelmann v. Winkelmann, 345 Ill. 566, 178 N.E. 118, 120, citing Snyder v. French, 272 Ill. 43, 111 N.E. 489. We are in accord with the pronouncement of the Illinois court.

While fully conscious of the well-established rule that the question as to whether relief should be granted or denied is addressed to the conscience of the chancellor and that many considerations enter and are to be weighed, we feel that there is not only a failure of satisfactory proof as to the making of the agreement to adopt but the evidence fails to show any fraud upon appellee by reason of the failure to enforce the alleged agreement. For the reasons stated the judgment and order of the district court should be reversed, and the cause remanded for further proceedings in accordance with this opinion, and

It is so ordered.

SADLER, BICKLEY, and BRICE, JJ., concur.

ZINN, J., did not participate.

67 P.(2d) 240

STATE ex rel. SOFEICO v. HEFFERNAN.

No. 4159.

Supreme Court of New Mexico.

Dec. 22, 1936.

Rehearing Denied April 23, 1937.

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Frank H. Patton, Atty. Gen., and Edward P. Chase, Asst. Atty. Gen., for appellant.

Edward D. Tittmann, of Hillsboro, for appellee.

ZINN, Justice.

This is an appeal prosecuted to this court from an order of the district court discharging appellee from custody on his petition for a writ of habeas corpus. Appellee was arrested on April 13, 1935, on a charge of having in his possession part of a game animal, to wit, the skin of a bear, contrary to the provisions of Laws 1931, c. 117, § 8.

Appellee had theretofore been arrested on March 31, 1935, charged with killing a bear out of season. He was sentenced to a fine and imprisonment, from which, however, on the 5th day of April, 1935, appellee was discharged on a writ of habeas corpus. No appeal was prosecuted from such discharge. The writ was allowed on the theory that there is no such crime in the state of New Mexico as described in the complaint, to wit: "Killing a bear out of season." The bearskin in the instant case is of the said bear.

Appellee contends below and here that the crime now charged is a part of the same crime for which he was originally sentenced to imprisonment and from which imprisonment he was released by the lower court on April 5, 1935, and that such finding precludes any new prosecution for any alleged crime, to prove which it would be necessary to prove the same facts as would have had to be proved in the former charge. In other words, if it is not a crime to kill a bear in New Mexico, the possession of the hide of such bear cannot be a crime, and in any event, having been discharged and no appeal prosecuted on the charge of killing a bear, he cannot be again prosecuted for possessing the skin of the bear.

The prosecution of the appellee in both instances in the justice court was based on certain rules and regulations made by the State Game Commission. These rules were promulgated by the Game Commission pursuant to Laws 1931, c. 117.

Two very interesting and clear-cut issues of law are presented to us for disposition. Disposing of the first question in favor of appellee eliminates any necessity of treating the second question.

The first question presented is simply this:

Appellee questions the constitutionality and validity of Laws 1931, c. 117, on the theory that it delegates legislative powers to the State Game Commission. The Attorney General contends that the statute merely confers on the Game Commission power to determine certain facts and then act upon these facts in accordance with the legislative direction.

In considering this proposition of law, it becomes necessary to set forth herein the pertinent parts of the statute under consideration.

Chapter 117 of the Session Laws of 1931, under which this prosecution was had, is entitled, in part: "An Act Relating to Game

and Fish: Authorizing the Making and Promulgation of Regulations by the State Game Commission, and Providing Penalties for the Violation of Such Regulations."

Sections 1, 2, and 3 read as follows:

"Section 1. It is the purpose of this act and the policy of the State of New Mexico to provide an adequate and flexible system for the protection of the game and fish of New Mexico and for their use and development for public recreation and food supply, and to provide for their propagation, planting, protection, regulation and conservation to the extent necessary to provide and maintain an adequate supply of game and fish within the State of New Mexico.

"Sec. 2. The State Game Commission is hereby authorized and directed to make such rules and regulations and establish such service as it may deem necessary to carry out all the provisions and purposes of this act, and all other acts relating to game and fish, and in making such rules and regulations and in providing when, to what extent, if at all, and by what means game animals, birds and fish may be hunted, taken, captured, killed, possessed, sold, purchased and shipped, the State Game Commission shall give due regard to the zones of temperatures, and to the distribution, abundance, economic value and breeding habits of such game animals, birds and fish. * * *

"Sec. 3. The State Game Commission, in addition to the powers now vested in it, and not as a limitation of such powers, is expressly authorized and empowered by regulation adopted and promulgated in the manner hereinafter provided, to: (a) Define game birds, game animals and game fish; (b) Establish open and closed seasons for the killing or taking of all kinds of game animals, game birds and game fish, and to change such open seasons from year to year, and to fix different seasons for different parts of the state; (c) Establish bag limits covering all kinds of game animals, game birds and game fish, and the numbers thereof which may be killed or taken by any one person during any one day or during any one open season; (d) Authorize or prohibit the killing or taking of any game animals, game birds or game fish of any kind or sex; (e) Prescribe the manner, methods, and devices which may be used in hunting, taking, or killing game animals, game birds, and game fish."

Section 4 reads as follows:

"Any regulation of the State Game Commission reduced to writing, adopted by an affirmative vote of a majority of the members of the State Game Commission, signed by the President and attested by the Secretary of the State Game Commission, filed in the office of the State Game Warden, and published as provided by Section 11, Chapter 35, Session Laws of 1921 (Section 57-111, Compilation of 1929) shall be deemed to have been duly adopted and promulgated, and shall become effective fifteen (15) days after such publication.

"A copy of any such regulation certified by the State Game Warden to be a true copy and to have been adopted, signed, filed

and published as aforesaid, shall be prima facie evidence in any court in this State of the adoption, publication and promulgation of such regulation.

"The State Game Warden shall furnish a true copy of any such regulation to any person, firm or corporation, on request."

The record before us does not disclose whether the regulations under which the appellee was prosecuted were properly promulgated. We assume such regulations were properly promulgated and that a certified copy as provided by said section 4 was properly introduced at the prosecution of appellee. Such assumption is based on the fact that appellee does not question on that score the validity of the conviction in the justice of the peace court.

Section 7 reads in part as follows: "Any person who shall violate or fail to comply with regulations adopted and promulgated by the State Game Commission, pursuant to the provisions of this Act, or any other act, or who shall violate any of the provisions of any act relating to game or fish, now or hereafter in force, shall, upon conviction, be fined not less than twenty-five ($25.00) dollars nor more than three hundred ($300.00) dollars, or imprisoned not less than one day nor more than ninety days, or both such fine and imprisonment, in the discretion of any court."

Under authority conferred upon the State Game Commission by said statute, bear are defined as big game animals by regulation No. 57, section 2, which regulation was published according to law March 15, 1934. This statement is also from the brief of the Attorney General and not controverted by appellee. We accept its truth for the purpose of this opinion.

Seasons for game are subject to change, and therefore are contained in a digest published each year by the Department of Game and Fish. The open season for bear as established by the State Game Commission, under authority conferred upon it by said Laws 1931, c. 117, § 3, is from October 1st to December 10th of each year. A copy of the digest of game and fish laws is found in the brief of the Attorney General, and its accuracy is not questioned by appellee. We accept it as such. It reads as follows:

"Under authority conferred upon the State Game Commission by Chapter No. 117 of the 1931 Session Laws of the Tenth Legislature of the State of New Mexico, the following open seasons and bag limits for game animals, game birds, and game fish are hereby established, effective April 1, 1934, and this regulation shall remain in effect until changed by order of the State Game Commission.

"Section 1. The Seasons and Bag Limits For Big Game Shall Be:

"Bear: One per season, October 1 to December 10, inclusive.

"Dogs shall not be used in hunting bear during the deer season, and traps shall not be permitted at any time.

"Deer: (Mule deer, Virginia White Tail and Arizona White Tail). October 25 to November 15, inclusive.

"Turkeys and Squirrels: October 25 to November 15, inclusive.

"Bag limit, one buck deer with horns six inches or more in length, two turkeys and five squirrels.

"Elk: There shall be a special permit season on elk on the Pecos River watershed, north of a line drawn east and west through the town of Pecos and not to exceed 100 special permits at $10 each shall be issued. Applications shall be received up to September 30, and permittees shall then be determined by a public drawing if there are more than 100 applicants. The season shall be October 25 to November 15, inclusive, with a limit of one bull elk with 3 points on each horn. Hunting shall conform to rules prescribed by the State Game Warden, and hunters shall check in and out at such points as may be designated by him. Permittees must also possess regular big game hunting licenses."

Appellee very interestingly argues that the true rule ought to be that animals feræ naturæ should rightfully be held to be in the owner of the land on which the animals are. Appellee supports this argument with a citation from Holdsworth's History of English Law, vol. 1, pp. 94-109, and vol. 7, p. 494. It is appellee's contention that the generally accepted American doctrine, to wit, that the state, in the exercise of its police power, has the right to regulate the taking of game so as to protect the same in the interest of the food supply, is a mere fiction. That this is merely a smoke screen, curtaining its real purpose which appellee claims is legislation for the special benefit of those who may belong to gun clubs, or who possess the leisure and qualifications of sportsmen. Appellee cites the dissenting opinion of Justice Van Dyke, in Ex parte Kenneke, 136 Cal. 527, 69 P. 261, 262, 89 Am.St.Rep. 177 in support of his argument. Nevertheless, we are not impressed with this intriguing argument. We believe the prevailing American doctrine sound in law, principle, and common sense.

All the authorities are to the effect that the state holds title to the wild animals in trust for the people. No individual has any title to any such animal until he reduces it to lawful possession. As trustee for the people, the state through its Legislature may enact laws designed to conserve wild life, and regulate or prohibit its taking in any reasonable way it may deem necessary for the public welfare, so long as it does not violate any organic law of the land.

As stated by the Supreme Court of Washington in a leading case: "Under the common law of England all property right in animals feræ naturæ was in the sovereign for the use and benefit of the people. The killing, taking, and use of game was subject to absolute governmental control for the common good. This absolute power to control and regulate was vested in

the colonial governments as a part of the common law. It passed with the title to game to the several states as an incident of their sovereignty, and was retained by the states for the use and benefit of the people of the states, subject only to any applicable provisions of the federal Constitution." Cawsey v. Brickey, 82 Wash. 653, 144 P. 938, 939, and cases therein cited.

In New Mexico, as in many other states, game and fish have been, and continue to be, a source of food supply. Wild animals are not of common right open to capture and possession by the public. This may have been true in the early Indian days, when no necessity existed for restrictions, and when the native residents as well as the newcomers were largely dependent upon hunting and fishing for food to supplement the supply brought by wagon trains over the Santa Fé Trail. This status has long since passed. It is now generally recognized that New Mexico's valuable wild animal life would soon be exterminated if the state should fail to conserve it and aid in its reproduction.

Other states have enacted laws with this purpose in view, and, whenever this has been done without trenching on private rights protected by the Constitution, such acts have been almost uniformly upheld. 12 R.C.L. 691, and cases therein cited. Nearly every conceivable regulation for the propagation, conservation, taking, and disposal of fish and game has been upheld where no constitutional objections have stood in the way. Generally, courts have given very liberal construction to such statutes, to the end that the public welfare should be subserved.

We do not agree with Justice Van Dyke in his dissenting opinion in the case of Ex parte Kenneke, supra, wherein he says: "The women and children of the state, and the men who have not sufficient time to hunt game, and the old and infirm, and such as are not endowed with good sight, are all deprived of any use or benefit in the wild game unless some sportsman friend may see proper to give it to them. He has read history to very little purpose who does not know that game laws such as this, enacted and enforced in the interests of a privileged few, have been the fruitful source of the oppression of the masses of the people, and have caused more popular discontent and resentment than almost any other subject. It were better to exterminate the game at once than to preserve it for the special benefit only of a favored few."

It may be true that many of us prefer immersion in fiction or history to the rod and reel or an afternoon of bridge to the chase of game with gun. Justice Van Dyke is not sufficiently acquainted with the hunting and fishing fraternity when he states that women, children, the aged, and infirm are being deprived of any use or benefit of wild game. We could almost take judicial notice of the fact that some of the best hunters and fishermen are women and children. Even the aged and infirm are often seen on the banks of a river or lake with rod and bait. Many of us cannot forget our child-

hood days when, with bamboo, pinhook, and worm, we enjoyed an afternoon's meditation beside a lake, totally indifferent as to whether the worm drowned or the fish was caught, to accept unqualifiedly the opinion of Justice Van Dyke that children are deprived of any use or benefit of wild game.

It may be true that either because of inherent laziness, soft muscles, or total indifference we now join the ranks of nonfishers and nonhunters and depend upon the bounty of some sportsman friend to enjoy a trout or cut of venison in season, yet even we davenport, sofa, or softchair sportsmen receive some of the food supply which is protected by the game laws, and which would be otherwise exterminated.

Appellee argues that judges are notorious hunters and fishermen, hence the universal judicial opinions sustaining game laws. Appellee cites no authorities in support of his condemnation (or praise) of the judges as being sportsmen, and we cannot take judicial notice thereof.

Reverting to the issue.

The state of New Mexico under its police power, and to carry out its trust, passed the statute (Laws 1931, c. 117) in question. So far as it affects the public, the main purpose of the statute is reasonable, and (with one exception, which will hereafter be discussed) is not contrary to any provision of the Federal or State Constitution. Here we have a statute aimed to conserve the property of the state which it holds in trust for the public. It should be given a liberal construction to sustain its validity, and it cannot be set aside unless it clearly violates the organic law of the nation or state.

The Legislature for the protection of the game and fish of New Mexico and for the purpose of regulating their use and enjoyment, for public recreation and food supply (chapter 117, § 1), has vested in the State Game Commission, an administrative branch of the executive department, the administration of our game and fish, and to this commission is intrusted the duty of safeguarding this property in the interest of the public. The statute in question is an exercise of the state's power in carrying out its large and comprehensive conservaation program of promoting and protecting the public resources, and the comfort and happiness of its people.

The Supreme Court of the United States, in Lacoste v. Department of Conservation, 263 U.S. 545, 44 S.Ct. 186, 187, 68 L.Ed. 437, in upholding a law of Louisiana, where a tax was levied upon furs taken from animals captured in the state, in the hands of dealers, and which act also covered regulations in detail of the whole subject of hunting, trapping, and disposition of the furs so taken, said:

"The wild animals within its borders are, so far as capable of ownership, owned by the state in its sovereign capacity for the common benefit of all of its people. Because of such ownership, and in the exercise of its police power the state may regulate and control the taking, subsequent use and

property rights that may be acquired therein. * * *

"The legislation is a valid exertion of the police power of the state to conserve and protect wild life for the common benefit. It is within the power of the state to impose the exaction as a condition precedent to the divestiture of its title and to the acquisition of private ownership. * * * Wild animals permitted by the state to be taken and reduced to possession on prescribed conditions may reasonably be distinguished from other classes of property. * * * Protection of the wild life of the state is peculiarly within the police power, and the state has great latitude in determining what means are appropriate for its protection."

The decision held the Louisiana act constitutional, and the same principle applies to the act here in question. The statute is a valid enactment under the police power of the state.

The appellee, however, presents the proposition that the act itself contravenes N. M. Const. art. 3, § 1, as being a delegation of legislative power to an executive department. With this contention in its entirety we cannot agree.

We have here a statute made by the enacting body in the exercise of its police power. The validity of the grant of discretion depends largely upon the nature of the business or thing with respect to which it is to be exercised, and as to whether or not the proper regulation and control thereof require that a discretion be vested in one or more public officials in order properly to control the conduct of the business, or the use, etc., of the article or thing in question.

On the question of the validity or invalidity of statutes vesting discretion in public officials without prescribing definite rules of action, we find exhaustive case notes in 12 A.L.R. 1435, 54 A.L.R. 1104, and 92 A.L.R. 400.

From a reading of many cases, we find the general rule to be that a statute or ordinance which vests arbitrary discretion with respect to an ordinarily lawful business, profession, appliance, etc., in public officials, without prescribing a uniform rule of action, or, in other words, which authorizes the issuing or withholding of licenses, permits, approvals, etc., according as the designated officials arbitrarily choose, without reference to all of the class to which the statute or ordinance under consideration was intended to apply, and without being controlled or guided by any definite rule or specified conditions to which all similarly situated might knowingly conform, is unconstitutional and void.

However, within this rule is another rule: "It is also well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule, or the discretion relates to the administration of a police regulation and is necessary to protect the public morals.

health, safety, and general welfare." 12 A. L.R. 1447.

Laws 1931, c. 117, relates to the administration of a police regulation.

The Legislature meets once every two years, and then only in session for 60 days or less. N.M.Const. art. 4, § 5. It is concerned with many affairs of state other than the protection of our wild life. The knowledge and ability required of providing means to preserve, propagate, and protect the birds in the air, the beasts in our forests, and the fish in our streams and lakes, requires years of study and knowledge beyond that of the average man. Considering all the elements involved, it would be unreasonable and unscientific to expect the Legislature to determine in advance when a game or fish season should be open or closed, when and where game and bird preserves should or should not be established. If a drouth or flood should occur, which, coupled with an open season, might exterminate any of the game, fish or bird species, it would be beyond common sense to call into special session the Legislature for the express purpose of closing a season which had theretofore been declared open by statute to preserve and save from extinction some species of game or fish. A senseless and narrow technical construction might hold that chapter 117 in its entirety is a delegation of legislative power. We cannot view the same in that light.

We find that in the necessary exercise of the police power of the state some discretion must be vested in our State Game Commission. It is difficult and impracticable for the Legislature to lay down definite, minute, and comprehensive rules in the matter of game protection. This the State Game Commission can do. This the Legislature authorized the commission to do. This is not a delegation of legislative power, but in chapter 117, § 2, and all of section 3, except subsection (a) thereof, we merely find the authority for the Game Commission to determine certain facts or a state of things upon which the law has already acted, depending upon the determination of such facts or state of things by the Game Commission. This is not the enactment of substantive law. Locke's Appeal, 72 Pa. 471, 13 Am.Rep. 716.

The Game Commission has the power to establish open and closed seasons and prescribe the method of killing or capturing the same, and to establish bag limits. These are mere matters of fact to be determined by the Game Commission incident to its administration of the trust.

By analogy, we can assume a forestry commission intrusted with the care and management of the timber lands of the state. To such commission would be intrusted the care, management, and sale of timber. It would be unreasonable to say that the Legislature, and it alone, by statute must regulate the time when timber is to be cut, which trees must be cut, and the type of tools to be used in the logging operation. Common sense answers the query in the supposed case by the creation of a forestry commission and the same reasoning is applicable in the instant case.

We now come to the Achilles heel of the act under consideration. By subsection (a) of section 3, the State Game Commission is authorized to define game birds, game animals, and game fish. Under this provision the State Game Commission would have authority to designate range cattle, rattlesnakes, jack rabbits, or cottontail rabbits as "game animals" when they are clearly not such as known to the law. We do not question the right of the Legislature to place its protective arm about any wild animal and protect it from extinction and intrust such protection to the Game Commission. No such authority exists in the executive branch of our government and the Legislature cannot delegate such authority. The term "game" is to be understood in its ordinary signification, and includes all game birds, game fowl, and game animals. Although we find that in New Mexico the Legislature has denominated a bear as a game animal, Laws 1935, c. 123, § 1, subsec. 3; nevertheless it is a predatory animal primarily, and has been so recognized by our Legislature. Five different territorial legislatures enacted laws placing bounties on the scalp of bear. See 1897 Compiled Laws, § 763; 1899 Session Laws, c. 38, § 1; 1901 Session Laws, c. 10, § 1; 1903 Session Laws, c. 80, § 1; 1905 Session Laws, c. 77, § 1. The State Game Commission cannot, by resolution, declare that a jack rabbit is a game animal. This is clearly a legislative function.

The Legislature, representing the people, and the Legislature alone, can define what is and what is not a game animal, and the Legislature can make it a criminal offense to kill wild animals which are either predatory animals or game animals. Such power cannot be delegated. The Attorney General offers no authority supporting a contrary view, and our search has disclosed none.

The courts are almost unanimous in upholding the power of commissions under statutes similar to ours to fix hunting season; and promulgate regulatory orders. There is an annotation in 34 A.L.R. at page 832, and the following cases have been decided since the writing of the note: Musgrove v. Parker, 84 N.H. 550, 153 A. 320; Van Camp Sea Food Co. v. Department of Natural Resources (D.C.) 30 F.(2d) 111; Ex parte Lewis, 101 Fla. 624, 135 So. 147; People v. Soule, 238 Mich. 130, 213 N.W. 195; Horne v. State, 170 Ga. 638, 153 S.E. 749.

In so far as chapter 117 authorizes the State Game Commission to promulgate orders providing when, to what extent, and by what means game may be hunted, taken, captured, killed, possessed, sold, purchased, and shipped, we hold that said chapter 117 does not contravene the Constitution of the State of New Mexico, but as to that provision of said statute which authorizes the State Game Commission, an arm of the executive branch of our government, to define game birds, game animals, and game fish, we hold that it is an unlawful delegation of legislative authority, and therefore contravenes article 3, § 1, of the N.M.Const. The legislative branch, and it alone within the limitations of the Constitution, can

create substantive law, and the right to define what constitutes a game animal is clearly substantive law. The clearest analogy to the power herein attempted to be delegated would be an act of the Legislature authorizing a commission to define what constitutes intoxicating liquor. Clearly the courts could not sustain such a delegation of legislative authority.

Having disposed of the first question, it becomes unnecessary to determine the second proposition presented herein; namely, whether the possession of a bearskin is a separate and distinct offense from that of killing the bear from which the skin was taken.

The appellee was held to answer the charge that he had violated certain regulations promulgated by the State Game Commission under an authority claimed by said commission pursuant to Laws 1931, c. 117, § 3. We hold that such authority does not exist. The trial court so held, and the appellee was discharged on his application for a writ of habeas corpus. We find no error in the ruling of the trial court in discharging the appellee from custody on his petition for a writ of habeas corpus, and the judgment of discharge will be affirmed.

It is so ordered.

SADLER, C. J., and HUDSPETH, BICKLEY, and BRICE, JJ., concur.

On Rehearing.

ZINN, Justice.

On rehearing, the Attorney General presents a proposition not specifically and directly presented when we first considered the case. It is now his contention that the charge against appellee of unlawfully possessing the bearskin was not based upon the violation of a regulation of the Game Commission, but rather on Laws 1931, ch. 117, § 8. Clearly that is true.

However, the foundation of this latter case is the first case. Appellee was first charged with killing a bear out of season. The State contended at that time that this species of animal is a game animal, not because the Legislature defined it to be a game animal, but because the Game Commission, pursuant to its regulation No. 57 declared the bear to be a game animal. The Game Commission claimed authority to define bear to be a game animal in Laws 1931, ch. 117. The theory under which the appellee was prosecuted in both cases in the justice of the peace court, and the theory urged upon the district judge in the habeas corpus proceedings, was not that the bear had been defined or classed as a game animal by any legislative declaration, but was predicated upon the Game Commission's pronouncement that the bear was a game animal.

We said in our opinion that the Game Commission cannot do this without a prior legislative declaration that the bear is a game animal. From this statement of the law we do not recede. The entire case, beginning with the prosecution in the justice of the peace court on to the final appeal, presented the question as to whether or not the Legislature could delegate to the Game Commission the right to define

game animals. The district court as well as this court was led into a consideration of the question of delegation of powers. This question we determined.

Our attention has now been called (on rehearing) to Laws 1935, ch. 123, § 1, subsec. 3, amending 1929 Comp.St. § 57-217, which provides as follows: "A big game license shall entitle the person named therein to hunt big game and other game quadrupeds during the season therefor. (Deer, bear and wild turkey are classified as big game.)"

The Attorney General contends that bear is a game animal because of this legislative act. If the Legislature has defined bear to be a game animal, then clearly the appellee violated the law.

[redacted] In view of our opinion, nothing would prevent the Game Commission from fixing the open and closed seasons on such game animal. It would properly be within the powers of the Legislature to delegate to the commission such power. In prosecuting the appellee, charging him with either killing or having in his possession a part of a game animal, the State would have to base its case on both a statute showing that bear was a game animal and also that such animal had been killed out of season. To support such charge the State would have to invoke a statute defining bear to be a game animal and rules and regulations of the commission to show that the bear was killed out of season.

It may be questioned whether this legislative declaration (Laws 1935, ch. 123, supra) is sufficient to classify bear as a game animal. However, we have made an independent search of our statutes relating to game, to ascertain if the Legislature has already declared the bear to be a game animal.

[redacted] In our original opinion we stated, "The legislature has denominated a bear as a game animal, Laws 1935, c. 123, § 1, subsec. 3." That act would not be sufficient to validate a regulation of the commission theretofore made making bear a game animal because, in the first place, it did not purport to be a validating act, and, further, if the Legislature had no power to delegate the function of designating game animals to the commission, it is doubtful whether they could afterwards validate such an unconstitutional action. In our original opinion we did not consider the fact that subsection 3 of section 1, ch. 123, Laws 1935, so far as it bears on what is a game animal is concerned, was merely a re-enactment of subsection 3 of 1929 Comp.St. § 57-217, which in turn was the compilation of a portion of Laws 1927, c. 34. The Attorney General did not call our attention to this, and we assumed that the Legislature had never, prior to 1935, said that bear was a game animal.

[redacted] Our search of the statutes discloses that the Legislature by chapter 34, Laws 1927, did intend to denominate bear a game animal. This is apparent from reading the same. Section 1 of that act amends section 12 of chapter 47, Code 1915, as amended by section 7, ch. 101, Laws

1915, as amended by section 3, ch. 133, Laws 1919. In tracing the pertinent parts of the amended section, we find that section 2435, Code 1915 (Act June 14, 1912, Laws 1912, c. 85), said: "No person shall at any time shoot, hunt or take in any manner any game which is by law protected in this state without first having in his possession a hunting license as hereinafter provided for the year in which such shooting or hunting is done. * * * A big game license shall entitle the person therein named to hunt game quadrupeds during the open season therefor. (Wild turkeys are classified as big game under the meaning of the chapter.)"

This section was amended by Laws 1915, c. 101. There was a re-enactment or amendment of the section, but subsection 3 remained the same. This was amended by chapter 133, Laws 1919, but no change was made in subsection 3. Then at the 1927 Session, chapter 34, section 3, was amended by changing the part in parenthesis so as to read "(Deer, bear, and wild turkey are classified as big game.)" In the same act appears section 2, which amends section 1 of chapter 154, Laws 1921, as amended by section 3 of chapter 57, Laws 1925. This section 1 of chapter 154, Laws 1921, so amended was an amendment of section 2438, Code 1915, as amended by section 4, c. 133, Sess. Laws 1919. In tracing this legislation, we see that in section 2438, which was a portion of the Act of June 14, 1912, it was declared: "The open season for hunting, taking or possessing any of the animals, birds or fish protected by this chapter shall be between the following named dates only, both inclusive."

Likewise bear was not mentioned in the amendment of this section made in chapter 133, Laws 1919. Likewise bear was not mentioned in the amendment made by chapter 154, Laws 1921, but by section 2 of chapter 34, Laws 1927, the Legislature, by way of amendment of the earlier enactments, declared: "The open season in each year for hunting, taking or possessing any of the game animals or birds protected by this Act shall be: * * * For bear from October 10th to October 31st, both inclusive, limited to one bear in a season."

In the same amendatory act (chapter 34, Laws 1927) where, in section 1, whereby section 12 of the original act was amended, the Legislature indicated in subsection 3 thereof that a bear is a game animal "protected by this Act," they also further in the same amended other sections so as to specifically show that bear was to be protected by "this act" by declaring the open season on said bear to be limited to 22 days and further limited to one bear in a season.

Our original opinion is correct if the only definition of a game animal is to be found in the rules and regulations of the Game Commission. But the bear as a game animal is sufficiently defined in the statute and has been so defined long prior to the offense alleged to have been committed by appellee. This being so, the appellee was properly charged with the unlawful killing of a game animal, to wit, a bear.

This brings us necessarily to another point raised by appellee to sustain his discharge on habeas corpus. He claims he was discharged by the district court in the first habeas corpus (which order of discharge became final, because no appeal was taken), and therefore such final decree of discharge becomes res adjudicata to the second prosecution.

The question thus presented is whether or not the possession of a bearskin in the instant case becomes a separate and distinct offense from that of killing the bear from which the skin was taken or was the adjudication by the trial court in the first habeas corpus proceeding a bar to a prosecution on the second charge?

On March 31, 1935, the appellee was charged with killing a bear out of season. The trial court in the subsequent habeas corpus proceeding released the appellee on the theory that it is no crime in the State of New Mexico to kill a bear out of season. From this judgment no appeal was prosecuted by the State.

So long as a judgment remains unappealed from and in full force, it does not detract from its effect as a bar to further suits upon the same cause of action that it may be erroneous, so as to be reversible on appeal or error, or so irregular that it would be vacated on a proper application for that purpose. See 34 C.J. § 1184.

No appeal having been prosecuted, the judgment was final. Therefore, to all legal intents and purpose, that particular bear was by judicial decree held not to be a game animal. Such judgment becomes res judicata as to any and all future litigation between the same parties (State v. Heffernan) involving that particular bear's status as a game animal.

The particular bear in question is no more a game animal to support the charge of the state that the appellee had in his possession the skin of a game animal, to wit, a bear, than would such a charge be supported had the bear been a circus bear. The appellee invokes a rule of law too well established in our jurisprudence, the rule of res judicata.

Under this rule the judgment or decree of a court of competent jurisdiction upon the merits concludes the parties and privies to the litigation and constitutes a bar to a new action or suit involving the same cause of action either before the same or any other tribunal. Under this rule any right, fact, or matter in issue, and directly adjudicated upon, or necessarily involved in, the determination of an action before a competent court in which a judgment or decree is rendered upon the merits, is conclusively settled by the judgment therein and cannot again be litigated between the parties and privies whether the claim or demand, purpose, or subject matter of the two suits is the same or not. See 34 C.J. § 1154.

In the case now before us the parties were the same as in the previous habeas

corpus proceedings. The matter first adjudicated was that the particular bear in question was not a game animal. To prove the instant case the State would have to prove that the skin in possession of the appellee was taken from a bear that was a game animal. The court having already adjudicated (between these same parties, even though erroneously) that the bear was not a game animal, it is not the policy of the law to permit this same question between the same parties to be again litigated.

Res judicata is a rule of universal law pervading every well-regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the state that there should be an end to litigation, the other, the hardship on the individual that he should be vexed twice for the same cause.

The final determination of the original action as to the entire subject of the controversy (Is a bear a game animal?), and such controversy and every part of it, must stand irrevocably closed by such determination.

The appellee could not again be prosecuted for killing the bear, and he cannot be prosecuted for having in his possession the skin of that same bear.

For the reasons given the result announced in our original opinion sustaining the ruling of the trial judge in discharging the appellee from custody on his petition for a writ of habeas corpus must stand. The motion for rehearing is denied.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

67 P.(2d) 250

CAVENDER v. PHILLIPS et al.

No. 4140.

Supreme Court of New Mexico.

April 6, 1937.

Otto Smith, of Clovis, for appellants.

Hatch, Grantham & Houk, and Mayes & Rowley, all of Clovis, for appellee.

BICKLEY, *Justice.*

From a decree for the appellee (plaintiff below) against appellants (defendants below) quieting title to certain real estate, this appeal has been prosecuted. Only one proposition requires discussion.

The complaint contains a statutory action to quiet title. An answer was filed by one of the defendants (appellant), containing denials and certain affirmative allegations assailing the validity of a tax deed relied upon by plaintiff as the source of his title. A demurrer was filed to the affirmative portions of the answer upon the ground principally that the allegations thereof fail to state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's complaint. This demurrer was sustained and appellant declined to amend; whereupon judgment was entered for appellee.

We assume that when the court ruled upon the demurrer there was presented to him the same picture that is presented to

us in the pleadings and briefs of counsel for appellant. So viewing it, it appears that the appellant had been the owner of the property involved; that said property was sold for delinquent taxes and never redeemed; that a tax sale certificate describing said property was issued to Curry county, filed for record, and thereafter by the county sold and delivered to Walter W. Mayes, one of the attorneys for appellee, who delivered same to the treasurer and tax collector of Curry county, who, in turn, issued the tax deed in exchange therefor to appellee; that the said Walter W. Mayes attempted to assign the certificate to plaintiff by indorsement; that said indorsement by Mayes was made in blank; that the name of plaintiff did not appear therein; that it was not dated; that no consideration was specified therein; that the name of plaintiff to whom the tax deed in question was issued appeared no place in the tax proceedings until he appears as grantee in the tax deed. It is assumed that plaintiff, the physical holder of the certificate, presented it to the treasurer and demanded the deed which was issued to him, or that said certificate was presented to the treasurer and demand made by his attorney, Walter W. Mayes, that deed be executed to plaintiff. From these representations, it is claimed that the county treasurer acted in an unwarranted and illegal manner in delivering a tax deed to the plaintiff, and that consequently said tax deed is void.

Appellant relies almost exclusively on the decision of the Territorial Supreme Court in Territory v. Perea, 6 N.M. 531, 30 P. 928. It was held: "In a proceeding by mandamus, by a holder of a certificate of tax sale, indorsed in blank by the original purchaser, to compel the sheriff and ex officio collector of Bernalillo county to execute and deliver to him a deed to the land sold, where it appeared that the defendant, by the order of the board of county commissioners, had previously made and delivered to the administrator and legatee of the original purchaser a deed to the land, after the time of redemption had expired; that the proceedings before the board were regular; and that, at the time of the execution and delivery of the deed, there was no assignment of such certificate of record in the office of the probate clerk,—Held: The sheriff had no power to execute a second deed to the land, while the first deed remained uncanceled, and the court below properly refused to grant a peremptory writ of mandamus to compel him to do so." Not only is that decision not a binding precedent in the case at bar, but the reasoning therein has been rendered inapplicable because of the changes made in the tax statutes since the time that decision was rendered. The real question decided by the court in that case was that the respondent had no power to issue another tax deed for the reason that by the issuance of the tax deed previously issued he had exhausted his legal authority and that compliance with the alternative writ was legally impossible. The court, speaking of the deed which the collector had been ordered by the county commissioners

to make, said: "The sheriff was powerless to resist the order of the board. It was his duty to make the deed. The remedy provided by statute was strictly pursued, and the deed was made as required by law. The sheriff, by the execution of that deed, exhausted his power in the premises, and, so long as that deed remains uncanceled, it is clear that the respondent has no power to execute a deed to the relator."

It is likewise to be noted that the court put much emphasis on the fact that the application of the statute relative to assignment of tax sale certificates was made to a mandamus case and not to a suit in equity.

In considering the views of the Supreme Court of Iowa, for which our court manifested a respect, and in differentiating it, the first thing Judge McFie said after the citation (Swan v. Whaley, 75 Iowa, 623, 35 N.W. 440) was: "This was an action in equity to cancel a deed." That was one distinguishing feature. The court emphasized this in concluding its argument on the subject by saying: *"We do not hold* that the signing of the name on the back of the certificate, for a valuable consideration, with the intention of transferring the certificate, would not give the holder such an equitable interest in the certificate and the rights accruing by virtue of it as would enable him to enforce them in a court of equity, but we are of the opinion that the transfer of the certificate, *under the circumstances shown in this case, did not operate to convey the legal title therein* to the relator, so as to enable him to maintain an action of *mandamus.*" (Italics ours.)

Black on Tax Titles, in section 316, says: "But in some of the states, it has been provided by statute that such certificates 'shall be assignable by indorsement.' There is, however, some difference of opinion as to the proper construction of such a statutory provision. We find one case holding that the mere writing of his name by the purchaser on the back of the certificate does not constitute an 'indorsement,' and that a person to whom the certificate is delivered by the purchaser, with his name so written upon it, has no authority, by virtue of such delivery, to write a formal assignment thereof above the signature. But this view is not sustained by the weight of authority. On the contrary, the authorities appear to agree that the design of such a statute is to make the certificate quasi negotiable, so that it may pass from hand to hand, carrying all rights with it, by a mere indorsement in blank."

The one case cited is Territory v. Perea, supra. However, we do not quarrel with the dictum of Judge McFie in that case. We merely say it is not persuasive in the case at bar.

There are a number of distinguishing features between that mandamus action and the case at bar, which is a suit in equity. Some of them are of greater importance than others, but we will mention several. The indications are that our Territorial Supreme Court would have been inclined to adopt the holding of the Iowa

Supreme Court in Swan v. Whaley et al., 75 Iowa, 623, 35 N.W. 440, if it had before it for consideration a case to be determined upon equitable principles. In disposing of that case as affording a precedent in the mandamus case, our court called attention to the fact that the Iowa Code provided that when the assignment of the certificate is made the right and title of the assignor immediately vests in the assignee without depending upon any further or future contingency. Our then existing territorial statute (Comp.Laws § 2885) provided to the contrary; it therein being declared: "When the assignment of a certificate is entered upon the record of sales in the office of the probate clerk, it shall vest in the assignee or his legal representatives all the right and title of the original purchaser." Judge McFie went on to say: "The assignment, therefore, under the statute of New Mexico, is conditional upon something being done by the assignee to have the right and title of the original purchaser vest in him, and, until this is done, the right and title of the original purchaser does not pass to the assignee. * * * 'A certificate of purchase at a tax sale does not convey a legal title. It is, however, evidence of an equitable title to the land, and enables the purchaser to call in the legal title.' These certificates are the foundation of title, and may ripen into full and complete legal title. * * * Assignments of such certificates are required to be entered of record in this territory before the title to them vests in the assignee." Our Territorial Supreme Court was considering statutes existing in 1892. In 1921 our Taxation Code was entirely overhauled and rewritten, being chapter 133, Session Laws 1921, which controls the case at bar. By section 442, the effect of the tax sale certificate was declared as follows: "The tax sale certificate, when recorded, shall vest in the purchaser, his heirs or assigns * * * a complete legal title to the property described therein, subject to redemption as provided by law." The effect was to convey a complete legal title subject to defeasance by redemption, which was directly contrary to the effect of the statutes under consideration in the Perea Case; there the certificate being merely evidence of an equitable title which would ripen into a complete legal title only after the period of redemption had expired. Furthermore, the requirement of the statutes existing at the time of the Perea decision that assignments be recorded was dropped when the 1921 Tax Code was formulated, or prior thereto. We discover nothing in the Tax Code requiring the recordation of assignments. The law requires that the tax sale certificate be recorded and recordation of the certificate is requisite for the vesting of complete legal title "in the purchaser, his heirs or assigns." We discover no requirements for further recordation of the certificate of sale after an assignment or successive assignments have been indorsed thereon. The change in our system of effectuating tax titles since the decision in the Perea Case has minimized the import-

ance of that case to a degree, particularly as some of the reasons for the decision no longer exist.

The court in the Perea Case invoked the argument that it would be a dangerous thing to permit a person claiming to be the holder of a certificate to write a formal assignment over the alleged signature of the assignor after his death. The court suggested that as an assignment is a conveyance, the form of the assignment might be explained by testimony which would disclose whether his act of indorsement on the certificate was intended to be a conveyance or not. Manifestly under the facts in the Perea Case and in a mandamus action, where the officer could not be required to perform an act other than ministerial, and not then unless it was clearly his duty to perform it, and concerning which he would have no discretion to refuse performance, the fact that Moore, the purchaser at the tax sale and the holder of the certificate, was dead before the assignment was written in above Moore's signature on the certificate was an important factor in the court's conclusion. The court said that since Moore's mouth was closed, the adversary of his heirs or personal representative ought not to be permitted by his acts to reflect facts which had occurred before Moore's death. A much less strict view can be taken in the case at bar. Here it appears from the record in an equity case that Walter W. Mayes, to whom the tax sale certificate had been originally issued and who had assigned it in blank to Cavender, the plaintiff, was in court as Cavender's counsel. Not only was Mayes' mouth not closed, but he was opening it to urge the integrity of his assignment of the certificate to Cavender. These differences in circumstances existing in the Perea Case and in the case at bar reflect the differences in the effect that the application of principles may have to divergent situations.

Portions of the decision in the Perea Case may still be useful in another mandamus case, but it places no restraint upon us in the case at bar. The difference between the way the matter comes up, whether in a mandamus case or in an equity suit, may be very important.

We think our decision in State ex rel. McFann v. Hately, 34 N.M. 86, 278 P. 206, affords illustration of this. We there held that one who had no interest in real estate, but desires to purchase a tax title thereon, could not complain because the county treasurer permitted the original owner or lienholder to redeem after the expiration of the statutory period of redemption but before such prospective purchaser had acquired any right in the certificate. We said that we did not wish to be understood as holding that the treasurer has the power to extend the period of redemption by oral agreement with the taxpayer, nor waive the utmost diligence and readiness to pay required by law, but we held that where the tax sale certificate was still held and owned by the county and no third person's interests were involved, although the statutory period of

redemption may have previously expired and the county treasurer had accepted the amount which was due from one otherwise having a right to redeem, the rights of the redeemor could not be assailed by one not showing a better right. The action of the county treasurer under the facts in that case involved some exercise of discretion. It is to be very much doubted if the holding in that case would support mandamus to require the county treasurer against his refusal to receive tendered redemption money and permit a redemption after the statutory period of redemption had expired.

In the Perea Case Judge McFie distinguished the Iowa case because the Iowa court said that no assignment was necessary to warrant the treasurer in executing the deed, inasmuch as an Iowa law (Code 1873, § 894) provided that the "lawful holder" was entitled to the deed upon producing the certificate. Section 4100, C.L. 1897, controlling in the Perea Case, provided: "On demand of the purchaser, his heirs or assigns, and on presentation of the certificate of sale, the collector * * * shall make out a deed," etc. If Judge McFie properly appraised the Iowa decision as above noted, then it would more nearly fit our law as it now exists than at that time, because section 452, c. 133, L. 1921, provides that under designated circumstances, "on demand of the holder of the tax sale certificate, presentation thereof to the county treasurer," a deed shall be issued, etc. We think that the object of this provision is to afford the treasurer certain evidence of who is entitled to the deed when the right to one accrues. If, however, he should, without having the statutory evidence of assignment, execute a deed to the one who in fact and in law was entitled to receive it, the question of its validity would not be affected by the fact that he acted without such evidence. See Swan v. Whaley et al., 75 Iowa, 623, 35 N. W. 440. Of course, this is not to say that if the person who presented the certificate and made demand that a deed be issued to him is not in fact and in law the owner of the certificate, he would acquire any rights in the property involved by virtue of the execution of a deed to him. The real owner of the certificate doubtless could assert his right, title, and interest in and to the property as against a fraudulent interloper or his privies.

We think the phrase employed in section 455, "assignee of the purchaser," is not limited to a person named as assignee in an indorsement on the tax sale certificate. We apprehend that the interests represented by the certificate being a thing of value may be assigned as a matter of law, as for instance to the personal representative of a deceased owner of a certificate, or through execution sale to a creditor of such owner, and that the phrase "holder of the tax sale certificate" to whom the deed may be issued under the provisions of section 452 is broad enough to cover "heir at law," who under section 455, if named as grantee in the tax deed, is presumptively entitled thereto. And such language would seem to be broad enough to embrace any one

who is in law and in fact entitled to the interest represented by the certificate, such as an assignee by operation of law or by indorsement on the certificate. These considerations strongly support the view that "holder" is not limited to a person named in a formal assignment indorsed on the certificate.

It will be noted that section 455 does not say that the tax deed is prima facie evidence that the grantee is the holder of the certificate by indorsement thereof. It says that it is evidence that the grantee named in the deed was the purchaser, or his heir at law or his assignee, which suggests, as was held by the Iowa court in Swan v. Whaley, supra, that assignment of the certificate by indorsement affords the treasurer certain evidence of who is entitled to the deed, but is not the only evidence by which it may be established that the physical holder of the certificate is the assignee of the purchaser. See Christian v. Lockhart et al., 31 N.M. 331, 245 P. 249. It thus appears that the facts alleged in the answer do not fully negative the presumption that the grantee named in the tax deed is "heir at law or assignee of the purchaser."

In American Exch. Nat. Bank of City of New York v. Crooks, 97 Iowa, 244, 66 N.W. 168, it was held: "Possession of a certificate of purchase at tax sale (which Code, § 888, declares shall be assignable by indorsement), indorsed with the name of the one to whom it was issued, is prima facie evidence of ownership." The court says: "The land was sold to Charles S. Hazlet, and the certificate of sale issued to him. It came into the possession of the defendant Crooks, and the name 'Chas. S. Hazlet' is indorsed thereon. On the return of the certificate so indorsed, the tax deed issued to Crooks. The point is now made that there is no evidence that Hazlet ever parted with his title or interest in the certificate. We think the facts of possession by Crooks and the indorsement are prima facie evidence of ownership by Crooks. It is provided by Code, § 888, that the 'certificate of purchase shall be assignable by indorsement.' It is conceded on the authority of Swan v. Whaley, 75 Iowa, 623, 35 N.W. 440, that such an indorsement conveys the title upon proof that the parties so intended, but it is thought that the indorsement and delivery are not sufficient evidence of the fact of such intent. The fact of possession alone is some evidence of ownership, and the known purpose of an indorsement generally, and its legal effect in particular cases, strengthen the evidence, so that it is at least a prima facie showing of ownership. The indorsement and delivery were for some purpose, and a transfer of the certificate is the presumable one where no other purpose appears."

We view the matter on the record before us much as did Mr. Justice David J. Brewer in an opinion prepared for the Supreme Court of Kansas in Gardenhire v. Mitchell, 21 Kan. 83. A statute of Kansas provided for transfer of the interest of a tax certificate holder "by a written assignment, indorsed upon or attached to the

same," section 90, c. 107, Gen.St. of Kansas 1868, which we assume the court had under consideration. The action was one in ejectment. The defendant set up a tax deed, and the validity of this deed was the question for decision. In disposing of the contention that the assignment of the tax certificate was invalid, it was said:

"The second objection is, that there was no proof of the assignment of the sale certificate. The deed is itself prima facie evidence of everything, from the valuation of the land up to the execution of the deed, and that includes assignments of the sale certificate. (McCauslin v. McGuire, 14 Kan. 234; Hobson v. Dutton, 9 Kan. 477.)

"But as to one lot, plaintiff offered in evidence the sale certificate, which showed a formal assignment from the county to one Arthur Storms, and on the back the name of Arthur Storms indorsed in blank. No formal assignment from Storms appeared anywhere on the paper, yet the tax deed ran to Jacob Grebe. Counsel contends that such blank indorsement was not an assignment, and that therefore the deed was executed to the wrong party. It will be noticed that neither the county nor Storms is questioning this deed or claiming any interest in the property, and we think the matter is one which does not concern the plaintiff. The county sold to Storms, and contracted at a certain time to give a deed to him or his assignee on surrender of the sale certificate. Grebe, claiming to be the owner, presents the certificate with Storms's name indorsed, and the deed is made. Now if Storms had not actually sold the certificate to Grebe, he and he alone is wronged, and he must come into court for relief. In Woodman v. Clapp, 21 Wis. [350] 354, the court says:

"'The deed recites that the defendant was the assignee of Comstock, who was the assignee of the county. The county is concluded by this recital. If not a ratification of the previously unauthorized act of the clerk, it certainly inures to the benefit of the defendant by way of estoppel; and so long as the county is concluded, it is not an objection of which the plaintiff can avail himself in this action.'

"That case goes beyond this, for here the only question is the fact of the assignment; there, in addition, the validity thereof."

In line with the views expressed by Judge Brewer that only one who has a right to challenge the sufficiency of a tax title may be heard to complain of irregularity in the proceedings, see Kreigh v. State Bank of Alamogordo, 37 N.M. 360, 23 P.(2d) 1085; Knollenberg v. State Bank of Alamogordo, 35 N.M. 427, 299 P. 1077; Witt v. Evans, 36 N.M. 365, 16 P.(2d) 60.

Furthermore, we think the provisions of section 455 of the 1921 Taxation Code, when considered in the light of section 435 of said act, have a material bearing on the case. Section 455 provides in terms that tax deeds shall be prima facie evidence in all courts in all controversies and suits in relation to the rights of the purchaser, his heirs and assigns, to the lands

thereby conveyed of certain facts. Nine are enumerated, some of which we quote:

"First. That the real estate conveyed was subject to taxation for the year, or years, stated in the deed.

"Second. That the taxes were not paid at any time before the sale. * * *.

"Eighth. That the grantee named in the deed was the purchaser or the heir-at-law, or the assignee of the purchaser."

Section 435 provides that no attack on the title to any property sold at a tax sale in accordance with the provisions of said act shall be entertained by any court, nor shall such title be invalidated by any proceeding, except upon the ground that the taxes were paid before the sale or that the property was not subject to taxation.

It thus appears that the tax deed is properly only prima facie evidence of the first and second facts enumerated since they may be controverted. It would seem, however, that as to facts enumerated in section 455, which are not jurisdictional in their nature and which under section 435 may not be controverted, and the nonexistence of which may not be lawfully urged in any attack upon a tax sale or title, the effect of the tax deed is to make it more than prima facie evidence of such nonjurisdictional enumerated facts; in fact, construing section 435 with section 455, there is strong reason for claiming that the tax deed as to facts enumerated which do not fall within the class of "essentials of taxation" is conclusive evidence thereof.

We have several times held that the restriction of defenses to tax sales and titles to the fact that the tax had been paid or the property was not subject to taxation was a valid exercise of legislative power. See Manby v. Voorhees, 27 N.M. 511, 203 P. 543; Witt v. Evans, supra; and the Iowa Supreme Court in Allen v. Armstrong, 16 Iowa, 508, upon the same argument expressed the view that it is competent for the Legislature to say that a deed shall in the purchaser's favor be conclusive evidence as to certain facts not falling within the class of essentials of taxation.

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

HUDSPETH, C. J., and SADLER and ZINN, JJ., concur.

BRICE, Justice (dissenting).

To maintain his action to quiet title the plaintiff must have some title in the real estate that can be quieted. He must succeed on the strength of his own title, and not on the weakness of his adversary's. If he has no title then he cannot recover, though the defendant may have no title. If he does not have to show a title, good against the whole world, he at least must show one superior to that of the defendant. This court, in Abeyta et al. v. Tafoya, 26 N.M. 346, 192 P. 481, said:

"The rule is well stated by the Circuit Court of Appeals (Ninth Circuit) in the case of Ripinsky v. Hinchman, 181 F. 786, 105 C.C.A. 462, as follows:

" 'The general rule, in a suit to quiet title or to remove a cloud, as well as in ejectment, is that the plaintiff must succeed upon the strength of his own title, and not on the weakness of that of his adversary. The very idea of removing a cloud from title presupposes that the plaintiff has a title of some order to defend or to relieve of an alleged or threatened incumbrance or cloud.' * * *

"This being the rule, it must become a question of fact as to whether appellants showed title."

In Stanton v. Catron, 8 N.M. 355, 45 P. 884, 888, the Territorial Supreme Court stated: "The allegation and proof of title have ever been the basis of this form of action in courts of equity prior to the adoption of the statutes in the several states upon this subject. It has ever been the title of the plaintiff which he has sought to have quieted against the demands of an adverse interest. It is his title which is the groundwork of the action. Can it be said that the legislature, in their enactment of these statutes to quiet title, have done away with the necessity of alleging and establishing the very thing which they intend the court shall determine and quiet, to wit, the title of the plaintiff."

Appellee alleged that he owned the real estate involved, in fee simple. This is the title he seeks to quiet. If he has no title, then the case should be reversed with instructions that it be dismissed.

The demurrer to the answer admits that appellee's title depended upon the validity of a tax deed issued to him on his demand by the county tax collector, under authority of section 452 of chapter 133, N.M. Sess.L.1921 (hereinafter set out), upon his presentation of a tax sale certificate indorsed in blank by the assignee of the county; and that he has no other evidence of title.

Sections 445 and 452 of chapter 133, N.M. Sess.L.1921, providing for assignment of certificates of tax sales and the execution and delivery of tax deeds, are as follows:

(445) "Certificates of sale shall be assignable by endorsement only. When issued to the county the said certificates may thereafter be sold and assigned to anyone first applying who will pay the face amount thereof, with accrued interest and a recording fee of fifty cents."

(452) "Any time after the expiration of the term of three years from the date of recording the tax sale certificate, where the property has not been redeemed, on demand of the holder of the tax sale certificate, presentation thereof to the county treasurer, * * * the county treasurer shall execute and deliver to said person a tax deed for said property. The said deed shall vest in the grantee, his heirs, successors and assigns, a perfect and complete title in fee simple to said premises, free and clear of all liens and encumbrances except taxes levied thereon prior or subsequent to the year for which the same was sold."

The majority opinion does not clearly state the legal principles upon which this case is decided, but I believe they are as follows:

1. The "holder" of a tax sale certificate is not necessarily one to whom it has been assigned in writing; but a deed may be issued thereon to one to whom it has been delivered by the county or its assignee, with the intent that he shall own it.

2. The record owner of property is not in a position to object to errors and irregularities in the issuance of a tax deed, and the appellant could not raise the question of the invalidity of the assignment of the tax sale certificate or the illegality of the deed.

3. A tax deed is conclusive evidence of the fact "that the grantee named in the deed was the purchaser or the heir at law or the assignee of the purchaser."

I will take up these propositions in the order in which they are named here.

The "holder" of a tax sale certificate is entitled to a tax deed upon his demand upon the county treasurer therefor, accompanied by a presentation of such certificate. This the law provides; but it is plain that only the "holder" of such certificate is so entitled. The original purchaser is of course a holder; but inferentially such original purchaser and his assignee alone are holders; for such certificates are "assignable by endorsement only." It therefore follows logically that unless appellee was the original purchaser of the real estate involved, or unless the tax certificate was assigned to him by indorsement by one legally authorized, he has no title. The county was the original purchaser, and one Mayes its assignee. The effect of the issuance of the certificate to the county and its subsequent assignment to Mayes is fixed by section 442 of the Tax Code of 1921 (chapter 133) as follows: (442) "The tax sale certificate, when recorded, shall vest in the purchaser, his heirs or assigns, or the county and its successors, a complete legal title to the property described therein, subject to redemption, as provided by law. Counties shall be deemed purchasers within the meaning of this act."

We held in Alamogordo Improvement Co. v. Hennessee et al., 40 N.M. 162, 56 P.(2d) 1127, that the title conveyed by sale of land for the nonpayment of taxes is one in fee simple absolute, created by an independent grant, striking down all previous titles and interests in the property, after the time for redemption had expired. It may be assumed then that Mayes had such title in the property upon the assignment to him of the tax sale certificate, for a tax deed passes no title, and adds nothing to the strength of the title obtained by the execution, delivery, and recording of the certificate and its proper assignment.

We stated in Witt v. Evans, 36 N.M. 365, 16 P.(2d) 60, 61: "Under the statute in question, the deed is of slight importance. The sale itself, applicable from recordation of the certificate, divests the owner of legal title, leaving him a mere right of redemption. Section 442. The right to redeem from the tax here in question lapsed not later than January 27, 1926. Williams v. Van Pelt, supra [35 N.M. 286, 295 P. 418]; Knollenberg v. State Bank, 35 N.M. 427,

299 P. 1077. On that date the county had 'complete legal title,' which, on March 28, 1927, it passed to appellant by assignment of the certificate. Evidently the office of the deed was not to pass a legal title which the grantee already had, nor to divest the original owner of a title which he had already lost. It was preserved in the system as a conventional muniment of title, as prima facie evidence of certain facts, and (originally, but not after repeal of section 458 [Laws 1925, c. 102, § 28]) to prevent reversion of title to the original owner on failure to demand deed within six years."

The English statutes for the prevention of frauds and perjuries, commonly called the "Statute of Frauds" (St. 29, Charles II), is in force in this state, and unless there is statutory exception in case of tax titles, Mayes could only divest himself of title by a sufficient writing signed by him; or by such part performance as would relieve the purchaser of the effect of these statutes; and the payment of the purchase price not accompanied by possession is not sufficient. Osborne v. Osborne et al., 24 N.M. 96, 172 P. 1039; Jones v. Rocky Cliff Coal Mining Co., 27 N.M. 41, 198 P. 284. Title to real property obtained through tax proceedings may be assigned by indorsement and delivery of the tax sale certificate, and this is the foundation of appellee's claim. If the indorsement of the tax sale certificate in blank and its delivery to appellee divested Mayes of title and vested it in appellee, the case should be affirmed; but if it did not, then appellee had no title to "quiet" and though appellant has no title, the appellee's case has failed. Appellant has had possession of the property for many years, paying taxes as they accrue, and this, in any event, is a sufficient defense as against a claim of one who has shown no title to the property.

A tax deed issued without a performance of the statutory requirements authorizing its execution and delivery is void. Black on Tax Title, § 384; Wells v. Bloom et al., 96 Neb. 430, 147 N.W. 1112; De Ford v. Smith, 23 Colo.App. 78, 127 P. 453; City of Chicago v. Collins et al., 302 Ill. 270, 134 N.E. 751; Smith v. Todd, 55 Wis. 459, 13 N.W. 488, 489; People v. Banks et al., 272 Ill. 502, 112 N.E. 269; Empire Ranch & Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005; Palmaffy v. Cort et al., 100 N.J.Eq. 99, 135 A. 463; Scott v. Warden, 111 Cal. App. 587, 296 P. 95; Dennis v. Robertson, 123 Va. 456, 96 S.E. 802; Wilson v. Wood, 10 Okl. 279, 61 P. 1045; Pitkin v. Reibel, 104 Mo. 505, 16 S.W. 244; Dimpfel v. Beam, 41 Colo. 25, 91 P. 1107; Pratt v. Pope, 78 Fla. 270, 82 So. 805. The rule is thus stated in 61 C.J., title Quieting Title, § 1872: "* * * Since the purchaser's right to acquire a valid title at a tax sale is statutory and in derogation of the common law, any provisions of the statute imposing on the tax purchaser the duty of complying with prescribed conditions or obligations before taking out his deed are to be considered mandatory and essential to the validity of the deed, and must, therefore, be substantially complied with." I find no law to the contrary. The solution of the problem then depends upon whether

Mayes' indorsement in blank was an "assignment by endorsement" as required by section 445 of chapter 133, N.M.Sess.L. 1921, supra. This requirement is mandatory, and unless the tax sale certificate was "assigned by endorsement," it was not assigned at all, and the deed executed by the county treasurer to appellee was void because it was executed and delivered in violation of a mandatory statute.

Some courts sustain the view that an indorsement in blank is sufficient to comply with such statutes upon the theory that tax sale certificates are chattels, title to which may pass by sale and delivery alone; and if the statute is not technically complied with, the purchaser is authorized to add the assignment above the signature of the assignor to conform to the statute. Swan v. Whaley, 75 Iowa, 623, 35 N.W. 440; Chrisman v. Hough et al., 146 Mo. 102, 47 S.W. 941; Larson v. Glos et al., 235 Ill. 584, 85 N.E. 926. This class of cases treats the certificate as having some of the qualities of a negotiable instrument, or at least a chattel which, except for the statute, would pass by bargain and sale. On the other hand, it is held by other courts that such certificates are not chattels and not assignable by indorsement in blank, though not a conveyance of real estate. Territory ex rel. Gildersleeve v. Perea, Sheriff, 6 N.M. 531, 30 P. 928; Dawson v. Anderson, 38 Okl. 167, 132 P. 666; White et al. v. City of Brooklyn, 122 N.Y. 53, 25 N.E. 243; Wilson v. Wood, 10 Okl. 279, 61 P. 1045; Horn v. Garry, 49 Wis. 464, 5 N.W. 897; Reed v. Merriam, 15 Neb. 323, 18 N.W. 137.

The Territorial Supreme Court, in Territory v. Perea, 6 N.M. 531, 30 P. 928, 930, reviewed the authorities as to the meaning of "assignment by endorsement" to which we can add but little in support of the conclusion reached. It was said, "The word 'indorsement' has its primitive and popular sense of something written on the outside or back of a paper, on the opposite side from which something else had been previously written," and concluded: "From these general definitions we are inclined to agree with the defendant in error that to write the name upon the back of an instrument would be a proper assignment when applied to negotiable paper, but, as applied to nonnegotiable instruments, such as certificates of purchase at tax sale, the terms of assignment should be written upon the instrument, as well as the name of the assignor, unless there is a specific provision of law that to sign the name upon the back of the instrument is a sufficient assignment to transfer the right, title, and interest of the owner to the assignee." That this is correct, we think is supported by authorities generally, and particularly by the following: Powell v. Commonwealth, 11 Grat. (Va.) 822. "The word 'indorsement' has not a definite technical meaning in law or in fact other than 'upon the back;' and its meaning is always determined by the context, if in writing, and its connection, if by spoken words. It is as applicable to the receipt of a payment upon the note as to a party to the note, and properly includes filing, or any other memorandum which a person may place upon the back of an in-

strument. It includes not only such entries as pertain to the contract itself, but many entries which may have no relation to the contract. It may relate to things material to the subject of the contract, or to persons who are parties to the contract, or to such as are entirely immaterial to either." Commonwealth v. Spilman, 124 Mass. 327, 329, 26 Am.Rep. 668; Burnsville Turnpike Co. v. State, 119 Ind. 382, 20 N.E. 421, 3 L.R.A. 265; Johnson v. Brewer, 134 Ga. 828, 68 S.E. 590, 31 L.R.A.(N.S.) 332; State v. Cordray, 200 Mo. 29, 98 S.W. 1, 9 Ann.Cas. 1110; Kramer v. Spradlin, 148 Ga. 805, 98 S.E. 487. "Assignment by endorsement" means literally an assignment written on the back of an instrument.

Assignments by indorsement in blank generally apply to negotiable instruments, and not only pass title to such instruments but are implied contracts to pay them at maturity upon the default of the makers. They have no reference to the assignment of interest in real estate or personal property other than negotiable instruments, in regard to which by statute or usage, technical assignment in writing has been dispensed with. The words "assignment by endorsement" as contemplated by the New Mexico statute in question mean a writing on the back of the tax sale certificate sufficient to transfer to another the interest of the original holder of the tax sale certificate in the real property described therein, and is not substantially complied with by the writing of the holder's name on the back of such certificate.

The authorities are divided on whether a tax sale certificate that is not a conveyance of real estate is assignable by indorsement in blank, but no case holds that property described in a certificate which is in effect a deed or conveyance of real estate can be transferred by endorsing a certificate in blank.

There are but few authorities on the question, and I will here review all that I have found; though the Territorial Supreme Court has held that a blank indorsement did not comply with a similar statute.

It was held in Territory ex rel. Gildersleeve v. Perea, Sheriff, 6 N.M. 531, 30 P. 928, after a careful review of the authorities, that a tax certificate could not be assigned by indorsement in blank. The following is from the syllabi:

"The writing of his name in blank by the purchaser on the back of a certificate of tax sale is not sufficient to constitute an 'indorsement,' within the meaning of section 2885, Compiled Laws [Code 1884], providing, that such certificates 'shall be assignable by indorsement.' By the words 'assignable by indorsement' is meant that the assignment itself as well as the name of the assignor shall be written upon the instrument; and a holder of such a certificate, signed on the back by the purchaser in blank, is not authorized to write an assignment above such signature.

"The mere delivery to another of a certificate of tax sale by the original purchaser, with his name written in blank on the back, vests no right or title in the holder."

The statutes construed were sections 2885 and 2892, Comp.Laws 1884, and are as follows:

(2885) "The certificate of sale shall be assignable by endorsement, and an assignment thereof, when entered upon the record of sales in the office of the probate clerk, shall vest in the assignee, or his legal representatives, all the right and title of the original purchaser."

(2892) "At any time after the expiration of the term of three years from the date of the sale of any real estate for taxes under the provisions of this chapter, on demand of the purchaser, his heirs or assigns, and on presentation of the certificate of sale, the collector then in office shall make out a deed for each lot or parcel of real estate sold and remaining unredeemed, and deliver the same to the purchaser, his heirs or assigns."

The corresponding sections to be considered here are sections 445 and 452 of chapter 133, N.M.Sess.L. 1921, supra.

The respective statutes are so nearly identical in meaning that unless we overrule the Perea decision we must hold that the mere writing of the holder's name on the back of a tax certificate did not effectuate its assignment.

Said section 452 was an amendment of a prior statute, which follows: "At the expiration of the time for redemption, if such property be not redeemed, the county treasurer upon application by the purchaser or his assignee of any property at tax sale or of any duplicate tax sale certificate, shall execute and deliver to him a deed for the real estate sold; but the execution and delivering of any such deed shall not have the effect of releasing or extinguishing the lien on the property for any unpaid taxes thereon, whether levied before or after the date of the certificate referred to in section 5502." Section 5506, Code 1915.

This statute was construed in Christian v. Lockhart et al., 31 N.M. 331, 245 P. 249, in which we held that a warranty deed from the holder of a certificate was a sufficient assignment to pass title, stating:

"It is to be observed that this statute does not in terms require the assignment of the certificate itself, but contemplates that the assignee of the rights of the purchaser shall be entitled to the deed. A conveyance by warranty deed certainly conveys all of the rights of the vendor in and to the land and in and to all remedies and claims whereby title may be perfected and protected. Here the original assignee had a right and interest, when he conveyed, to present his tax certificate and obtain a deed when the period of redemption had run. This right passed to his vendee under his warranty. See 18 C.J. 'Deeds,' § 276; Vos v. Dykema, 26 Mich. 399.

"Counsel for appellants cite, in opposition to this conclusion, State v. Winn, 19 Wis. 304, 88 Am.Dec. 689. An examination of that case, however, shows that the Wisconsin statute required an assignment on the back of or attached to the tax certificate, which renders the case inapplicable here."

The intimation is that if the law had provided only that the assignee of a certificate was entitled to a tax deed (as it does now), then a warranty deed would not be sufficient basis therefor; but as the statute authorized the issuance of a tax deed either to the *assignee of the property,* or of the certificate, an assignment of the certificate was unnecessary if the property was assigned.

The majority suggest that the Perea Case was a proceeding in mandamus, and the court in its opinion suggested that it did not hold that the assignee did not have rights that could be enforced in a court of equity. I will refer to that matter later, but at this place I wish to emphasize that it was held in the Perea Case that such indorsement in blank did not comply with the statute. The majority opinion states that the law has been amended since the decision in the Perea Case; that under the statute here involved title to real property is conveyed to the holder, whereas title did not pass under the law construed in the Perea Case. This is true, and all the more reason, as we shall see later, why a strict compliance with the law is necessary to convey title; but is no reason why almost identical statutes should be construed differently. The meaning of "assignment by endorsement" is not different because of the amendment. The Perea Case was decided approximately thirty years before the act of 1921 was passed; notwithstanding which, the Legislature substantially reenacted the laws therein construed. Under such circumstances we should adhere to its holding.

I know of no other state whose court has passed on the question having a law that vests title by tax sale certificate, and this must be kept in mind in determining the effect of our statute. Ordinarily the holder does not obtain title by virtue of the certificate but only rights which entitle him thereto upon complying with the law; whereupon a tax deed is executed to the purchaser or his assigns by an officer who has no interest in the property, vesting title. But it is the law that vests the title. The power of the county treasurer is not coupled with an interest, and his unauthorized acts are void. The question of the effect of such indorsements have been before the courts of a number of states, but I believe in each instance the certificate involved did not vest title. In cases where such indorsements were held sufficient compliance with the law, the certificate was treated as a chattel, subject to bargain and sale, like any other personal property. In this state they are no more a chattel than is a deed; and a blank indorsement thereon is no more effective as a means of divesting title than such indorsement on a deed unless so provided by statute.

The statute of Nebraska required the treasurer to attest the execution of a tax deed with his seal; it was held in Reed v. Merriam, 15 Neb. 323, 18 N.W. 137, that the want of a seal was fatal. The opinion states:

"The certificate was then canceled and filed with the county clerk. Unless the certificate was presented to the county treas-

urer, he had no authority whatever to execute a deed. This was a condition precedent to his right to exercise that authority. In other words, the law makes the return of the certificate the evidence upon which the treasurer has authority to act. There is no power to accept secondary evidence in lieu of the certificate, nor to execute deeds to correct errors in former deeds. The second and third deeds, therefore, being made without authority, are null and void, and it being conceded that the first is invalid, the title to the real estate in question did not pass to the plaintiff. * * *

"Whatever may have been the object of the legislature in requiring the treasurer to attest the execution of a tax deed by his seal, the provision is one that cannot be dispensed with, and the want of a seal is no valid excuse. A treasurer acts under a naked statutory power in executing a tax deed, and unless he complies with the provisions of the statute, the deed will be void."

In Morris v. Bird et al., 71 Kan. 619, 81 P. 185, 186, the Supreme Court of Kansas decided a similar question. It is stated in the opinion: "By the provisions of section 7648 of the General Statutes of 1901, the transfer of a tax-sale certificate must be made by a written assignment indorsed upon the certificate or attached thereto, before the clerk is authorized to issue a deed thereto to the person in possession of the certificate. [Authority.] The holder of a tax-sale certificate properly and regularly issued has an interest in the real estate which cannot be transferred by a mere delivery of the certificate. In order to pass such interest, under our statute, the assignment must be in writing. In Smith v. Todd, 55 Wis. 459, 13 N.W. 488, the court, in passing upon a statute which provided that a tax certificate 'may be assigned by the purchaser by writing his name in blank on the back thereof, and by the county treasurer or the county clerk in like manner, with his official character added, or any person's interest therein, may be transferred by a written assignment indorsed upon or attached to the same,' it was held that 'the county clerk has no authority to issue a tax deed to the second assignee of a tax certificate whose assignment is not indorsed thereon or attached thereto.' On page 464 of 55 Wis., page 490 of 13 N.W., the court said: 'There can be no question that the tax deed so issued and executed in violation of law is absolutely void. Tax proceedings by which the owner of land may be divested of his title must be strictly in accordance with the law. The authority of the county clerk to issue a tax deed must be found in the statute, or it does not exist at all, and the deed he executes without such authority conveys no title.'"

It was held in White et al. v. City of Brooklyn, 122 N.Y. 53, 25 N.E. 243, that such an indorsement in blank did not assign a tax sale certificate; that the certificates were void, but that plaintiff could recover the money paid for them. We copy the following from the syllabi: "Also held, that while the defendant might, for the purpose of performance of the contracts contained in the certificates, have treated the purchasers, as the

parties entitled to the benefit of them until notice was filed, the provision was no defense in this action, as an assignment of the certificates would be in practical effect an assignment of the claims against the city for reimbursement; but that the certificates were not negotiable instruments transferable simply by indorsement; and that the indorsements alone were insufficient evidence to establish title in plaintiffs to the three certificates."

The majority opinion contains a quotation from American, etc., Bank v. Crooks, 97 Iowa, 244, 66 N.W. 168. This decision follows that court in Swan v. Whaley, 75 Iowa, 623, 35 N.W. 440, 441; to which we should look for the reasons supporting the conclusion reached by that court. The following is copied from the opinion in the latter case, in which the same question was decided:

"Section 888 of the Code is as follows: 'The certificate of purchase shall be assignable by indorsement, and an assignment thereof shall vest in the assignee or his legal representative all the right and title of the original purchaser. * * * In case said certificate is assigned, then the assignment of said certificate shall be placed on record in the office of the county treasurer in the register of tax sales.' The contention is that this section requires a formal assignment, transferring to the assignee all the rights and interests of the purchaser, to be indorsed upon the certificate. * * *

"It is contended that Whaley was not entitled to receive a deed of the property from the treasurer, because of the insufficiency of the assignment from Phillips to Fairfield, and of the fact that neither of the assignments under which he held were recorded in the treasurer's office. * * * The certificate of purchase is a mere chattel, and, like any other article of personal property, is the subject of bargain and sale. The provisions of section 888, with reference to the assignment and the recording thereof in the register of tax sales, relate merely to the creation and preservation of the evidence of the sale. They are not essential to the sale itself. A right in and to the certificate which would be enforceable in law can be created without either the execution or recording of any written assignment. The object of the provision is to afford the treasurer certain evidence of who is entitled to the deed when the right to one accrues. If, however, he should, without having any evidence of the assignment, execute a deed to the one who in fact and law was entitled to receive it, the question of its validity would not be affected by the fact that he acted without such evidence."

If this doctrine is sound, of which I have serious doubts, it would not apply to certificates conveying title to real estate. Such certificates are not "mere chattels" subject to bargain and sale like personal property.

There are two other cases of the same holding; based at least inferentially upon the same reasoning as that of the Iowa case, Chrisman v. Hough et al., 146 Mo. 102, 47 S.W. 941, in which that court stated: "Where a purchaser at a tax sale transfers the certificate of purchase to another by a mere indorsement, the latter is authorized in afterwards writing a formal assignment above the indorsement." And Larson v. Glos et al., 235 Ill. 584, 85 N.E. 926, 927, from the opinion in which case we copy the following: "The second ground upon which it is said the decree may be affirmed is that the indorsement and delivery of the certificate, and payment therefor, did not amount to an assignment to Timke. In the absence of a statute, a mere indorsement upon an instrument not negotiable is not sufficient to operate as an assignment of the instrument [authorities]; but section 207 of the revenue act [Smith-Hurd Ill.Stats. c. 120, § 193] provides that the certificate of purchase shall be assignable by indorsement, and that an assignment thereof shall vest in the assignee or his legal representatives all the right and title of the original purchaser. An indorsement consists in writing the name of the holder on the back of the certificate, and such an indorsement, completed by delivery, is, under the statute, operative to effect a transfer of all the right and title of the original purchaser. The indorsement by Glos authorized Timke to write above it a formal assignment, if that had been necessary."

There certificates were treated as chattels; and the words "assignment by indorsement" as meaning the signing of the certificate holder's name on the back thereof. I doubt if the former is correct, and am quite sure the latter has no such meaning except when applied to negotiable instruments, unless specifically so provided by statute. But in any event these holdings have no application here, for the reasons I have stated.

The case of Gardenhire v. Mitchell, 21 Kan. 83, the opinion of which was written by Judge Brewer, is cited by the majority on this question. The weight of an opinion by this great jurist would bear heavily against me if it supported the view of the majority, but it has no application here. The plaintiff in that suit claimed under a father, and a deed from his mother and sister, who were the widow and daughter of the owner. The court held that the tax sale was valid and therefore plaintiff had no title whatever, and without a title to quiet he was held to have no interest in the property and therefore was not an interested party. There was no formal assignment of the certificate from its holder to Grebe to whom the deed ran. The certificate was indorsed in blank, as in this case. Judge Brewer, in the opinion, stated: "It will be noticed that neither the county nor Storms is questioning this deed or claiming any interest in the property, and we think the matter is one which does not concern the plaintiff. The county sold to Storms, and contracted at a certain

time to give a deed to him or his assignee on surrender of the sale certificate. Grebe, claiming to be the owner, presents the certificate with Storms's name indorsed, and the deed is made. Now if Storms had not actually sold the certificate to Grebe, he and he alone is wronged, and he must come into court for relief." The court does not hold that there was a sufficient assignment of the certificate; in fact, it is intimated otherwise; but because the plaintiff had no title in himself it was held that he was not an interested party, and that is as far as this case goes.

The conclusion reached in the subsequent case of Morris v. Bird et al., supra, decided later by the same court, is inconsistent with the majority's interpretation of Judge Brewer's opinion. The same statute was construed in the two cases and had been construed in the case of Clippinger v. Tuller, 10 Kan. 377, as I am contending, in which Judge Brewer concurred in the opinion. The court in the Clippinger Case stated: "It is true, the plaintiff has a quitclaim deed for the premises covered by the tax-sale certificate from Hidden and Slater to himself. But a quitclaim deed from the holder of a tax-sale certificate is not of itself such an assignment of the tax-sale certificate as will authorize the clerk to issue a tax deed to the grantee mentioned in the quitclaim deed: State v. Winn, 19 Wis. 304, 307. The assignment under the statutes to authorize the clerk to act in such a case must be 'a written assignment *indorsed upon*' or '*attached to*' the tax-sale certificate: Gen.St., 1048, § 90. It must accompany the tax-sale certificate, be filed away with it, and be preserved as evidence in the office of the county clerk."

In Wilson v. Wood et al., 10 Okl. 279, 61 P. 1045, 1046, the court in passing on a like question, stated: "While the tax certificate does not pass title to the land, it is evidence of an equitable interest, which may ripen into a legal title, and therefore does convey an interest in land. The certificate is a part of, and is essential to, the sale. There cannot be a completed sale without it. It is one of the essentials necessary to confer title on the owner, and hence cannot be dispensed with. It is not a negotiable instrument, and cannot be assigned except where authorized by statute. Then the statutory mode of assignment must be followed. In the absence of a statute authorizing an assignment of a tax certificate, the interest in the land of which the certificate is the evidence can only be conveyed in the manner that real estate is conveyed. Where an assignment is made without authority of law, and a tax deed is made to the assignee, the deed will be void. * * * The assignment relied upon was in fact void. Without an assignment, no valid deed could issue to the plaintiff in error; and, as there was no assignment made in the manner required to transfer the interest in the land represented by the tax certificate, it follows that the deed was not valid as against the mortgagee."

The nature of such an indorsement was determined in Horn v. Garry, 49 Wis. 464, 5 N.W. 897, 901, as follows: "It is, as was said by the court in Eaton v. Supervisors, 44 Wis. [489] 490, a purchase of the lands upon condition that the sale shall be void upon payment made as above stated, otherwise to be valid, and entitled the owner of it to an absolute title to the land. It gives the owner an interest in real estate, and such interest can only be conveyed by writing in the manner prescribed by statute. * * * These provisions of the statute clearly show that these certificates are not assignable by mere delivery, but they are treated as instruments giving the owner an interest in real estate, and consequently require an instrument in writing to convey the right of the owner. * * * The cases cited by the learned counsel for the appellant of the transfer of bills of lading or warehouse receipts made to bearer are based upon an entirely different principle. These instruments relate to personal property, the title to which may be passed by delivery, and when there is a sale in fact the delivery of the documentary evidence of title, with intent to transfer the title, is a sufficient delivery to perfect the transfer of the property itself. * * * In the case at bar the evidence shows that the plaintiff did not sell his interest in the property described in the certificates to McMahon, nor did he make any assignment to him of the interest, if he had any, in the lands described therein; and, the certificates having none of the essential qualities of negotiable instruments, the delivery of the instrument itself passed no title to McMahon which he could transfer to another, so as to affect the rights of those claiming an interest in the lands described therein under him by prior title."

Nowhere in the opinion of the majority have I been able to find any definition of "assignment by endorsement," or any definite conclusion as to the effect of a blank indorsement on such certificates; but reasoning from the result, I have assumed it is held that an indorsement in blank is sufficient; in effect, holding that such certificate is a "mere chattel"; which cannot be correct. The statute itself provides that in case of the holder's death, title to the tax certificate (or the real estate it represents) vests in his heirs as other real property and does not vest in his personal representatives. Section 442, c. 133, Sess.L.1921.

My conclusion is that after the time for redemption has elapsed the certificate evidences a title to real estate in fee simple; that an assignment of a tax sale certificate is a conveyance of real estate; that "assignment by endorsement" means a written assignment on the back of the tax certificate, signed by the assignor to the effect that the rights of the assignor in the certificate (if not in the property it represents) are assigned to the assignee.

Whether the tax sale certificate *is itself real estate,* as held in Eaton v. Supervisors, 44 Wis. 489, or in effect a deed to real estate, the rights of the holder do not pass

by its delivery to a purchaser or by blank indorsement and delivery to one. The policy of the Legislature of this state in the matter of sales of real estate for taxes has always been to require a complete record title to be kept; yet this sound policy is destroyed by the majority opinion, which, in effect, holds that a change of ownership of real estate may be effected by mere delivery of a tax certificate after the first blank indorsement. No such loose manner of transferring title could have been intended.

It is said in the majority opinion: "In line with the views expressed by Judge Brewer that only one who has a right to challenge the sufficiency of a tax title may be heard to complain of irregularity in the proceedings."

But, as we have seen, the opinion by Judge Brewer, referred to, has no reference to a defendant in possession, but to a plaintiff who has no title to quiet. I do not find that any of the cases cited under that part of the opinion just quoted, support the quoted statement. The court is not concerned about the defendant's title until plaintiff shows title in himself, and by his demurrer he admits he has no title. The defendant, being in possession, has a better right than a stranger to the title out of possession.

The statute (Laws 1921, c. 133, § 455, subd. 8) provides that a tax deed shall be prima facie evidence of certain facts, among which is: "That the grantee named in the deed was the purchaser or the heir-at-law, or the assignee of the purchaser." It is stated in the majority opinion: "There is strong reason for claiming that the tax deed as to facts enumerated which do not fall within the class of 'essentials of taxation,' is conclusive evidence thereof." I have not been able to discover one such reason. It would be in the face of a statute, except for which the tax deed would be evidence of nothing except its own execution. The statute specifically provides that a tax deed is only prima facie evidence of certain facts, showing conclusively that such facts are subject to being disproved in the absence of curative statutes; and yet the majority hold that such facts are conclusively proved to be true by a paper shown to be void and therefore not a tax deed—"a scrap of paper." A tax deed (not an instrument in the form of a tax deed that is void) is prima facie evidence of certain facts. The instrument in question is assumed to be a tax deed until the evidence proves its invalidity; after which it is evidence (prima facie, conclusive or otherwise) of nothing.

The tax deed is void; the appellee has no title; and the judgment of the district court should be reversed and the cause dismissed.

67 P.(2d) 286

CITY OF ROSWELL v. JONES et al.

No. 4205.

Supreme Court of New Mexico.

April 12, 1937.

H. C. Buchly and G. T. Watts, both of Roswell, for appellant.

George Threlkeld, of Roswell, for appellees.

Frank H. Patton, Atty. Gen., and Edward P. Chase, Asst. Atty. Gen., amicus curiæ.

ZINN, Justice.

Appellees were charged with violating Ordinance 397, Section 3, of the Municipal Ordinances of Roswell, in permitting a lottery device to be conducted in the place of business operated by the appellees. The place of business is the Yucca Theatre, owned by R. C. Griffiths Theatres, Inc., and the alleged lottery device is what is commonly known as "Bank Night."

In the police magistrate's court the appellees were found guilty and fined $25 each. They appealed to the district court where the cause was tried de novo. The district court ruled that:

"* * * the device complained of does not constitute a lottery device in that the participants in 'Bank Night' pay nothing to either register or participate in the drawing, it being equally free to those who do not even purchase a ticket as to those who do purchase a ticket, there being no consideration for the chance to win, and as a conclusion the court finds no violation of the ordinance."

The court discharged the appellees, dismissed the complaint, and the City of Roswell prosecutes this appeal from such judgment. The Attorney General enters his appearance amicus curiæ in support of the City of Roswell.

"Bank Night" as operated by appellees is similar to the plan considered by many courts in cases herein cited. It is the usual plan of free registration, the drawing of a number corresponding to a number in the registration book, and the presence of participants required inside or outside of the theatre at the time of the drawing, and the awarding of a cash prize to the person whose number is called, if such person is present either in the theatre or immediately outside. The plan is described in detail

in many of the cases to which we refer. Any variations in details between the cited cases and the facts before us are immaterial.

We do not have a legislative definition of lottery in New Mexico. In 1889, the Territorial Legislature of New Mexico enacted a statute in relation to lotteries. Laws 1889, c. 47 (Comp.St.1929, § 35-3803, et seq.)

Section 1 of said act (Comp.St.1929, § 35-3803) provides, as follows: "Whoever shall set up, draw, manage, or otherwise promote any lottery for money or any other thing of value, or dispose of, or promote the disposing of, any money or thing of value by way of lottery, or aid in committing any of said offenses, shall be fined five hundred to ten thousand dollars."

The Attorney General in his brief defines a lottery as: "* * * a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value in money or other articles."

We agree with the Attorney General when he says this definition is sensible and true.

The devices and schemes which some courts have condemned and other courts have refused to condemn as lotteries, are as varied as the ingenuity of man can devise. Generally the different devices and plans can be placed into two categories. On the one hand the lottery where tickets are sold for a cash consideration, the prize may either be a large sum of cash or an article of value, and the winner is determined by lot. The purchaser is not limited in the number of tickets or chances he may purchase, and the operators of the lottery withhold from the receipts of the sale of tickets an amount to defray the expenses of the lottery and also a profit. This plan is universally outlawed under statutes similar to ours.

On the other hand, we have devices and schemes akin to a lottery which are used to promote the sale of goods or services or to increase patronage in profit enterprises. "Bank Night" comes within the latter class.

The courts are divided in their views when construing the latter class or devices which might be termed "akin to a lottery." Even these fall into two groups. In one group it will be found that the prize tickets were only furnished to customers—those who purchased something. The payment made by the customer was for both the article purchased and the prize ticket—part of the consideration was for the ticket. The vast majority of the cases hold these schemes to be lotteries. State v. Powell, 170 Minn. 239, 212 N.W. 169, and Matta v. Katsoulas, 192 Wis. 212, 212 N.W. 261, 50 A.L.R. 291, are typical of this group. The decisions, however, are not entirely uniform in holding even such a scheme to be a lottery. R. J. Williams Furniture Co. v. McComb Chamber of Commerce, 147 Miss. 649, 112 So. 579, 57 A.L.R. 421, holds it not to be.

In the group similar to "Bank Night" will be found the cases where the distribution of prize tickets is purported to be both

to noncustomers as well as to customers. In considering such schemes the courts are hopelessly divided.

In the early case of Yellow-Stone Kit v. State (1890) 88 Ala. 196, 7 So. 338, 7 L.R.A. 599, 16 Am.St.Rep. 38, the court said:

"There is no law which prohibits the gratuitous distribution of one's property by lot or chance. If the distribution is a pure gift or bounty, and not in name or pretense merely, which is designed to evade the law, —if it be entirely unsupported by any valuable consideration moving from the taker, —there is nothing in this mode of conferring it which is violative of the policy of our statutes condemning lotteries, or gaming. We may go further, and say that there would seem to be nothing contrary to public policy, or per se morally wrong, in the determination of rights by lots. * * * The gratuitous distribution of money or property by lot has never prevailed to such extent as to require police regulation at the hands of the state, nor, so long as human nature remains as it now is and has been for so many thousand years, is it likely ever to be otherwise. The history of lotteries for the past three centuries in England, and for nearly a hundred years in America, shows that they have been schemes for the distribution of money or property by lot in which chances were sold for money, either directly, or through some cunning device. The evil flowing from them has been the cultivation of the gambling spirit,—the hazarding the money with the hope by chance of obtaining a larger sum,—often stimulating an inordinate love of gain, arousing the most violent passions of one's baser nature, sometimes tempting the gambler to risk all he possesses on the turn of a single card or cast of a single die, and 'tending, as centuries of human experience now fully attest, to mendicancy and idleness on the one hand, and moral profligacy and debauchery on the other.' "

In the case of State v. Danz, 140 Wash. 546, 250 P. 37, 48 A.L.R. 1109, the Supreme Court of Washington, by a five to four decision, held a scheme resembling that presented in this case to be a lottery.

In the case of People v. Cardas, 137 Cal. App.(Supp.) 788, 28 P.(2d) 99, 100, 101, the court in considering a plan similar to "Bank Night" said: "Our conclusion is that the holders of the prize tickets did not pay a valuable consideration for the chance of winning the prize—did not hazard anything of value upon the chance—and consequently the scheme was not a lottery, and therefore the defendant was not guilty of having violated sections 320 and 321 of the Penal Code."

In Glover et al. v. Malloska, 238 Mich. 216, 213 N.W. 107, loc.cit. 108, 52 A.L.R. 77, the Michigan court in considering a scheme similar in its nature to "Bank Night" said:

"The scheme was clearly a lottery. People v. McPhee, 139 Mich. 687, 103 N.W. 174, 69 L.R.A. 505, 5 Ann.Cas. 835; People v. Wassmus, 214 Mich. 42, 182 N.W. 66. The often asserted essentials of a lottery, viz. consideration, prize, and chance, were all present. Malloska sold the tickets to his

customers for distribution by them in the course of trade to further his pecuniary interest, and this established consideration. The fact that Malloska gave some tickets away at fairs and exhibitions and the purchasers of tickets for use in the retail trade gave them away, without pay, to their customers, and sometimes to others, did not at all save the scheme from being a lottery."

In Society Theatre et al. v. Seattle, 118 Wash. 258, 203 P. 21, 22, the Supreme Court of Washington said: "But while the patrons may not pay, and the respondents may not receive any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theaters who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theaters reap a direct financial benefit."

In the case of State v. Hundling, 220 Iowa, 1369, 264 N.W. 608, 103 A.L.R. 861, the Supreme Court of the State of Iowa reached the conclusion that in "Bank Night" the element of consideration was absent and not a lottery. "Bank Night" was considered in the case of State v. Eames, 87 N.H. 477, 183 A. 590, 592. The court arrived at the same conclusion as the Iowa court. The Iowa and New Hampshire courts held that the participant did not pay a valuable consideration for the chance to participate, and that the scheme, therefore, did not constitute a violation of the lottery statutes.

A plan or scheme similar to the one we are considering was up before the Supreme Judicial Court of Massachusetts, which held the plan to be a lottery. Commonwealth v. Wall, 3 N.E.(2d) 28, 29, 30. The Massachusetts court attempted to distinguish its ruling from the Eames Case, on the theory that the New Hampshire court found that "free participation is a reality." However, the plans considered by the New Hampshire and Massachusetts courts were identical. The distinction attempted to be made by the Massachusetts court is without a difference.

In General Theatres v. Metro-Goldwyn-Mayer Distributing Corporation (D.C.) 9 F. Supp. 546, in a case where the plan was somewhat similar to "Bank Night," District Judge Symes ruled that the scheme was a lottery in violation of the laws of Colorado. This case was cited with approval in Central States Theatre Corporation v. Patz et al. (D.C.) 11 F.Supp. 566, decided May 10, 1935, by District Judge Dewey, of the Southern District of Iowa, Central Division. However, in the two Federal cases the District Judges did not analyze their own reasons for ruling the scheme a lottery, but merely stated their belief that the scheme was a lottery and decided accordingly.

We have read and considered many other cases where the question involving the identical "Bank Night" scheme, or devices similar thereto were considered. We see no value in lengthening the opinion by citing from them.

The definition quoted by the Attorney General distinguishes the true lottery, lotteries which are gambling propositions, such as the Louisiana lottery, Mexican lottery and

Irish sweepstakes, from lottery, schemes, or gift devices which use prize and chance to push the sale of goods or services or to increase patronage in profit enterprises.

In construing "Bank Night" and schemes akin thereto as either being lotteries or not, the courts are divided because some hold that such a scheme, having the three elements, to wit, prize, chance, and consideration, is a lottery, whereas other courts fail to find the element of consideration, and rule that such a scheme is not a lottery. The former fail to point out or forget the evil aimed at.

We prefer to reason the matter in our own way, going to the fundamental reason for banning lottery schemes. The mere finding of the three elements necessary to constitute a lottery, to wit, prize, chance, and consideration is not sufficient. These elements are often found in innocent games of amusement or in the distribution of gifts by legitimate and responsible merchandising firms, with no intent to encourage or participate in a gambling scheme.

"When, however, the community at large is invited to come in, a new and very serious objection springs up. Independently of the opportunity for fraud by the managers of such enterprises, their publication imparts an excited spirit of gambling to the public generally. On the one side, often ensue gross cases of deception as to the scheme itself; on the other, the sacrifice of the savings by the ignorant and credulous, and excitement, destructive of regular industry, often inducing insanity. *It is to suppress this species of lottery, we should remember, that the lottery statutes are aimed.*" (Italics ours.) Wharton's Criminal Law, vol. 2, p. 2075, part section 1778.

In The Americana, vol. 17, p. 670, we find the following: "Lottery, a public gambling scheme, by which, for a valuable consideration, one may by favor of the lot obtain a prize of a value superior to the amount or value of that which he risks. In its best and most frequent application, the word describes those schemes of this nature which are conducted under the supervision and guaranty of government, and the proceeds of which are devoted to public objects. Almost all modern states have, at some period of their history, employed lotteries as a means of revenue. But though they supply a ready mode of replenishing the public treasury, they have always been found to exert a mischievous influence upon the people. The poor are invited by them rather than the rich. They are diverted from persistent labor and patient thrift by the hope of sudden and splendid gains; and as it is the professed principle of these schemes to withhold a large part of their receipts, a necessary loss falls upon that class which can least afford to bear it."

In volume 7 of the New Standard Encyclopedia we find: "Lottery, a scheme for the distribution of prizes by chance. Lotteries like every other species of gambling have a pernicious influence on the character of those concerned in them. As this kind of gambling can be carried on secretly and the temptations are thrown in the way of both sexes, all ages and all descriptions of

persons, it spreads widely in a community, and thus silently infects the sober, economical, and industrious habits of a people."

The Supreme Court of Colorado, in Cross v. People, 18 Colo. 321, 32 P. 821, 822, 36 Am.St.Rep. 292, has stated certain principles with respect to lotteries which we believe are fundamental and sound. The court said:

"The gratuitous distribution of property by lot or chance, if not resorted to as a device to evade the law, and no consideration is derived, directly or indirectly, from the party receiving the chance, does not constitute the offense. In such case the party receiving the chance is not induced to hazard money with the hope of obtaining a larger value, or to part with his money at all; *and the spirit of gambling is in no way cultivated or stimulated, which is the essential evil of lotteries, and which our statute is enacted to prevent.*" (Italics ours.)

In the Colorado case it was shown that the plaintiffs in error gave business cards, which entitled the holders to a chance on a piano, to be distributed as the holders of such chances might elect. These tickets or chances were given indiscriminately to persons, whether they purchased goods of plaintiffs in error or not, to those who registered their names at their shoe store, and to those who, from a distance, sent the return postage. Purchase of goods was not a condition upon which the card was delivered. The fact that such cards or chances were given away to induce persons to visit their store with the expectation that they might purchase goods, and thereby increase their trade, the Colorado court said:

"* * * is a benefit too remote to constitute a consideration for the chances. Persons holding these cards, although not present, were, equally with those visiting their store, entitled to draw the prize. The element of gambling that is necessary to constitute this a lottery within the purview of the statute, to wit, the paying of money, directly or indirectly, for the chance of drawing the piano, is lacking, and the transaction did not constitute a violation of the statute."

The giving away of property or prizes is not unlawful, nor is the gift made unlawful by the fact that the recipient is determined by lot. 38 C.J. 286, defines a "lottery" as follows: "A species of gambling which may be defined as a scheme for the distribution of prizes or things of value by lot or chance among persons who have paid, or agreed to pay, a valuable consideration for the chance to obtain a prize; or as a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value, in money or other articles."

This is the generally accepted meaning of the term, especially when used in criminal statutes. 17 R.C.L. 1222; Yellow-Stone Kit v. State, supra; Cross v. People, supra; People v. Cardas, supra; R. J. Williams Furniture Co. v. McComb Chamber of Commerce, supra; People v. Mail & Express Co. (Sp.Sess.) 179 N.Y.S. 640; Id., 192 App.Div. 903, 182 N.Y.S. 943.

The term "lottery," as popularly and generally used, refers to *a gambling scheme* in which chances are sold or disposed of for value, and the sums thus paid are hazarded in the hope of winning a much larger sum. That is the predominant characteristic of lotteries which have become known to history. The evil which attends such a lottery is that it arouses the gambling spirit and leads people to hazard their substance on a mere chance. It is undoubtedly the evil against which our statute is directed. Every scheme of advertising, including the giving away of premiums and prizes, naturally has for its object, not purely a philanthropic purpose, but increased business. Even the corner grocer who gives candy or miniature bicycles to the children of the neighborhood may be prompted by that motive, but that does not make the gift unlawful. And if the grocer, instead of giving candy or a wagon to all the children, gives it only to some as determined by lot, that circumstance does not make the gift unlawful. And in neither event is the gift made unlawful by the further circumstance that the business of the grocer in the neighborhood may be thereby increased. Profit accruing remotely and indirectly to the person who gives the prize is not a substitute for the requirement that he who has the chance to win the prize must pay a valuable consideration therefor, in order to make the scheme a lottery.

The spirit of gambling, the squandering of savings, the evils aimed at by our lottery statute, can no more be found in "Bank Night" than can be found in the numerous advertising schemes seen daily where thousands of dollars are given away as prizes to "slogan coiners" or "lucky guessers" who send to the manufacturer a wrapper from a can of soup or bar of soap.

In the case of People v. Cardas, supra, the California court applies the test properly. It there considered a scheme almost identical in its essential characteristics with the case at bar. The prize was a ticket for a round trip to Catalina Island. It was awarded by lot among persons who held tickets which had been distributed without charge to people generally in the community. The winner was permitted to enter the theatre without the payment of admission in order to receive the prize, as in the case at bar. The court held that, since the holder of the chance acquired it as a gift and without the payment of any valuable consideration, the scheme was not a lottery; that, unless the holder of the chance hazards something of value for the chance, the scheme is not a lottery. The case is sustained by reason and common sense. It is in harmony with the recognized definitions of a true lottery, the definition given by the Attorney General as previously set out herein, and the supporting citations. Being present at the Yucca Theatre, either inside looking at "Mickey Mouse" or "Greta Garbo" or on the outside of the place where the prize is given, and where it costs nothing to be, cannot be said to be the payment of a valuable consideration, and this is so even though the donor of the prize may receive some direct or indirect benefit from such presence.

The Supreme Court of New Hampshire in State v. Eames, supra, said: "The problem presented by 'Bank Night' and similar schemes is to determine whether it is an evasion of the statute or an avoidance of it, and this question is essentially one of fact. * * * The test by which to determine the answer to this question is not to inquire into the theoretical possibilities of the scheme, but to examine it in actual practical operation. If * * * 'the great majority of people pay for such privilege,' then it is an evasion and as such is not to be countenanced. * * * [If,] however, free participation is a reality, * * * then, regardless of the motive which induced the defendant to give such free participation, the scheme is not within the ban of the statute. Violation is shown only when, regardless of the subtlety of the device employed, the state can prove that, as a matter of fact, the scheme in actual operation results in the payment, in the great majority of cases, of something of value for the opportunity to participate."

Although signing one's name in a book or appearing at the theatre within five minutes of the time of the drawing might be regarded as consideration, it cannot be called "pay" without warping the word out of all recognition. It clearly is not "* * * a game of hazard in which small sums of money are ventured for the chance of obtaining a larger value in money or other articles."

For the reasons given, the judgment of the trial court will be sustained.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, J., concur.

BRICE, J., did not participate.

SADLER, Justice (dissenting).

The scheme or device exposed in the record before us represents an unfair business practice. However, this fact does not condemn it as a lottery unless three essential elements appear, namely, (1) chance, (2) prize, and (3) consideration. Two—chance and prize—admittedly are present. A supposed absence of the third—consideration—as held by the majority, alone supports their conclusion. The statement in the prevailing opinion that the mere presence of the three elements, chance, prize, and consideration, is not sufficient to constitute a lottery is obiter dictum in view of their holding that there is here no consideration. If the dictum be the law, a no man's land of uncertainty prevails, and the question ever persists: When is a lottery not a lottery? Without aid of the test heretofore employed, that it is a lottery if the three elements, chance, prize, and consideration appear in the transaction, the courts in each instance must supply the answer according as the judges may feel the scheme involved does or does not promote the evil aimed at.

I find no difficulty in seeing the consideration which stamps this scheme a lottery. The patrons drawn to the theater in the hope of gaining the prize money *collectively* furnish the *prize money itself* as well as a profit to the proprietor. Thus consid-

[redacted]

eration arises as an inseparable incident to increased attendance.

Willis v. Young [1907] 1 K.B. 448, presents a device with similar earmarks. The proprietors of a weekly newspaper caused medals to be distributed gratuitously to the public. Each medal bore a distinctive number and the words, "Keep this it may be worth 100*l*. See the *Weekly Telegraph* today." The winning numbers, arbitrarily selected by the newspaper proprietors, were unknown to distributors of the medals, but were published weekly in the newspapers. It was not necessary that the holder of a medal should purchase a copy of the paper as a condition of receiving a prize. Indeed, no medal would be given out with the purchase of a paper, but could be had free for the asking. Information as to the winning numbers could be had without charge at the newspaper office. The object of the scheme was to induce persons to inspect or buy the paper and its circulation increased substantially during the time the scheme had been carried on. Lord Alverstone, Chief Justice, holding the scheme a lottery, said:

"I cannot entertain a doubt that the decision of the learned magistrate was wrong, and that the respondents ought to have been convicted of the offence charged. We are fully aware of the ingenuity of the gentlemen who originate these schemes, and of their advisers, and doubtless this will not be the last attempt to devise a scheme to keep outside the statute dealing with lotteries; I do not say to evade the statute, for a practice is either within a statute or not. Now it has been admitted by the respondents' counsel that if a coupon had been delivered with each medal, and a charge of a penny had been made, the scheme would undoubtedly have been a lottery, but it is contended that the fact that no charge was made for the medal made all the difference. In my opinion this Court would be stultifying itself were it to give any effect to the ingenious argument by which this ingenious device was supported. * * *"

"If this is an honest scheme, as I assume it to be, the suggestion is that there appear periodically in the paper announcements of the names of the prize winners, and that many hundreds of pounds are given away to them. The money for the prizes, however, comes out of the receipts of the respondents, and these in their turn come, to a considerable extent, from the people who buy the paper, although no doubt the advertisements may bring in a considerable sum. The persons who receive the medals therefore contribute collectively (though each individual may not contribute) sums of money which constitute the fund from which the profits of the newspaper, and also the money for the prize winners in this competition, come. I adopt the definitions of 'lottery' which have been cited to us in the present case, and, looking at the real substance of the scheme, I think that it falls within the narrowest and most limited definition of a lottery, though it is not necessary for the purpose of our decision to go so far as that. If the scheme had been to deliver

a medal with each copy of the paper to the person buying that copy, there could have been no question that it would have been a lottery; in the present case the mischief is really the same, and an inducement is held out to the same class of people to buy copies of the paper, and I am glad to say that I know of no statute, and of no judicial decision, which compels me to hold that this scheme is not a lottery."

Central States Theatre Corp. v. Patz (D.C.) 11 F.Supp. 566, 568, is a case on all fours with the one in hand. The scheme was held to be a lottery. Judge Dewey spoke on the question of consideration as follows:

"Taking it by its four corners, which the plaintiff insists the court should do in determining the issues of the case, it is very apparent that the increase in the attendance is from those persons who are interested in the drawing and not in the picture, and that they have paid their entrance fee primarily in the hope of being successful on the wheel of fortune. It may be that this number is small in comparison to the whole, but, if it is a lottery as to a few, or a lottery comparatively small in its consideration, it is a lottery nevertheless."

See, also, General Theatres, Inc., v. Metro-Goldwyn-Mayer Distributing Corp. (D.C.) 9 F.Supp. 546, 549; Commonwealth v. Wall (Mass.) 3 N.E.(2d) 28; Society Theatre v. City of Seattle, 118 Wash. 258, 203 P. 21, 22. Also see case notes, 48 A.L.R. 1115; 57 A.L.R. 424. In the Society Theatre Case last cited the Supreme Court of Washington said:

"But it is argued that the element of consideration does not appear because the patrons of the theaters pay no additional consideration for entrance thereto, and pay nothing whatever for the tickets which may entitle them to prizes. But while the patrons may not pay, and the respondents may not receive any direct consideration, there is an indirect consideration paid and received. The fact that prizes of more or less value are to be distributed will attract persons to the theaters who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theaters reap a direct financial benefit."

Judge Symes of the federal bench in our neighboring state of Colorado had no hesitancy in declaring a scheme similar to the one before us to be a lottery. In the General Theatres Case, supra, he said: "If a person on the outside held the winning ticket he was admitted free of charge into the theater and entitled to the automobile. This change, in my opinion, was one in form rather than in substance, and I still think it violates the statutes of the state as to those paying for their admissions. I do not feel this court has to determine that question, however, because the plan is one that is in its essence gambling. It appeals to the cupidity of the public and is opposed to public policy and good business ethics. Its success proves this."

Seeing in the scheme reviewed all three essential elements, chance, prize, and consideration, I identify it as a lottery. The conclusion follows that the judgment of the district court discharging the defendants should be reversed. Because of a contrary conclusion by the majority, I dissent.

67 P.(2d) 293

In re BLATT et al.

STATE v. BLATT et al.

No. 4199.

Supreme Court of New Mexico.

April 16, 1937.

A. M. Fernandez, Sp. Tax Atty., of Santa Fé, Quincy D. Adams, Asst. Atty. Gen., and David W. Carmody, Asst. Dist. Atty., of Santa Fé, for the State.

C. C. Catron and Wilson & Watson, all of Santa Fé, for respondents.

ZINN, Justice.

On a writ of certiorari directed to the clerk of the district court of the First judicial district, for the county of Santa Fé, directing said clerk to return to this court for review the record in the instant case, the transcript of record was filed here on February 18, 1936.

From this record it appears that on August 9, 1935, Morris and Johanna Blatt (who will be referred to in this opinion as the petitioners), the owners of certain property located in the city of Santa Fé, filed with the district court of Santa Fé county their petition alleging in two counts. In the first count it is alleged that the property was "pretendedly but erroneously and illegally assessed" for the year of 1934 in the total sum of $54,925. This total made a tax charge of $1,629.93. This amount the petitioners paid under protest. They also alleged that the value so placed on their property for tax purposes for the year of 1934 is "inequitable, unjust, arbitrary, excessive, erroneous and illegal." The petition states that the same is filed within sixty days from the date of the payment of said taxes under protest. They pray the court to investigate the matters contained in the petition, hear the evidence, and to enter a final decree directing a correction of the assessment, and refund of any sums which the court may find to have been illegally and erroneously charged and paid.

In the second count of the petition, the petitioners allege (in the same terms as in the first count) that their property for the year of 1933 was assessed at $52,637.50 which was subsequently reduced to $47,374.50, at which reduced figure the tax charged amounted to $1,645.77. The petitioners also allege in the second count that they appeared before the county board of equalization seeking a correction of the claimed erroneous and illegal valuation, but to no avail, and did thereafter appeal the matter from said ruling of the county board of equalization to the State Tax Commission, with the same result on appeal. The petition alleges that the State Tax Commission failed to take action within due time, and that the petitioners paid under protest the tax charge for 1933 in order to enable the petitioners to have the court inquire into and review the illegality of the assessment in accordance with Laws 1933, c. 143. The petition alleges that due to a failure on the part of the State Tax Commission to act within sixty days after the payment of the taxes under protest, the petitioners did not bring the action in the district court within the sixty-day period provided by said statute. They prayed equitable relief in the event the court

could not assume jurisdiction under chapter 143, supra.

The district attorney of the First judicial district entered his appearance and accepted notice of the filing of the same and consented that the court hear and determine the matters set out in the petition and to enter such judgment as the facts might justify.

On December 2, 1935, there was filed an order of the district court, which in substance shows that the cause was heard on the 30th day of November, 1935, upon the petition and the appearance, waiver, and consent of the district attorney. The court recites that the petitioners appeared in person and by their counsel and that the court heard the evidence.

The order recites that the court has jurisdiction of the parties and of the subject-matter, both as a court of equity and under and by virtue of chapter 143 of the Session Laws of 1933. The order then recites in the terms of the petition that for the years of 1933 and 1934, the real estate and improvements of the petitioners were assessed upon the tax rolls, and as to the 1933 tax assessment, the petitioners appealed the matter to the State Tax Commission, where the matter remained pending and undetermined on the day the first half of taxes became delinquent and in order to avoid the accrual of penalties and interest on the first half of taxes for 1933, on December 28, 1933, the petitioners paid the sum of $750 to the county treasurer by check under protest, said check having indorsed thereon: "Payment of taxes under protest, the same having been erroneously and illegally charged." Also "payment of this check made under protest. Blatt Building Company, per M. Blatt." On the 2d day of June, 1934, the appeal still being undetermined, the second half of taxes for the year 1933 were paid in the same manner; the sum being $895.77.

The order further recites that on the 10th day of June, 1935, petitioners paid the taxes for the entire year 1934 to the county treasurer, in the sum of $1,629.93, by check, under protest; said check having indorsed thereon: "Payment under protest of taxes as per attached statement. Payment of 1934 taxes on building and lot North Palace Avenue: East First National Bank: South Catholic Publishing Company; West Blatt. Also Catron Building, North Palace Avenue; West Shelby Street; South First National Bank; East Blatt. This payment is made under protest because of unjust, excessive, inequitable and arbitrary valuations placed upon the above premises for tax purposes. Said tax having been erroneously and illegally charged."

Paragraphs 7 and 8 of said order read as follows:

"7. That such assessments and taxes charged against petitioners and their said property for the years 1933 and 1934 inclusive are erroneous, excessive, inequitable, unjust and illegal.

"8. That the value of said premises for tax purposes for the said years of 1933 and 1934 inclusive are: Real Estate $18,040.00.

Improvements $26,350.00. The same as the amounts assessed on the tax rolls of Santa Fé county upon said premises for the year 1932."

The order then goes on to recite that the petitioners by the payment of the taxes for 1933 and 1934, and under protest, are entitled to a refund from the treasurer of Santa Fé county in such amount as the difference between the amount paid under protest and the true tax computed on the values found by the trial court. The court in its order then proceeds under the provisions of Laws 1933, c. 86, to fix the assessment and valuation of the petitioners' property for tax purposes not only for the year 1934 but to continue for the years of 1935, 1936, and 1937. The order then recites that:

"It further appearing to the court that since the filing of the petition in this cause the assessor of Santa Fé County has for the year 1935 assessed the lands and improvements here involved in a sum far in excess of the values herein found by the court as the true tax values for the year 1934, and petitioners having in open court moved the court that their said petition be extended to include their taxes for 1935 so as to avoid the filing of another petition and effectuating the provisions of said 1933 statute, Chapter 86 of the New Mexico Session Laws, which said motion is hereby granted, the court finds the following additional facts:

"11. That such assessments and taxes charged against petitioners and their said property for the year 1935 are erroneous, excessive, inequitable, unjust and illegal.

"12. That the value of said premises for tax purposes for the year 1935 is: Real Estate $18,040.00. Improvements $26,350.-00. The same as the amounts herein ordered assessed on the tax rolls of Santa Fé County upon said premises for the year 1934."

The order directed the county treasurer, upon the correction being made, to total the amount of tax due from the petitioners for the years of 1933, 1934, and 1935 and to give petitioners credit for the three amounts of $750, $895.77, and $1,629.93 upon the amount of taxes so computed to be due and receive from the petitioners a sufficient amount in addition to fully pay up any balance due for their taxes for the year 1935, and to then mark the taxes for the three years paid and issue his receipts therefor.

Thereupon the State of New Mexico and the State Tax Commission, by Quincy D. Adams, Assistant Attorney General, and A. M. Fernandez, special tax attorney, filed a motion praying that the above order of the court be set aside and vacated. The grounds for said motion are as follows:

"I. Said order is irregular and void for the reason that the complaint upon which said order is founded wholly fails to state a cause of action either in law or in equity in that no facts whatsoever are alleged showing that said taxes and the assessments upon which they are based were in-

equitable, unjust, arbitrary, excessive, erroneous and illegal, no allegation of any kind is made in said petition as to the actual value of said property on any of the years therein mentioned; and no allegation of any kind and no mention whatsoever is made in said petition as to the assessment for the year 1935.

"II. The petition in said cause shows upon its face, that it was attempted to be filed and the jurisdiction of this court attempted to be invoked under the provisions of Chapter 143, Session Laws of 1933, whereas this court under said Chapter had no jurisdiction to enter said order for the following reasons:

"(a) Said complaint has no allegations whatsoever showing that the taxes charged under said assessments for the year 1933, 1934 and 1935 were erroneous or illegal.

"(b) This court is without authority to review the judgment of the taxing officials on the question of the value of said property for said years under said Chapter 143, Session Laws of 1933.

"III. That said order is irregular and void in that it attempts to reduce the valuation for the year 1933, and to require the county treasurer to credit moneys paid under protest on taxes for said year on taxes for another year, to-wit, 1935, although the petition shows on its face and by the exhibits attached thereto that more than one year had elapsed since such moneys were received by the treasurer, and before said petition was filed, and notwithstanding said moneys have been by the requirements of the statute under which said suit was brought legally distributed to the various funds of the city, county and state.

"IV. This court was without any equitable jurisdiction in rendering said order for the following reasons:

"(a) That the proceeding filed in this court is a special statutory proceeding and not a suit in equity.

"(b) The petition wholly fails to allege any facts sufficient to constitute a cause of action in equity, and wholly fails to allege any facts entitling petitioners to equitable relief.

"(c) The state of New Mexico, the State Tax Commission and the County Treasurer of Santa Fé county are necessary and indispensable parties defendant to a suit in equity for the reduction of valuations or the abatement of taxes, and that neither of them were made parties or served with notice or process of any kind, and have not had an opportunity to be heard."

This motion was followed by a supplemental motion, likewise directed at said order, which specifically added as grounds to the original motion, the following:

"1. That as to the assessment for the year 1934, no allegation is made in the petition showing that any appeal was taken from the action of the assessor in making said assessment to the board of equalization or to the State Tax Commission, and that said petition as to said year fails to state any cause of action whatever, that said complaint cannot be

amended in this respect so as to state a cause of action for the reason that there was in fact no appeal made to the State Tax Commission as to said assessment.

"2. That hearing on this cause was had upon an appearance on the part of the District Attorney waiving notice of hearing, but without pleading in any way in response to said petition; that the State was in no way represented in said hearing, and that said appearance of the District Attorney is ineffectual to waive the objections in our original motion and herein set out.

"3. That the State has a meritorious defense to said petition."

Soon after the above motion was filed, the district attorney (by his assistant) also filed a motion in said cause, which reads as follows:

"It having been called to the attention of David W. Carmody, Assistant District Attorney of the First Judicial District of the State of New Mexico, that an order granting relief in the above entitled cause was entered without notice of hearing to the State Tax Commission, and that no stenographic record was taken of the testimony of said hearing, and that a motion was filed by the State Tax Commission and the office of the Attorney General to vacate said order; that even though said order granting relief specifically reserved the allowance of an appeal, said appeal is without avail in as much as no record whatsoever was taken at the said hearing, and it would, therefore be impossible for the Supreme Court to pass upon the evidence supporting the petition herein, and that at the time that the attorney for the petitioners requested your movant to sign the waiver heretofore filed herein, the said attorney verbally assured your movant that notice would be given him of the said hearing in order that your movant could be present thereat,

"Therefore, comes now said Assistant District Attorney and joins in the said motion to vacate, and prays that said order be set aside and that a new hearing with due notice to the State Tax Commission be ordered.

"[Signed] David W. Carmody
"Assistant District Attorney."

The record is silent as to whether or not the district attorney ever received notice from the attorney for the petitioners of the hearing on the petition or if attorney for petitioners did verbally agree to give the district attorney such notice. It appears from the record, however, that the same day the district attorney filed his motion, the court entered its order as follows:

"The above entitled cause having come for hearing before the court, upon the motion and supplemental motion of the state of New Mexico and the State Tax Commission, for an order setting aside and vacating the judgment heretofore on the 2nd day of December, 1935, entered in the above entitled cause, and the court having heard arguments of counsel, and being fully advised in the premises, is of

the opinion that said motion is not well taken:

"It is, therefore, ordered that said motion and supplemental motions, and the motion of the assistant district attorney be, and they are hereby overruled, to which the state excepts.

"Done at Santa Fe, New Mexico, this 29 day of January, 1935.

"[Signed] M. A. Otero, Jr.
"District Judge

"O. K.
"[Signed] C. C. Catron."

There is thus presented for our review, on certiorari, questions involving the interpretation of Laws 1933, c. 143, its purpose and object.

The state assigns seven errors to the district court. We group the subject-matter of the claimed errors under three separate groups and treat them in that manner. Each will deal with the jurisdiction of the court as to the taxes for a particular year and the availability of chapter 143 as a vehicle to an aggrieved taxpayer.

We start with the taxes for the year of 1933. The state contends that Laws 1933, c. 143, contemplates the single relief of recovery of specific moneys paid under protest, and that a failure to bring the action or proceeding within sixty days is fatal to the jurisdiction of the court; that a failure to file suit within sixty days bars the right as well as the remedy. If this be correct, then the order as to taxes for the year of 1933 was void, and the direction to apply the refund as a credit on the 1935 taxes of the petitioner (or the 1934 taxes as argued by petitioner) was without authority.

Laws 1933, c. 143, is an act to amend Comp.St.1929, § 141-404, relating to payment of taxes paid under protest. This 1933 statute reads as follows:

"Section 1. That Chapter 141, Section 404, of the 1929 Compilation of the Laws of the State of New Mexico be and is hereby amended to read as follows:

"141-404. Erroneous payments. Taxes paid voluntarily to any officer authorized to collect the same shall not be refunded or rebated in any instance. Where any person shall pay any tax, penalty, interest, or costs under protest, claiming the same to be erroneously or illegally charged, he may present his claim to the district court by petition, and it shall be the duty of the district attorney, upon notice, to appear in response to such petition without the necessity of the issuing or service of any process, and the court shall hear and determine the matter and enter such judgment as the facts may require. Taxes paid under protest shall, by the treasurer, be held in a suspense fund until legal proceedings for the determination of the right thereto shall have been concluded, at which time they shall be disposed of in accordance with the final judgment in such proceedings; Provided, that in case no legal proceedings shall be effectively begun within sixty days from the date of the payment thereof, such moneys shall thereupon be funded and distributed as

other taxes, and shall thereafter not be subject to repayment."

The only change this statute made in Comp.St.1929, § 141-404, is found in the proviso that legal proceedings must be effectively begun within "sixty days," whereas the time formerly was six months. Board v. Atchison, T. & S. F. Ry. Co., 40 N.M. 6, 52 P.(2d) 126.

In the case of Los Alamos Ranch School v. State, 35 N.M. 122, 290 P. 1019, 1020, upon the question of whether an appeal would lie to this court in a proceeding instituted in the district court pursuant to the provisions of Comp.St. 1929, § 141-404, we said: "Under section 141-404, the petition is presented to the district court by the taxpayer having paid the taxes under protest. The district attorney, upon notice, becomes the adversary of the taxpayer, and must represent the taxing authorities. *The petition, to be availing, must be presented within six months after the taxes are paid under protest.*" (Italics ours.)

The specific question now before us was not passed upon in the Los Alamos Ranch School Case. We believe, however, the court in its dicta forecast the correct view.

In the instant case the taxes for the year 1933 were paid on June 14, 1934. The petition was filed on August 14, 1935, one year and sixty days after payment under protest.

At the common law, the courts were powerless to give relief against erroneous judgments of assessing bodies. If a fraud be charged the taxpayer may invoke the aid of a court of equity.

"The wrongs which spring from errors on the part of assessors are, in a large proportion of all the cases, as little susceptible of correction, unless the legislature shall have provided a remedy by statute. Courts of equity have but a limited jurisdiction, extending to few cases besides those in which the impelling motive on the part of the assessors has been to do injustice and inflict injury. The chief protection of the citizen must at last be sought in the intelligence and integrity of public officers, and where these fail, as too often they do, the injury must frequently prove irreparable. * * *" See section 1610, c. 27, Cooley Taxation, vol. 4, p. 3218.

Again: "The power of courts to interfere in matters of taxation, except as permitted by statute, is limited. They may review questions of law affecting taxes, including the question as to what are legislative subjects of taxation, and whether taxes are for a public purpose, and may inquire into the jurisdiction of assessors and boards of equalization. They may review questions of situs of property for purposes of taxation, and may review assessments which are arbitrary or so excessive or discriminatory as to be constructively fraudulent. So valuation is reviewable by the courts where it was arrived at in a whimsical, capricious or unwarrantable way." See section 1612, c. 27, Cooley Taxation, vol. 4, pp. 3219 and 3220.

If the Legislature especially empowers the court to give relief against erroneous judgments of assessing bodies, then the court may act to give such relief. However, the court can only act in the manner provided by the statute and under such conditions as are prescribed by the statute. If a right is granted to an aggrieved taxpayer to recover taxes paid under protest, and a remedy is provided, the right must be exercised in the manner provided by the statute and the remedy must be sought in like manner.

"The rule is well settled in this country that whenever a statute grants a right which did not exist at common law, and prescribes the time within which the right must be exercised, the limitation thus imposed does not affect the remedy merely, but is of the essence of the right itself, and one who seeks to enforce such right must show affirmatively that he has brought his action within the time fixed by the statute; and if he fails in this regard he fails to disclose any right to relief under the statute. 25 Cyc. 1398; Savings Bank v. Powhatan Clay Mfg. Co., 102 Va. 274, 46 S.E. 294, 1 Ann.Cas. 83; Lambert v. Ensign Mfg. Co., 42 W.Va. 813, 26 S.E. 431; Taylor v. Cranberry I. & C. Co., 94 N.C. [525] 526; The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; Hill v. Board of Supervisors, 119 N.Y. [344] 347, 23 N.E. 921.

"In Finnell v. Southern Kan. Ry. Co. (C.C.) 33 F. [427] 428, the court said: 'There is also another class of cases in which a cause of action which does not exist at common law is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them.'

"In speaking of a statute very similar to the one now before us, the Supreme Judicial Court of Massachusetts, in Wheatland v. City of Boston, 202 Mass. 258, 88 N.E. 769, said: 'It is to be observed that this is not a mere statute of limitations. It establishes certain conditions precedent to the maintaining of an action to recover back a tax. One of these is, in substance, that the payment must have been made under protest, or under certain modes of compulsion mentioned in the statute; the other is that the action shall have been brought within the time specified. Compliance with the latter of these conditions is no less essential to the right of action than compliance with the former.'"

Dolenty v. Broadwater County, 45 Mont. 261, 122 P. 919, 922.

Without chapter 143, the petitioners could not have recovered. Chapter 143 gave them a right and a remedy. They had the right to pay their taxes under protest claiming the same to be "erroneously or illegally" charged. (We shall come to the meaning of the quoted phrase later.) The remedy provided was the presenting of a petition to the district court, which court should hear and determine the matter and enter such judgment as the facts

may require. The right is granted and the remedy provided if the action is brought within sixty days from the date of payment. Failure to bring such action within the time prescribed by statute withdraws the right. Without the right no remedy is available.

"Compliance with those conditions is a necessary condition precedent to an exercise of the right thus conferred." Dolenty v. Broadwater County, supra.

No right and no cause of action exists after the sixty days provided by the statute have elapsed. The Legislature has prescribed the conditions under which a taxpayer who thinks himself injured can have his injury redressed. The court was without jurisdiction to even entertain the suit. It necessarily follows that any order it entered in respect to the 1933 taxes was void.

As to the 1934 taxes, we are brought to a determination of the actual meaning and interpretation of chapter 143, and more specifically the meaning of the phrase "erroneously or illegally charged" as applicable to the instant case.

The petitioners paid their taxes under protest and within sixty days brought a suit seeking to recover such "tax, penalty, interest, or costs." The statute says the petitioners may recover such items if they are erroneously or illegally charged. The court is directed to enter such judgment "as the facts may require."

A brief review of this kind of legislation will aid in a determination of the purpose and scope of chapter 143. Section 4070, Comp.Laws 1897 (L.1882, c. 62, § 58), provided for the refunding to the taxpayer of all taxes paid which were thereafter found to be "erroneous or illegal, whether the same be due to erroneous or improper assessment, or improper or irregular levying of the tax, to clerical or other irregularities." This was repealed, and in its stead there was enacted Laws 1913, c. 84, § 26 (1915 Code, § 5479), which provided for the refund of erroneous payments which are found to be "erroneously or illegally charged." 1915 Code, § 5479, was repealed by Laws 1921, c. 133, and replaced by section 404 of the same act. The 1921 act is phrased identically as the statute here under consideration, except that it did not contain the provision respecting voluntary payments as provided by the first clause of chapter 143. This first clause was added by an amendment in 1925 (Laws 1925, c. 102, § 22). The final change was made in 1933 shortening the time within which suit must be brought from six months to sixty days. We find throughout this type of legislation a plan to alleviate against erroneous or illegal assessments.

[redacted] The phrase "erroneously or illegally charged" has a well-established meaning as found in such statutes.

"Statutes expressly provide for refunding in many states. Some of these statutory enactments contain provisions which call for the refunding of taxes in those cases in which taxes illegally assessed are paid

under a mistake of fact, or where there has been some clerical mistake in the assessment or collection of taxes. The term 'erroneously assessed,' as used in such a statute, means an assessment illegal because of a jurisdictional defect and *does not include a mere error of judgment in valuing the property.*" (Italics ours.) Section 1259, c. 20, Cooley Taxation, vol. 3 (4th Ed.) pp. 2501 to 2506, inc.

Under chapter 143, if the charge or assessment be illegal or erroneous, as for example there has been a clerical mistake, double or erroneous assessment, or because the taxing authorities had no right or authority to make the assessment, then it becomes the duty of the taxpayer to pay the amount so assessed under protest, bring suit within the statutory time to correct the tax roll, and recover the amount paid. However, the remedy provided by chapter 143 is not available where the claim by the taxpayer is in effect that the tax charged is excessive. It is only where the party aggrieved claims the defects or errors are jurisdictional, rendering the assessment invalid, that chapter 143 can be invoked to aid the taxpayer.

We do not necessarily hold in the instant case that the judgment of the trial court was based on a claim of excessive assessment solely. It is true that the petitioners did plead that the value of the lands and improvements placed upon their property for taxation purposes for the year of 1934 is inequitable, unjust, arbitrary, and excessive, and that relief was prayed from such excessive valuation. However, we also find the allegation that the real estate and improvements were pretendedly but erroneously and illegally assessed and charged upon the assessment roll, thus bringing the same within the jurisdiction contemplated by chapter 143. The effect of this will be later discussed. At this point we are concerned with the meaning and intent of chapter 143, and in demonstrating the kind of cases contemplated as coming within its scope, we are called upon to show that assessments which are deemed excessive do not come within its scope.

A leading case enunciating the principle that "erroneous assessment" or "illegal assessment" does not mean "excessive assessment" is the case of Clay County v. Brown Lumber Co., 90 Ark. 413, 119 S.W. 251, 252. In the Clay County Case it appears that the assessor had assessed the property in question at $2,000. The Brown Lumber Company having paid the tax, petitioned the county court for a refund, alleging it had been erroneously and excessively taxed the amount so claimed as a refund. The circuit court allowed the refund, from which the county appealed. The cause was reversed. The Supreme Court of Arkansas, said: "As is said in the case of Stanley v. Supervisors of Albany County, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000: 'A party who feels himself aggrieved by overvaluation of his property for purposes of taxation and does not resort to the tribunal created by the state

for correction of errors in assessment cannot maintain an action at law to recover the excess of taxes paid beyond what should have been levied on a just valuation.' When legislation, in accomplishing the necessities of government, makes provision that certain officers or boards shall fix the assessment of property, it does not violate the right of due process of law. Now while, ordinarily, appeal is granted from such officer or board to some court or board of revision, yet, when such boards of equalization are properly constituted, there is no appeal from their decision in simple matters of judgment or opinion as to values, unless appeal is specifically provided for by statute. 2 Cooley on Taxation, p. 1380; Welty on Law of Assessments, § 158; 21 Ency.Plead. & Practice, 439; 1 Desty on Taxation, 605. And when a mode, in the nature of an appeal, is prescribed by the statute, a failure to invoke the statutory remedy within the time and manner prescribed precludes relief by any other proceedings. 27 Am. & Eng.Ency.Law (2d Ed.) 726; Wells Fargo & Co.'s Express v. Crawford County, 63 Ark. 576, 40 S.W. 710, 37 L.R.A. 371. As is said in the case of Pulaski County Board of Equalization Cases, 49 Ark. 518, 533, 6 S.W. 1, 7: 'The taxpayer must pursue the remedy provided for his relief or abide by the finding of the board.' Randle v. Williams, 18 Ark. 380. This rule applies to all cases of excessive valuation where the assessing officer or board acts within its jurisdiction. *On the other hand, where the defects or errors are jurisdictional, rendering the assessment invalid, the party aggrieved has the right to invoke judicial remedies against the illegal acts of such officer or board.*" (Italics ours.)

We find that our system of taxation is similar in many respects to the Arkansas system.

We quote further from this same opinion to illustrate our view: "The term 'erroneous assessment,' as there used, refers to an assessment that deviates from the law and is therefore invalid, and is a defect that is jurisdictional in its nature, and does not refer to the judgment of the assessing officers in fixing the amount of the valuation of the property. If the property paid on was exempt from taxation, or if the property was not located in the county, or if the tax was invalid, or if there was any clear excess of power granted, so as to make the assessment beyond the jurisdiction of the assessing officer or board, then the provisions of Kirby's Dig. § 7180, give the owner a remedy for a refunding of such taxes thus erroneously paid. But a remedy is not given by this section to the party aggrieved by reason only of an excessive assessment or overvaluation of his property."

The case of South Broadway Nat. Bank v. City and County of Denver, 51 F.(2d) 703, 705, was decided by the Circuit Court of Appeals of the Tenth Circuit in 1931, on a suit filed for the recovery of taxes in the sum of $7,160.36 paid to the treasurer of the City and County of Denver. The Colorado statute (Comp.Laws

1921, § 7447) relied upon by the plaintiff in that case provides as follows: "In all cases where any person shall pay any tax, interest or cost, or any portion thereof, that shall thereafter be found to be erroneous or illegal, whether the same be owing to erroneous assessment, to improper or irregular levying of the tax, or clerical or other errors or irregularities, the board of county commissioners shall refund the same without abatement or discount to the taxpayer."

Speaking through Judge Lewis, the Circuit Court of Appeals of this, the Tenth Circuit, said in denying the relief prayed for: "The Colorado statute (section 7447), on which plaintiff relies, permits recovery only when the taxes paid are thereafter 'found to be erroneous or illegal.'" Judge Lewis quotes with approval from the Clay County Case to the effect that an "excessive assessment" is not an "erroneous assessment." Judge Lewis also quoted from the case of Stanley v. Supervisors of Albany County, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000, as follows: "It [the method of assessment as to banks complained of] must sometimes lead also to overvaluation of the shares; but, if so, no ground is thereby furnished for the recovery of the taxes collected thereon. It is only where the assessment is wholly void, or void with respect to separable portions of the property, the amount collected on which is ascertainable, or where the assessment has been set aside as invalid, that an action at law will lie for the taxes paid, or for a portion thereof. Overvaluation of property is not a ground of action at law for the excess of taxes paid beyond what should have been levied upon a just valuation. The courts cannot, in such cases, take upon themselves the functions of a revising or equalizing board." Judge Lewis concludes as follows: "Moreover, an error as to valuation of property for taxation does not go to the question of jurisdiction of the taxing officer, and even if excessive it does not render the tax illegal and void, which is necessary in order to recover in an action at law. Stanley v. Supervisors of Albany County, supra."

In Southern California H. & Mfg. Co. v. Los Angeles County, 49 Cal.App. 712, 194 P. 62, 63, plaintiff sued to recover $781.27 which he alleged to have been erroneously and illegally collected, under section 3804, Political Code (quoted in the case), providing for the refunding of taxes, penalties, or costs "erroneously or illegally" collected. The court in the opinion states that the facts were practically undisputed. The lower court found that in consequence of the mistaken belief on the part of the deputy assessor that plaintiff was not entitled to deductions claimed for unsecured debts, plaintiff's properties were overvalued to the full extent of such assessment, and that in fact there was no balance upon which a tax could be levied, but notwithstanding the court entered judgment for defendant county. In that case, as in this, the plaintiff had not appeared before the board of equalization to object to its assessment.

We quote from the California court: "It is conceded by the appellant that its assessment in excess of the actual cash value of its assessable properties was not caused by an 'clerical error of the assessor,' but that its alleged right to recover the same rests solely upon its contention that such taxes were 'erroneously or illegally collected.' We are unable to sustain the appellant's contention in this regard. We are directed to no action on the part of the officials of the county of Los Angeles which would render the assessment of the plaintiff's property or the collection of the taxes claimed to be due thereon illegal. The plaintiff's said properties were subject to assessment, and the procedure pursued by the county assessor and by the board of supervisors in making said assessment and in levying said tax were admittedly in accord with the provisions of the Political Code relating to taxation. Neither do we think that the assessment and levy and the taxes in question was 'erroneous' within the meaning of the term as used in section 3804 of the Political Code. It is true, as found by the trial court, that the county assessor was mistaken in his conclusion as to the net amount of the plaintiff's properties subject to assessment and taxation; but it does not follow that merely by reason of said mistake the assessment and taxation of said property was erroneously made. The result of this mistake amounted merely to an overvaluation of the plaintiff's properties, or—which amounted to the same thing in effect—an undervaluation of the appellant's deductible debts; and we are cited to no case which goes to the extent of holding that an overvaluation of assessable properties on the part of the assessor is such an 'error' as would entitle the owner of such properties to the remedy provided in section 3804 of the Political Code; but, on the contrary, our attention has been called to a consistent line of decisions by the Supreme Court and District Courts of Appeal of this state, holding that the remedy of the property owner in the event of an overvaluation of his property by the assessor is by application to the board of supervisors of the county sitting as a board of equalization for a revaluation of his property."

We are convinced that Laws 1933, c. 143, in no manner contemplated relief against excessive assessments, and we so hold.

Laws 1933, c. 107, provides the manner and method of assessing property in this state. Section 10 thereof provides for assessment of property by the assessor at actual cash value. Section 14 thereof provides when the boards of equalization (the board of county commissioners of each county) shall hear and determine appeals that may be made from the valuation of the tax assessor.

Laws 1933, c. 86, provides that assessment of real property as provided by law shall be final and binding on all taxing authorities and all owners of such property for four successive years, "except

as to right of appeal." The pertinent provisions of said chapter 86, are as follows:

"Section 1. Hereafter all real property subject to assessment and valuation by the assessors of the different counties, including grazing lands, the value of which is fixed by the State Tax Commission, shall be appraised and valued for purposes of taxation once every four years, the first of such valuations to be in the year 1934, the next in the year 1938, and thereafter each four years.

"Sec. 2. All such property shall be assessed and valued at actual market value in the manner and by the authority as now provided by law, except that the value of all such property as finally fixed in the year 1934, and each succeeding fourth year thereafter shall be final and binding on all taxing authorities and all owners of such property for four successive tax years, except as to right of appeal. * * *

"Sec. 7. * * * Any person dissatisfied with any such apportionment shall have the right of appeal to the County Board of Equalization, and the State Tax Commission, to be exercised in the same manner as appeals in the case of contests over valuation of property, but in such case the sole question shall be the correctness of the apportionment of the total value of the divided tract, and in no case shall the total value as fixed and determined be disturbed or changed; and in cases of such appeals the owner or owners of the other portions of the divided tract shall be given five days' notice thereof by registered mail, and when so notified shall be entitled to be heard and shall be bound by the final decision on such appeal. In hearing such appeals, the County Board of Equalization and the State Tax Commission shall have the power to either disallow the same or in the event of the allowance thereof shall make a new apportionment so that the total value of the whole tract under consideration shall equal the value thereof as theretofore fixed."

Laws 1933, c. 104, amendatory of Comp. St.1929, § 141-230, provides for the method of appeals by dissatisfied taxpayers.

These three appeals, one the first Monday in April, one the first Monday in May, and one to the State Tax Commission to be heard at its June meeting (Comp. St.1929, § 141-508), are the only appeals provided. From and after the meeting of the State Tax Commission in June, the assessment fixed by the tax assessor is in law the actual cash value for taxation purposes. There is no method provided by statute in New Mexico, whereby a taxpayer who is aggrieved because of excessive assessment can appeal from the ruling of the State Tax Commission to the courts. The exception is in a case where a court of equity may review upon facts specifically set forth showing the assessment to be so excessive as to be constructively fraudulent, and then only upon a showing that all other remedies designated by the statute have been exhausted.

As this court said, in the case of State v. Persons, etc., in Chaves County, 29 N. M. 654, 226 P. 886, 889:

"Appellant argues that taxes levied on value in excess of actual value are illegal and void. As an abstract proposition this is unquestionably correct, since such an excessive valuation would be contrary to the terms of the statute authorizing the assessment. However, when we come to apply the abstract principle to the concrete case, we are met with the difficulty of ascertaining with precision the actual value of any given property. Omniscience has not put a price tag or other indication of value on any of our worldly goods. When value becomes an issue, imperfect human agencies must be devised and instituted for the decision thereof.

"'Absolute equality and uniformity are seldom, if ever, attainable. The diversity of human judgments, and the uncertainty attending all human evidence, preclude the possibility of this attainment. Intelligent men differ as to the value of even the most common objects before them—of animals, houses, and lands in constant use. The most that can be expected from wise legislation is an approximation to this desirable end; and the requirement of equality and uniformity found in the Constitutions of some states is complied with, when designed and manifest departures from the rule are avoided.' Stanley v. Supervisors of Albany County, 121 U.S. 535, 7 S.Ct. 1234, 30 L.Ed. 1000.

"The imperfections of such agencies are amply illustrated by the case now before us, where no two were able to agree as to the actual value of appellant's property; but there must be a finality to disagreements, and somewhere must be lodged authority to determine the issue conclusively. When so determined, the actual cash value of the property is fixed and established in law, although as a matter of fact, and considered in the abstract, the value so fixed may be excessive or deficient. So, under the law as it existed prior to the 1921 statute, in the absence of all grounds of equitable jurisdiction, when the state tax commission fixed the actual cash value of appellant's property, the value so fixed, as a matter of law, was the actual value, regardless of the belief on the part of appellant and on the part of the court that such value was excessive."

I. [redacted] When the assessor fixes the value upon property and the taxpayer fails to appeal first to the county board of equalization and then to the State Tax Commission, such value as placed on the property by the assessor becomes final, and the court cannot set up its own judgment of the value of the property in lieu thereof. Chapter 143 in no manner changed the rule or the law.

In the instant case, however, we are confronted with a more complicated proposition. We cannot say that the foundation of the suit in the trial court was based solely on excessive assessment. The trial court had jurisdiction of the parties and the general subject-matter. Within the taxpayer's petition and the judgment of the court we find the allegation that the

assessment or charge was also "erroneous and illegal." Thus the trial court had jurisdiction of the particular subject-matter. The payment under protest (as to the 1934 taxes) was made June 11, 1935, and the proceeding was instituted within sixty days thereafter as provided by law.

That Laws 1933, c. 143, does not contemplate the relief of reduction of assessment on the mere determination that it is excessive we have sufficiently demonstrated. Its purpose is not to enable a judge to substitute his opinion of property values for the opinion of the assessing authorities, and that the statutory criterion "erroneously or illegally charged," correctly interpreted means only such assessments or excesses in assessments as are "illegal and void."

The record before this court may justify the claim that the district judge has reduced an assessment merely because he considered the property to have been overvalued by the tax authorities.

However, every presumption of regularity and of due performance of official duty attends to sustain, if possible, the judgment of the trial court. The sworn allegation is that the 1934 assessment was "erroneously and illegally assessed and charged." That is the exact language of the statute, eliminating the word "assessed."

The district attorney, the taxpayers' "adversary" (Los Alamos Ranch School v. State, supra), filed his consent that the court "hear and determine the matters set out in said petition and enter such judgment as the facts may require at any time without further notice." The court "heard the evidence" and was "sufficiently advised in the premises." It determined that the assessment was "erroneous, excessive, inequitable, unjust and illegal." The district attorney and the judge knew the language of the statute and understood its meaning. The judge presumably was given evidence to support the judgment he rendered vacating the assessment.

We must hold the judgment sufficient as being based upon evidence heard. That is the rule. Canavan v. Canavan, 17 N. M. 503, 131 P. 493, Ann.Cas.1915B, 1064.

However, the conclusion we reach as to the regularity of the judgment only goes to the extent that the court adjudged the assessment to be erroneous and illegal. The judgment roll shows that there were other charges made to the effect that the assessment was excessive. The trial court was not content with holding that the assessment was erroneous and illegal and ordering such erroneous and illegal assessment stricken from the tax roll and directing a refund to the taxpayer of the money paid under protest. The judgment of the trial judge ordered a reassessment. This order of reassessment was without the issues and beyond the court's jurisdiction. Under no circumstances in a proceeding initiated pursuant to chapter 143 could the court reassess the property upon petition of the taxpayer. To this extent the pretended judgment is void. In this the trial judge exceeded his

jurisdiction. The trial court did not commit mere error or irregularity when by its judgment it proceeded to a revaluation of the property for the year of 1934, but exceeded its jurisdiction.

When the court found that the taxes for the year of 1934 had been erroneously and illegally charged, it could have ordered the assessment vacated and set aside and the money paid under protest refunded to the taxpayer. That is all that the court could do. If the cancellation of such assessment left the tax records without any assessment of the property, and one ought to be made, then it became the duty of the taxing authorities in the manner provided by law to place the property upon the tax rolls at a value to be determined by the taxing authorities and not the court.

The order of the court in revaluing the property as to the 1934 taxes being void, it necessarily follows that the order of the court respecting the 1935 taxes in the instant case likewise falls. This requires no additional comment.

Our conclusion that the trial court exceeded its jurisdiction when it reassessed the property disposes of petitioners' contention that there is nothing before us for review on certiorari. They admit jurisdictional errors may be reviewed on certiorari as we many times have held. South Spring Ranch & Cattle Co. v. State Board of Equalization, 18 N. M. 531, 139 P. 159; State ex rel. Board of Commissioners of State Bar v. Kiker, Judge, 33 N.M. 6, 261 P. 816; Gallup American Coal Co. v. Gallup Southwestern Coal Co., 39 N.M. 344, 47 P.(2d) 414. This being a special proceeding with no right of appeal provided (Los Alamos Ranch School v. State, 35 N.M. 122, 290 P. 1019), the judgment therein is reviewable, if at all, only upon certiorari, as we have just held it to be.

We have stated that no appeal exists from judgments in this special proceeding. That is true in so far as the present case is affected. However, mention should be made of the fact that by Laws 1937, c. 197, the Legislature has declared that an appeal shall be allowed from final judgments in all special statutory proceedings, under such rules of procedure as the Supreme Court may adopt.

For the reasons given, the judgment of the lower court is reversed, and the cause is remanded to the district court of Santa Fé county, with directions to set aside so much of the judgment in said cause as revalues and reassesses the property in question and for further proceedings in conformity to the views herein expressed.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

67 P.(2d) 505

WESTERN LIVE STOCK v. BUREAU OF REVENUE et al.

No. 4310.

Supreme Court of New Mexico.

May 10, 1937.

For former opinion, see 41 N.M. 141, 65 P.(2d) 863.

D. A. Macpherson, Jr., of Albuquerque, for appellants.

Frank H. Patton, Atty. Gen., for appellees.

PER CURIAM.

This is the second appeal of this case. For the facts see our former opinion, Western Live Stock v. Bureau of Revenue, 41 N.M. 141, 65 P.(2d) 863. Broadly, but a single issue was presented on the former appeal, namely, whether chapter 7, N.M.Session Laws of 1934 (Special Session), in its application to plaintiffs, operates as an unconstitutional burden on interstate commerce. We held that it does not, reversing the judgment in plaintiffs' favor by the district court of Santa Fe county, and remanded the cause to said court with directions to set aside its judgment and to sustain defendants' demurrer. "Interstate commerce" was put into the case through plaintiffs' claim that advertising contracts between them and out of state advertisers, and certain acts incident to performance of such contracts, constitute interstate transactions.

The district court of Santa Fe county, following the directions of our mandate, duly entered an order sustaining defendants' demurrer. Thereupon plaintiffs filed a written declaration of inability to amend and of refusal to plead further. The district court then rendered judgment against the plaintiffs, dismissing their complaint with prejudice. They seek a review of that judgment by this appeal.

The matter is before us upon the former record and a new transcript supplementing same, showing the proceedings subsequent to mandate. The parties have stipulated that the briefs filed by counsel for the respective parties on the former appeal shall be considered by the court as their briefs on this appeal. We thus have before us the same question, presented on

[redacted]

the same record (with the addition of the above-mentioned proceedings subsequent to mandate contained in the new transcript) and the same briefs. Obviously, the issue thus presented is ruled and foreclosed by our decision on the former appeal. It follows that the judgment of the district court must be affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

BICKLEY, J., being absent, did not participate.

[redacted]

[redacted]

67 P.(2d) 1000

WOOD GARAGE v. JASPER.

No. 4184.

Supreme Court of New Mexico.

April 19, 1937.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

G. L. Reese, Sr., of Roswell, for appellant.

J. C. Compton, of Portales, for appellee.

BICKLEY, Justice.

The Wood Garage sued the husband of appellant in the justice of the peace court on a promissory note executed August 10, 1929, by defendant W. H. Jasper and his father H. D. Jasper, and garnisheed a bank which held $160 on deposit in the name of the defendant, as appears by the answer of the garnishee. No defense was made to the action on the note. The appellant, Frankie Jasper, intervened and claimed that the money on deposit was her property and was not the money or property of the defendant. The justice of the peace rendered judgment for plaintiff on the note and adjudged that the garnishment be quashed.

The transcript on appeal to the district court shows a subject-matter within the jurisdiction of the justice court, and appellant, by its appeal, vouched for the jurisdiction of the justice of the peace and the district court. There is no claim that the jurisdiction of the justice court had ever been divested prior to the appeal.

The only contested matter in the district court involved the ownership of the money in the hands of the garnishee. It was a jury trial. The Jaspers offered testimony that the money belonged to appellant, intervener, and explained that it was rent money from an oil lease on land owned by the appellant, and supported such ownership by a deed from her husband to her, executed June 27, 1928, and recorded July 7, 1928, which was received in evidence without objection. Plaintiff then, for the first time, so far as appears from the record, sought to assail by cross-examination and tender of proof the bona fides of the deed. The nature of the evidence tendered by appellee for the purpose of destroying the weight of the deed to intervener in support of her claim of ownership of the fund tendered, if believed, to support the inference that the conveyance had been made and accepted for the purpose of defrauding the creditors of the grantor existing at the date of the conveyance; but since the deed was executed and recorded more than a year prior to incurring of indebtedness to plaintiff and about five years before this suit was commenced, it does not appear that any evidence was offered which would discharge the heavy burden upon one who seeks to set aside a conveyance as being fraudulent as against subsequent creditors, since the tendered evidence may not show actual fraud, and is silent as to reliance of plaintiff upon his belief of defendant's ownership of the land at the time credit was extended, and the tendered evidence smacks of the nature of a stale claim viewed from the standpoint of laches or limitations. However, this is unimportant except as suggestive upon another trial.

Intervener objected to the evidence tendered by appellee on the ground that plaintiff could not assail her title in this proceeding because the court did not have power under the circumstances to adjudicate the title and set the deed aside, because such relief was not within the issues. Plaintiff conceded that the deed could not be set aside in this action, but contended that since

intervener's claim of ownership of the fund was necessarily based upon her ownership of the land, her cause would fail if the court found that she did not own it. Intervener, with unfortunate persistence, objected to the court's considering the evidence offered by plaintiff to defeat her claim of ownership of the land. The court agreed with intervener and quoted section 79-206, N.M.Stats. 1929 Comp., as follows: *"Title to lands in question—Procedure.* If it appear on the trial of any cause from the evidence, that the title to lands is in question, the justice shall immediately make an entry thereof on his docket and cease all further proceedings."

The district court decided that on an appeal from a justice court it was bound by the same limitations and procedure applicable to such inferior courts. As to this we find it unnecessary to decide. However, the trial court did not follow through with this idea consistently. If, as he decided, he was sitting for a trial of the cause with no more power than the justice of the peace would have had if confronted with the same situation and was subject to the control of the statute quoted and was correct in his view that the justice court would have been ousted of jurisdiction in a like situation, then it was the district court's duty to make an entry on his docket "and cease all further proceedings." The trial judge did not do this, but instead rendered judgment in favor of the plaintiff and against the garnishee, which amounted to an adjudication that the money belonged to the defendant and not to the intervener, resting his decision solely on the fact that the money was deposited in the bank in defendant's account therein. Manifestly, if it appeared from the evidence "that the title to lands is in question," even though incidentally, this was so because the issue of the ownership of the money could not be decided without deciding who owned the land. The result of the ruling was to deprive the intervener of her day in court to assert her ownership of the fund. The trial court adopted the view that the intervention was a proceeding separate and distinct from the garnishment, although intervener had filed a petition in intervention and had also filed a "denial of the answer of garnishee," which stated that officers of the garnishee bank knew at the time they filed its answer that the sum of $160 deposited in said bank, and referred to in paragraph 1 of the answer of said garnishee, was the sole, separate, and individual property of the intervener, and that the defendant W. H. Jasper at no time since that deposit was made had any right, title, or interest in or to said deposit or credit in said bank. We cannot regard the intervention as a distinct and separate proceeding unrelated to the garnishment proceeding, but, even if it were, the district court was wrong in saying that intervener had interjected a dispute as to the title to real estate or that it was drawn in question by her, merely because she offered in evidence a deed to the land as evidence of her ownership of the money in question. If any one interjected a dispute as to title to land it was appellee.

The just trial judge realized the misfortune thus visited upon the intervener and announced that he would delay rendering judgment for a time sufficient for her to go into the district court in an original proceeding to assert her right to the money, which court would not be trammeled in deciding the issue even though the title to lands might be drawn in question.

If it was the district court's duty to cease all further proceedings because of lack of jurisdiction, of course he could not properly render judgment on the merits of the issue. So even if the view of the court as to limitations upon his power were correct, we would be required to dispose of the case by remanding it with directions to go back to the point where the error was committed and "cease all further proceedings." This would require the dismissal of the garnishment proceedings.

It is suggested that in a case where the transcript discloses to the district court that the justice court had jurisdiction of the subject-matter, namely, a civil action in which the debt or sum claimed is not in excess of $200, and there arises for the first time in the district court on appeal and the trial de novo "a matter in which the title to real estate or the boundaries of land may be in dispute or drawn in question," the district court could exercise its own jurisdiction to try such question as though the case had been commenced in the district court untrammeled by the limitations upon the jurisdiction of the justice of the peace, and it is contended that Sheley v. Shafer, 35 N.M. 358, 298 P. 942; Pointer v. Lewis, 25 N. M. 260, 181 P. 428; Romero v. Luna, 6 N. M. 440, 30 P. 855; Vinquist v. Siegert, 58 N.D. 295, 225 N.W. 806; Douglass v. Easter, 32 Kan. 496, 4 P. 1034; Lyman v. Stanton, 39 Kan. 443, 18 P. 513; Hart v. Carnall-Hopkins Co., 103 Cal. 132, 37 P. 196, and DeJarnatt v. Marquez, 132 Cal. 700, 64 P. 1090, support this view. As to this we find it unnecessary to decide, in view of our opinion that even had the district court been subject to the limitations imposed upon the powers of the justice of the peace, then its jurisdiction would not have been ousted upon the record before us, because the case was not a matter in which the title to real estate was in dispute or drawn in question.

Our Constitution, art. 6, § 26, provides: "* * * justices * * * shall not have jurisdiction in any matter in which the title to real estate or the boundaries of land may be in dispute or drawn in question." This is not a grant of jurisdiction, but is a limitation thereon. Seeking the grant of jurisdiction to justices of the peace, we find that section 1 of article 6 of the Constitution says that the judicial power of the state shall be vested in certain enumerated tribunals and courts, including justices of the peace. This, however, does not define the jurisdiction of the justice nor make a grant thereof in specific cases. There are statutes defining the jurisdiction of a justice of the peace, and the only one which is pertinent to this review is section 79-207, Comp.Stats.1929, enacted shortly after the adoption of the Constitution, and carried forward in the 1915

Code as section 3173. It is as follows: "Justices of the peace shall have jurisdiction in all civil actions, in which the debt or sum claimed shall not be in excess of two hundred dollars exclusive of interest."

This must be read in connection with the limitations contained in section 26 of article 6 of the Constitution quoted from supra, so that in effect the law stands: "Justices of the peace shall have jurisdiction in all civil actions, in which the debt or sum claimed shall not be in excess of two hundred dollars exclusive of interest, except where the title to real estate or the boundaries of land may be in dispute or drawn in question."

Section 79-206, Comp.Stats.1929, quoted supra, is neither a grant of jurisdiction nor a limitation thereon. It is, as the compilers of both the 1915 codification and the 1929 compilation thought, a procedural direction to justices of the peace as to what to do when the lack of jurisdiction shall "appear."

The next question to consider is how and when it shall be made to appear that the title to real estate may be in dispute or drawn in question in order to divest the jurisdiction of the justice of the peace. It is very generally provided by statute in the different jurisdictions that justices shall have no jurisdiction of actions in which the title to real property is involved. 35 C.J. 499.

"In order to oust the jurisdiction the question of title must ordinarily be directly and necessarily involved. And so, while a justice cannot determine questions of title, yet he may receive in evidence deeds, contracts, and other evidences of title when introduced for collateral purposes." 35 C. J. 500.

Many decisions are cited in support of the text in notes 52 and 53. Hart v. Hart, 48 Mich. 175, 12 N.W. 33, cited, affords an illustration which is applicable to the case at bar. That was an action of trover for hoops cut from lands. On the trial the defendant claimed that these hoops were cut upon lands belonging to the estate of Alvin N. Hart, deceased, and he offered in evidence the patent from the United States to Hart for these lands, and a power of attorney from the heirs of said Hart, deceased, of which plaintiff was one, to him, the defendant, to sell and convey all or any of the property, real or personal, belonging to said heirs. These offers were objected to as inadmissible under the pleadings and rejected. The Supreme Court, in reversing the judgment, said: "We are of opinion that the court erred in rejecting this evidence. There was really no controversy concerning the title to lands. A party may, for the purpose of identifying and proving his title to personal property, show that it was taken from off certain lands and that he was the owner thereof, but this does not bring the matter of title to lands in question. It would not follow in such a case that any controversy whatever would arise concerning the title to the lands, or that as between the parties the jury would have to pass upon a question of conflicting titles. In this case the plaintiff had joined with his cotenants in executing and delivering to the defend-

ant a power of attorney authorizing the latter to sell the real and personal property belonging to or owned by them as heirs at law of Alvin N. Hart, and under this authority the defendant clearly had the right to show that the hoops in question came from off lands which the deceased had owned."

There is very little support to the doctrine that a question of title to land raised only indirectly will oust jurisdiction. We would be reluctant to adopt a construction which will leave it open to raise a question of title to land incidentally, collaterally, or indirectly. It is suggested that the language of our Constitution, quoted supra, which says the justice shall not have jurisdiction when title to real estate "may be in dispute or drawn in question," aided by the statute which says that "if it appear on the trial * * * from the evidence, that the title to lands is in question, the justice shall * * * cease all further proceedings," supports a view that the jurisdiction of the justice may be "drawn in question" indirectly, collaterally, or incidentally. It does not seem to us that the fact that the statute contemplates that the dispute may appear "on the trial * * * from the evidence" is of especial significance in support of such construction. No strictly formal pleadings are required in the justice of the peace court. Each party may plead orally, but shall give a bill of particulars of his demand if required by the justice or the opposite party. Section 79-308, Comp.Stats.1929. It is required that the summons must set forth the "nature of the action," and defendant is required to make answer to plaintiff's demand. Surely if it appear from the summons, or answer, or other pleadings, written or oral, that "the title to real estate * * * may be in dispute or drawn in question," it would be the duty of the justice to "make an entry thereof on his docket and cease all further proceedings." So we think the language of section 79-206 does not militate against the generally accepted principles declared in 35 C.J. 500, quoted supra.

As to whether the question of title to real estate may be in dispute or drawn in question will depend upon the facts of each case from the pleadings and evidence. It will depend largely upon "the nature of the action and pleadings therein." 35 C.J. 501, and see note 61 for illustrations of instances where title held involved and where not.

In Pankey v. Modglin, 116 Ill.App. 6. which was a suit commenced before a justice of the peace to recover for breach of covenant as to title to real estate, when the cause came on for trial the defendant moved to dismiss the suit for want of jurisdiction as to the subject-matter. The justice denied the motion, heard the evidence, and rendered judgment in favor of plaintiffs for $21.-42. Defendant appealed to the county court and there renewed his motion to dismiss. That court held that the justice of the peace had no jurisdiction and dismissed the suit. The appellate court said that this was error. The appellate court said that the suit was "for the recovery of money only" of which the justice of the peace had jurisdiction.

The court went on to say: "No court could render any judgment in such action directly affecting the title. The question of title was only incidentally involved, and justices of the peace have unquestioned jurisdiction in a number of instances where title to real estate is so involved that it must be incidentally determined. This is sometimes so in forcible entry and detainer suits, yet such suits never directly involve title, and it is often so in actions for damages to real estate. Where the statute gives a justice of the peace jurisdiction, courts are powerless to impose limitations on such jurisdiction by construction. The fact that title may be incidentally involved does not oust a justice of the peace of jurisdiction. Village of Dolton v. Dolton, 201 Ill. 155 [66 N.E. 323]; Cobine v. McKittrick, 186 Ill. 324 [57 N.E. 880]; Pitts v. Looby, 142 Ill. 534 [32 N.E. 519]. Unless otherwise provided by statute, the test as to whether title, is so directly involved as to deprive a justice of the peace of jurisdiction, is whether the issues to be litigated demand a judgment affecting title. Where the issues demand a judgment for the recovery of money only, title is not directly involved."

The Supreme Court of Wyoming, in Jenkins v. Jeffrey, 3 Wyo. 669, 29 P. 186, 188, had before it a case in which it was contended that the court did not have jurisdiction because the question of title to land was involved. The court clearly demonstrated that the question of title is not involved in a forcible entry and detainer case, as has also been held by our court. The court went on to say: "The cases are almost unanimous in holding that, title not being in issue, no evidence to disprove the complainant's title is admissible. Evidence of title is sometimes admissible in forcible entry and detainer and detainer suits to show the purpose for which the entry was made, and the character and extent of the possession, though evidence of an adverse title cannot be given to prove the extent of the defendant's possession."

The Wyoming statute (Rev.St.1887, § 3435) read as follows: "If it appear, on the trial of any cause before a justice of the peace, from the evidence of either party, that the title to land or boundaries, shall be disputed or brought in question by the other party, by pleading or evidence, the justice shall immediately make an entry thereof in his docket and cease all further proceedings in the cause, and shall certify and return to the district court of the county a transcript," etc.

It will thus be seen that the Wyoming statute was not unlike the provisions of our Constitution and statute. The court quoted from an Ohio decision (Petsch v. Mowry, 1 Cin.R. 36) as follows: "The action for detainer is a possessory action merely. In general the title of the plaintiff is not to be investigated. The nature of his estate, whether fee-simple or for years, is immaterial. His possession at the time of making the tenancy and the delivery of the possession is sufficient; and the defendant cannot, by the introduction of the proof of title, take away the jurisdiction, for that

would put it in his power to defeat the action."

Quoting further from the Ohio decision: "We can see no reason why it is not possible to avoid so strict a construction, when it would deprive justices of jurisdiction in so large and important a class of cases as that of the various actions of detainer; for so strict a construction as that suggested by the supreme court would, at a single blow, strike the whole act relating to detainer from the Code. We cannot think this to have been the intention of the legislature."

We would hesitate to give the provisions of our Constitution and statutes relative to limitations upon the jurisdiction of justices of the peace, where title to real estate is in dispute or drawn in question, a construction which would deprive the justice of the peace of jurisdiction in so large a class of cases as ordinarily arise under our forcible entry and detainer statute.

Nichols v. Bain, 42 Barb.(N.Y.) 353, is an instructive case. The syllabus is as follows: "Where, upon a trial in a justice's court, a deed of real estate is offered in evidence, not to establish a title to land, but to show the performance of a condition precedent to the defendant's liability upon the instrument sued on, the justice should receive the deed, the same as other evidence, and retain jurisdiction of the cause."

The court said:

"The purpose of the statute is that a justice of the peace, shall not in any case have jurisdiction to try a disputed title to real property. But did it appear on this trial from the plaintiff's own showing that the title to real property was in question? It seems to me that it did not. A deed of real estate was introduced in evidence, not to establish a title to land, for that was not the issue, but to show the performance of a condition precedent to the defendant's liability upon the instrument which was the foundation of the action. That condition precedent was, that the plaintiff should purchase certain property owned by certain heirs. And a purchase from them was a performance, even though they had but an imperfect title. It was the purchase from said heirs, and not the extent or validity of their title, which was the fact sought to be established by the introduction of the deed in evidence; although I do not mean to admit that it would make any difference even had the plaintiff tried to establish a perfect title.

"It was said in Main v. Cooper (25 N.Y. [180], 184), that 'in all cases when deeds or paper evidences of title to real estate are introduced before a justice of the peace, he is entitled to consider the purpose for which they are introduced. If they are merely introduced incidentally, to establish some collateral fact not involving any title to, or interest in lands, he is to receive them like other evidence.'

"It was in this light that the justice, on the trial of this cause, should have permitted the introduction of the deed. It did not put in question any title to, or interest

in, lands. The title was collateral to the main issue on trial, and therefore the deed should have been received as other evidence, and jurisdiction of the cause retained."

In Putty v. Putty (Tex.Civ.App.) 6 S.W. (2d) 136, it was decided: "In suit to recover value of rents alleged to belong to minors and to have been converted by defendants, in which defendants denied that minors had any title to land, but claimed title in themselves, county court was not without jurisdiction on ground that case involved determination of title, since question of title was incidental only to rights of minors to recover rent."

The court said:

"The appellants, by proper assignment, challenge as error the action of the court in overruling their plea to the jurisdiction of the court, because the suit involved a determination of the title to the land.

" 'The suit was not one "for the trial of title to land," or "for the recovery of land." The two expressions used in the Constitution in defining the jurisdiction of the district and county courts are evidently intended to convey the same meaning, and have reference to cases where the title to land is to be determined, or its recovery had, by the judgment sought. In actions for a debt or damages, in amounts within the jurisdiction of the county courts, the right of recovery may depend upon the title to land. The court having the power expressly given to determine such right to recover must decide all questions of law and fact upon which its determination depends. Thus the question of title comes incidentally into the case, and must be decided before the court can render judgment settling the claims in dispute. But in doing so it does not adjudicate or settle the title to the land, nor the right to recover it, but simply determines that the plaintiff is or is not entitled to recover the thing sued for within the jurisdiction. In the present case, if plaintiff owned the land, she had the right to recover for the trespass upon it. On the other hand, if defendant owned the land, or if plaintiff did not own it, defendant was not liable to plaintiff for taking gravel. Of course, either party might have rights in the land, growing out of the right of possession, and not dependent on the question of title, but they are not involved in this case.' City of Victoria v. Schott, 9 Tex.Civ.App. 332, 29 S.W. 681."

This decision was cited with approval in Southwestern Bell Tel. Co. v. Burris (Tex. Civ.App.) 68 S.W.(2d) 542, 543.

In Baltimore & O. R. Co. v. Owens, 130 Md. 678, 101 A. 605, it was decided: "Under Code Pub.Gen.Laws 1904, art. 52, § 7, providing that no justice of the peace shall have jurisdiction in actions where the title to land is involved, it must appear to the court, from the nature of the action itself, that it is one in which the title to land is necessarily and directly involved, in order to oust and defeat the jurisdiction of the justice of the peace, and of the circuit court on appeal."

The judgment will be reversed so far as it pertains to the garnishment proceedings. The cause will be remanded for a new trial of such garnishment proceedings in accordance with the views herein expressed. And it is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

67 P.(2d) 1006

STATE v. LOBB.

No. 4271.

Supreme Court of New Mexico.

April 23, 1937.

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

Frank H. Patton, Atty. Gen., and Fred J. Federici, Asst. Atty. Gen., for the State.

ZINN, Justice.

The appellant was charged by information with making an assault with a deadly weapon (an automobile crank) upon Gene Day. The assault happened at an admittedly drunken party. Appellee claimed self-defense. Upon trial and conviction appellant was sentenced to serve a term of not less than one nor more then three years in the penitentiary. On appeal many errors are assigned. Only one needs to be considered in light of the result.

The court permitted the State, over the objection of counsel for appellant, to ask the appellant whether he had ever been in the custody of the officers before. It appears from the testimony that when appellant was taken in custody by the sheriff he asked for an attorney. A Mr. Pounds, the chief of police of Clayton, was brought in. During this time the appellant made certain admissions to the sheriff about the assault. These admissions were elicited in answer to questions propounded by the

sheriff and the chief of police. The appellant attempted to show that he made these admissions in the belief that Pounds was his attorney.

On cross-examination, over proper objection, the district attorney was permitted to ask the appellant this question:

"Is this the first time you have been in the custody of the officers?"

The Attorney General argues that the question was intended to show that Lobb had been in the custody of the officers of Clayton before and therefore knew that Pounds was the chief of police and not an attorney and it was therefore proper on cross-examination to impeach the attempted intimation of appellant that he had been entrapped into making certain admissions. In the alternative, the Attorney General contends it was also admissible under the theory enunciated by this court [State v. Solis, 38 N.M. 538, 37 P.(2d) 539, and cases therein cited] to test the credibility of the witness.

Neither contention is tenable.

Appellant's denial that he had knowledge that Pounds was not a lawyer did not authorize this question. The appellant's claim that he thought Pounds, the chief of police, was his lawyer was we believe palpably insincere. The district attorney might have been permitted to inquire to show that appellant knew Pounds was a police officer and not a lawyer. This could have been very easily done by proper questions. The district attorney clearly went beyond propriety when he asked appellee if this was the first time he had ever been in the custody of officers. The district attorney, in his zeal to convict, was taking an undue advantage of an opening made by the defendant.

"Except as it may sometimes be proper to inquire into such matters on cross-examination for purposes of impeachment, and except where the witness was accused of the particular crime for which defendant is being tried, it is generally not permissible for a party to bring out the fact that a witness has been accused of, or arrested or indicted, or that a warrant has been issued for his arrest, or information filed against him, or tried for, a crime of which he is not shown to have been convicted, for the purpose of affecting his credibility, even though the crime involves moral turpitude." 70 C.J., Title, Witnesses, § 1045.

There are exceptions to the rule above stated, as shown by the remainder of the text in Corpus Juris, but such exceptions do not go to the extent of permitting proof that the accused "had been in the custody of officers" without at the same time showing that he had been convicted of a crime involving moral turpitude or felony, or one affecting the witnesses' credibility.

The case of State v. Solis, 38 N.M. 538, 37 P.(2d) 539, is not in point, nor are any of the cases cited in that opinion, on the particular question. Specific acts of wrongdoing or "overt acts of wrongdoing" are admitted to impeach witnesses. They

have been largely applied in cases of women witnesses with reference to immorality, but being in the custody of an officer is beyond the rule laid down in these cases. Whether the appellant had or had not been in the custody of the police before is not impeachment of his assertion that he thought Pounds was a lawyer. When it is shown that appellee had been in custody of the officers, such fact clearly would tend to prejudice him in the eyes of the jury.

We said in State v. Conwell, 36 N.M. 253, 13 P.(2d) 554, 556:

"Except for purposes of impeachment, and the proof confined then within the narrow limits indicated by the statement just quoted, the general rule is that proof of other crimes is inadmissible, and the usual prejudicial character of such evidence is readily conceded by all courts and textwriters. Of course, there are well defined exceptions, as where the proof of other crimes tends to establish intent, motive, absence of mistake or accident, common scheme and plan, or identity of the person of the accused on trial. State v. Bassett, 26 N.M. [476] 477, 194 P. 867. No contention is had that the proof here made was for any other purpose than that of impeachment."

The other assigned errors need not be considered.

For the reasons given, the judgment must be reversed and a new trial awarded.

It is so ordered.

HUDSPETH, C.J., and SADLER, BICKLEY, and BRICE, JJ., concur.

67 P.(2d) 1007

BOARD OF COUNTY COM'RS OF TORRANCE COUNTY et al. v. CHAVEZ.

No. 4288.

Supreme Court of New Mexico.

April 29, 1937.

A. T. Hannett and Donald B. Moses, both of Albuquerque, for plaintiffs in error.

Fred H. Ayers and J. Lewis Clark, both of Estancia, and George R. Craig, of Albuquerque, for defendant in error.

HUDSPETH, Chief Justice.

This is a proceeding brought in the district court of Torrance county to compel the County Canvassing Board, hereinafter referred to as the Board, of that county to reconvene and canvass the votes cast in precinct No. 3 in Torrance county and include them in the final election results.

The ballot box from precinct No. 3 was delivered to the county clerk twenty-five hours and five minutes after the polls closed November 3, 1936. The Board convened on the 5th of November, 1936, and proceeded to canvass the returns of the election from all the other precincts in the county and toward the end of the six day period fixed by statute within which the canvassing of election returns is to be made issued certificates of election to the several county candidates having a plurality without taking into consideration the vote in precinct No. 3. A petition was filed by Jose L. Chavez, hereinafter called petitioner, in the district court on the 16th day of November, 1936, admitting that the polling place in precinct No. 3 was less than twenty-five miles from the county seat and that the ballot box, poll books, etc., were not delivered to the county clerk within twenty-four hours after the polls closed, but alleging that the failure to comply with the law with reference to delivery of the ballot box, etc., was due to forces beyond the control of the election officials. After hearing, wherein both parties introduced evidence, the court found, on substantial evidence, that the delay in delivering the ballot boxes, etc., was due to forces beyond the control of the election officials, and ordered the County Canvassing Board to re-

convene, canvass, declare, and certify the results of the votes of precinct No. 3 "in order that they may become a part of the final election results of said County." The court further ordered that "if it shall appear, after the canvassing, declaring and certifying of the votes cast in Precinct No. 3 of Torrance County, New Mexico, that certificates of election have already been issued to persons who did not receive a plurality of the votes cast at such election in keeping with the final election results then said County Board of Canvassers shall revoke the certificates of election already issued to such persons and shall issue a certificate, or certificates of election in favor of the person or persons who shall be found to have received a plurality of the votes cast at said election as shown by the final election results."

The statute, section 41, ch. 147, Laws of 1935, is an amendment of the election code, the pertinent part of which is as follows:

"'If the voting place is not more than twenty-five miles distant from the county seat, the ballot box, key, poll book, "Triplicate Original" registration book and unused supplies shall be delivered forthwith to the county clerk by one or more of the judges in person, but the same may be sent to the county clerk by messenger selected by the judges for that purpose, if the county seat is more than twenty-five miles distant.

"'Where any ballot box, any poll book, "Triplicate Original" registration book, are not delivered in accordance with these instructions within twenty-four hours of the close of the polls, the vote in that precinct shall not be counted or canvassed unless a petition is presented to the district judge of the district within which such precinct is contained and a sufficient showing made that the delay was due to forces beyond the control of the election officials, and then only when said district judge shall so find and make an order that the votes cast in said precinct shall be canvassed and become part of the final election result.' Said petition may be filed in the district court by any election official or any interested party without cost." (Section 41)

All parties agree that the statute is mandatory in that the County Canvassing Board was without authority to canvass the votes in precinct No. 3 which were delivered after expiration of twenty-four hours until the district judge found that the delay was due to forces beyond the control of the election officials and ordered the canvass of the votes cast in that precinct.

The first assignment of error is based upon the delay in making application to the district judge until more than six days had elapsed (the time allowed under Comp.Stats.1929 § 41-347 as amended by Laws 1935, c. 147 § 44, for the county canvass) after the election and

after the Board had canvassed the returns and issued certificates of election. It is the theory of the Board that under the statute quoted above application can be made to the district judge by letter "who can institute an inquiry, without notice to anyone, as to the reason why the returns have been delayed, and summarily order the Board to include them in its canvass," but that this remedy is "applicable only for the time within which the Board of County Canvassers are to canvass the returns."

There are four counties in the Third judicial district and the judge of that district resides some 250 miles from the county seat of Torrance county. Frequently the canvass of county election returns is made within a day, as it was in this case, although the certificates were not issued until later. It is evident that if the construction contended for by the Board is put upon this statute it will afford no remedy at all in many instances for the reason that the canvass will be completed before the judge can act.

While there seems to have been unnecessary delay in filing the petition in this case, we cannot say that the court erred in holding that the Board met and canvassed the result before anybody in interest had an opportunity to apply to the court under this statute.

A more serious question is presented by assignments of error Nos. 2 and 3, which read as follows:

"2. The court erred in ordering the Board to cancel the certificates of election theretofore issued by them for the reason that no power is granted to the court to make such order by Section 41-343, New Mexico Statutes Annotated, Compilation of 1929, Amended by Section 41, Chapter 147, Laws of 1935, and for the further reason that said certificates had been delivered to the persons shown to have been elected by the legal returns and said persons were necessary parties to an action to cancel certificates in their possession.

"3. That the court did not obtain jurisdiction of the persons and subject matter involved in this proceeding as a proceeding in mandamus under the provisions of Section 41-352, New Mexico Statutes Annotated, Compilation of 1929, for the reason that the court did not issue an alternative writ of mandamus."

The Board cites Montoya v. Gurule, 39 N.M. 42, 38 P.(2d) 1118, in support of its contention that this proceeding being special, the right to order the cancellation of election certificates is not to be inferred. The final order was entered December 3, 1936; the term of all the offices for which certificates were issued began January 1, 1937, so there was a period of approximately four weeks remaining within which the Board could complete its work. It is true that the statute quoted above does not specifically authorize the canceling of certificates of election, but the statute does authorize the court to

"make an order that the votes cast in said precinct shall be canvassed and become part of the final election result." In order to effect that purpose the certificates of election must be issued to the parties who receive a plurality of the votes cast. Under the recount provision of the county canvass statute, a ministerial proceeding, the Board is authorized to cancel certificates of election and issue new certificates. State v. Helmick, 35 N.M. 219, 294 P. 316. If the court had authority to issue the order to the Board it would seem that another proceeding should not be necessary to enforce it.

The trial court treated this as a proceeding in the nature of mandamus. Petitioner suggests that a proceeding under this statute resulting in a finding by the court that the delay in delivery of the poll books, etc., was due to forces beyond control of the election officials and an order directing a canvass would have been a condition precedent to the maintenance of a proceeding under Comp.Stats. 1929 § 41-352, providing for mandamus to compel a canvass of election returns.

The purpose of this statute is to prevent fraud. And to so interpret it that the voters of an entire precinct would be denied participation in a general election, although neither they nor a majority of their election officials were at fault, would certainly not be in keeping with the legislative intent. We hold that the learned judge below did not err in making the order and that he has authority to enforce it under the general powers conferred upon district courts by the Constitution.

Assignments of error Nos. 4 and 5 are without merit. The Board apparently confuses the language in the order "to canvass the vote" with the recount provision of Comp.Stats.1929 § 41-347, par. 5, as amended by Laws 1935, c. 147, § 44. The two proceedings are entirely distinct. The court's order and the statute quoted above referred to the canvass of the face of the returns as shown by the certificates of the precinct election officials. In other words, this order removes the bar raised by the failure to deliver the poll books, ballot boxes, etc., to the county clerk within twenty-four hours and directs that further proceedings be had as if they had been received in due time. It appears that the poll books were locked in a ballot box. We said in Madrid v. Sandoval, 36 N.M. 274, 13 P.(2d) 877, 880: "Section 41-321, Comp.1929, requires each box to be equipped with diverse padlocks of Yale or similar design. Section 41-343, Comp.1929, places custody of the key to one lock on each box in the county clerk and the other in the district judge folowing the original count. The result contemplated is clearly to require the presence of each of these officials to effect entry into the boxes." After the poll books are taken out of the ballot box the Board will proceed under the provisions of paragraph 1 of section 41-347 as amended in 1935 and following paragraph, and if the returns are so defective that they cannot be corrected without a recount

of the ballots, proceedings should be had in conformity with the provisions of paragraph 5, section 41-347, as amended in 1935, which provides that "* * * the ballot box shall be opened in the presence of the district judge or some person designated by him to act for him, of the election officers so summoned, and of the county canvassing board, and such other persons as desire to be present; and the election officers shall then and there recount the ballots and make a new certificate in duplicate to conform to the facts."

Finding no error in the record, the order of the district court will be affirmed, and it is so ordered.

SADLER, BICKLEY, and ZINN, JJ., concur.

BRICE, J., did not participate.

68 P.(2d) 160

In re SEVILLETA DE LA JOYA GRANT, SOCORRO COUNTY.

ROMERO et al. v. STATE TAX COMMISSION.

No. 4293.

Supreme Court of New Mexico.

May 4, 1937.

R. P. Barnes, Claud S. Mann, and Allen M. Tonkin, all of Albuquerque, for appellants.

C. C. McCulloh, Sp. Tax Atty., of Santa Fe, A. M. Fernandez, Asst. Atty. Gen., and Reid & Iden, of Albuquerque, for Thomas D. Campbell.

BRICE, Justice.

The county of Socorro became the owner of 216,000 acres of land known as Sevilleta de la Joya Grant, situated in that county, through purchase at a sale for delinquent taxes under statutory proceedings in August, 1928. Thereafter, on the 6th day of September, 1934, the state tax commission filed a petition in the district court of Socorro county, praying for an order for the sale of said property by the county, as provided by section 141-452, N.M.St. 1929, for not less than $75,000. This statute provides in substance that whenever any property which has been bought by the county at any tax sale, or any tax sale certificate held by the county, cannot be sold for the full amount of delinquent taxes assessed against the land, that the state tax commission may file a petition in the district court stating, among other requirements, an estimate of the maximum amount that could be realized by the sale of such property. That notice of such proceeding be served on the record owner of the property and others interested, at least ten days before the date of hearing. That the board of county commissioners, the district attorney, the Attorney General, or any person interested, may intervene in such proceedings; and further as follows:

"If upon such hearing, the court shall be satisfied that the public interest requires that said property shall be sold, or the taxes be settled, for a sum less than the total amount of taxes, penalties, interest and costs assessed thereon, a decree may be entered authorizing the county treasurer to sell said property in such manner as prescribed by the court, or to settle said delinquent taxes, for a sum not less than the minimum sum specified in such decree."

Provision is made that the county treasurer shall execute and deliver to the purchaser a deed which shall convey a fee-simple title. Taxes against this property amounted to some $137,000, exclusive of interest.

Upon hearing on the petition on February 21, 1935, an order was entered by the district court, authorizing the county treasurer of Socorro County to sell the property in the manner provided by law for not less than $75,000. Pursuant to this order, the county treasurer of Socorro county advertised the property to be sold on the 29th day of May, 1936; at which

time he sold it to Thomas D. Campbell for $76,750, which was the only bid made therefor.

Thereafter, on the 29th day of May, 1936, there was filed in the same cause a report of the sale; but before the report was approved by the court, and on the 18th day of June, 1936, an "Amended Protest and Motion" to set aside the sale was filed by the appellants herein, prayer of which is "that the sale under consideration be rejected."

An order was entered on the 19th day of November, 1936, after a hearing in which it was ordered "that said protest and motion be and the same are hereby overruled." Thereafter, on the 29th day of November, 1936, the district court of Socorro county entered its order confirming the sale; and on the same day entered an order allowing appeal from the order overruling appellants' motion and protest.

A motion to dismiss this appeal has been filed upon the ground that this court is without jurisdiction to hear it. By stipulation of parties and our consent, the motion and hearing on the merits have been consolidated for all purposes.

The proceedings providing for the sale of property and tax sale certificates by section 141-452, St.1929, is special, and no provision is made by law for appeals from judgments entered in such proceedings that would apply to this case. We have often decided that we have no jurisdiction to hear such appeals. Jordan v. Jordan, 29 N.M. 95, 218 P. 1035; Cook v. Mills Ranch-Resort Co. et al., 31 N.M. 514, 247 P. 826; Jackling v. State Tax Comm., 40 N.M. 241, 58 P.(2d) 1167; Board of County Com'rs v. Atchison, Topeka & Santa Fe Ry. Co., 40 N.M. 6, 52 P.(2d) 126; Los Alamos Ranch School v. State, 35 N. M. 122, 290 P. 1019.

The pleading filed by appellant entitled "Protest and Motion to Set Aside Sale" recites that appellants as owners of "Moieties and as taxpayers of the County of Socorro, intervene and protest and object to the sale," etc. of the land in question, upon a number of grounds set out in the motion; the principal one being that the sale was void for the reason that the district court was without jurisdiction to order the sale, in that section 141-452, St.1929, supra, was repealed in 1927. The prayer is "for all of which reasons these interveners and protestants pray the court that the sale under consideration be rejected and avoided."

The parties and the court treated this document as a motion filed by interveners; and a formal order overruling it was entered. But treated as a plea to the jurisdiction of the court, which in effect it was, still the appeal is from the judgment confirming the sale. The recent act of the Legislature authorizing appeals from judgments of the district court in special statutory proceedings does not apply here for constitutional reasons. Section 34 of article 4, N.M.Const.

The parties suggest that it is to the public interest that we pass upon the juris-

dictional question raised, a fact that we fully appreciate; but any decision of the question in this proceeding would be without authority. The question can be decided by us only upon an appeal from a judgment entered in a cause or proceeding in which the law provides an appeal may be prosecuted. State v. Chacon, 19 N.M. 456, 145 P. 125; In re Morrow's Will, 41 N.M. 117, 64 P.(2d) 1300.

This court, being without jurisdiction to hear the appeal, the motion to dismiss is sustained.

It is so ordered.

HUDSPETH, C. J., and SADLER and ZINN, JJ., concur.

BICKLEY, J., did not participate.

68 P.(2d) 162

STATE v. ROY et al.

No. 4171.

Supreme Court of New Mexico.

May 10, 1937.

Francis C. Wilson and John T. Watson, both of Santa Fé, for appellants.

Frank H. Patton, Atty. Gen., and Quincy D. Adams, Asst. Atty. Gen., for the State.

BRICE, Justice.

This is an action by the State against the appellants (defendants below) Roy and American Surety Company of New York, surety on his official bond as collector of delinquent taxes; to recover a sum of money claimed to be due the State of New Mexico. The appellant American Surety Company (hereafter styled surety company) demurred to plaintiff's complaint, which was overruled by the court. The surety company stood upon its demurrer and judgment was entered for the plaintiff. The question is whether the allegations of fact in the complaint state a cause of action. They are in substance as follows:

The defendant Roy was appointed delinquent tax collector for the county of Harding in 1927 and thereafter duly qualified. The defendant surety company was surety on his official bond, which is in form as required by section 141-446, N.M. Comp.St.1929, in the penal sum of $3,000.

In the year of 1928 the county treasurer of Harding county collected prior to delinquency and during the year of 1928,

approximately $3,500 from the tax payers for 1927 taxes; and erroneously remitted such sum to the State Tax Commission of the State of New Mexico. The defendant Roy, by virtue of and under color of his office as delinquent tax collector, claimed, and by mistake was paid by the State Tax Commission, the sum of $1,755.54 as his fee for the collection of said taxes. Learning of the mistake, the State Tax Commission returned to the treasurer of Harding county the $3,500 and thereafter demanded and received from said treasurer the sum of $1,755.54 to reimburse the State Tax Commission for the money it had paid to the defendant Roy. The treasurer of Harding county was directed by the State Tax Commission to collect from defendant Roy the $1,755.54, which it had erroneously paid him. Fees owed to the defendant Roy for delinquent tax collections, to the extent of $616.64, were withheld by the State Tax Commission and applied as part payment of the $1,755.54, leaving a balance unpaid of $1,038.89; which defendant Roy improperly retained and never accounted for to the State or the county of Harding, nor has such amount ever been paid by either of the defendants, or at all. By reason of the execution and delivery of said public official bond and of the breach of its condition, the State of New Mexico has been damaged in the sum of $1038.89, and interest.

The office of delinquent tax collector occupied by the defendant Roy was created by chapter 127 of N.M. Session L. 1927, which was in effect an amendment of previous tax laws. The statutes material to a decision of this case are as follows:

"For the purpose of carrying out the powers and duties conferred by this act on the state tax commission in the matter of collection of delinquent taxes the commission is hereby authorized and empowered to employ or use for each county of the state an officer to be known as 'delinquent tax collector.'" Section 141-443, Comp.St.1929.

"The Compensation to be paid Delin quent Tax Collectors shall be as follows:

"(a) For all delinquent taxes collected for the year 1926 and thereafter 3/5 of the 10% covered into the State Tax Commission Fund, as provided in Section 416 hereof.

"(b) For all taxes collected by said Delinquent Tax Collector, for the years 1925 and prior thereto, such proportion of the 10% as provided by Section 489 hereof as may be agreed upon by contract between the Commission and such Delinquent Tax Collector." Section 487 Sess.L.1927, c. 127; since amended (section 3, chapter 6 N.M.Sess.L.1929, Sp.Sess.)

"Every delinquent tax collector * * * shall take and subscribe to an oath of office and give a surety company bond in such sum as the commission shall prescribe for the faithful performance of his duties, which oath and bond shall be filed in the office of the commission." Section 141-446, N.M.Comp.St.1929.

"Thirty days after this act becomes effective 10% of all delinquent taxes for the years 1925 and prior thereto, when collected, shall be by the county treasurer paid to the state treasurer of the state of New Mexico and by such treasurer of the state covered into the state tax commission fund to be used by the state tax commission as provided by law." Section 141-447, N.M.Comp.St.1929.

"Delinquent taxes shall be paid to the county treasurer, and no such taxes shall be satisfied or discharged except by the receipt of the county treasurer, or by decree of court, or as otherwise provided by law." Section 141-453, N.M.Comp.St.1929.

"All moneys collected and not distributed or that may be collected by the treasurers of the several counties by suit or otherwise on account of delinquent taxes, shall be distributed as follows:

"That portion of such taxes levied for state purposes shall be paid to the state treasurer and covered into the state general fund; all of the remainder shall be covered into the respective funds entitled thereto as of the date of the levy thereof, if such fund or funds be in existence, otherwise into the general county fund, excepting where such delinquent taxes be subject to payment of a judgment rendered by a court of competent jurisdiction." Section 141-436, N.M.Comp.St.1929.

It is quite plain from these statutes that there was no authority for the county treasurer of Harding county to remit any portion of the taxes (delinquent or not) to the State Tax Commission Fund, except that provided for by section 141-447, N.M.Comp.St.1929, supra. Therefore the State Tax Commission correctly returned the amount to the treasurer of Harding county. This collection was made of 1927 current taxes and not delinquent taxes; so no part should have been remitted to the credit of the State Tax Commission Fund.

It is agreed by the parties that the defendant Roy had no commission due him out of this collection. The State Tax Commission erroneously remitted to Roy the $1,755.54, and the county treasurer erroneously remitted to the credit of the State Tax Commission Fund an equal amount upon its demand. The payment of this money to Roy was an error of the State Tax Commission, not of the county treasurer, and it should not have been reimbursed from the treasury of Harding county. It is now indebted to the treasurer for $1,039.89 balance due, and the defendant Roy is indebted to the State Tax Commission in an equal amount. Appellant is in error in stating that it was the duty of the county treasurer to remit delinquent taxes to the State Treasurer for the account of the State Tax Commission Fund; but only 10 per cent. thereof, as provided for in section 141-447, N.M.Comp.St.1929. It follows that this action was correctly brought by the State of New Mexico against the defendant Roy and surety on his official bond. The county of Harding has no claim against Roy or his surety.

The claim that the action was barred by limitation is based upon section 83-105 N.M.Comp.St.1929, which is as follows: "Those against sureties on official bonds and on bonds of guardians, executors, administrators and persons acting in a fiduciary capacity, within two years after the liability of the principal or the person for whom they are sureties, shall have been finally established or determined by a judgment or decree of the court and those brought against any county or state officer for or on account of any liability incurred in the doing of any act in an official capacity or by the omission of any official duty and for an injury to the person or reputation of any person, within three years."

This statute as originally passed was section 5 of chapter 5, N.M.Session Laws 1880, and was as follows: "Those against sureties upon official bonds and those brought against Sheriffs and other public officers for or on account of any liability incurred by the doing of any act in an official capacity, or by the omission of any official duty, and for the injuries to the person or reputation, within two years."

This was a section of a general limitation act; section 19 of which now appears as section 83-116, N.M.Comp.St.1929, and is as follows: "The above limitations and provisions shall not apply to evidences of debt intended to circulate as money; but shall, in other respects, be applicable in all other actions brought by or against all bodies corporate or politic, except when otherwise expressly declared."

The Attorney General's contention is that this statute does not apply to the State because the State is not expressly mentioned in the statute.

It is generally held that statutes of limitation do not apply to actions in behalf of the State, unless it is specifically so provided in the statute; or as otherwise stated, unless expressly provided in the statute, or unless the statute does so provide by the clearest implication. The authorities are numerous, but the following sufficiently state our views:

"Except the statute otherwise expressly provides, it cannot be set up as a bar to any right or claim of the State, thus, it does not apply to actions in favor of the State against sureties upon bonds given for the faithful discharge of the duties of public officers, or other official bonds; nor to actions to recover debts due to the State, or to recover lands belonging to it; nor, indeed, to any class of claims in favor of the State, unless the statute expressly so provides. But this rule only applies to claims in which the State is the real party, and has no application in cases where, although a nominal party to the record, it has no real interest in the litigation, but its name is used to enforce a right which inures solely to the benefit of an individual or a corporation, municipal or otherwise. * * * As to the general and State government, the old common-law maxim nullum tempus oc-

currit regi applies with full power, unless, as previously stated, the statute otherwise expressly provides. But this rule only applies when the general government is the sole and real party in interest. * * * It makes no difference what the nature or character of the claim is, as the statute does not apply to any claim in its favor. * *" Wood on Limitations (4th Ed.) § 52, p. 157.

"As we have already shown, as a general rule, limitations do not run against the State, unless the statute expressly includes the State, or does so by the clearest implication." Wood on Limitations (4th Ed.) § 52-A, p. 166.

In State v. Board of County Com'rs, 33 N.M. 340, 267 P. 72, 73, we held that the Bateman Act, which provides that all county indebtedness is void in so far as it is not, and cannot be, paid from funds of the current year, did not apply to an indebtedness of the State. We, through Mr. Justice Watson, said: "There is no reason to suppose that indebtedness to the state was contemplated. On the same principle that statutes of limitation do not run against the state (Hagerman v. Territory, 11 N.M. 156, 66 P. 526; 27 C.J. 710 et seq.) we think that a statute declaring indebtedness void under certain circumstances should not affect indebtedness to the state, unless the state is expressly named in the statute as subject to its provisions."

The State is not expressly mentioned in the statute; and unless it is included by "the clearest implication," the statute does not apply to this suit; for it is one by the State to recover funds belonging solely to the State.

There is no necessary or clear implication that State claims are barred by this statute. Individuals and political subdivisions of the State may have claims against sureties on official bonds.

Appellant calls our attention to section 39-114, Comp.St.1929, which is as follows: "Any compromise, satisfaction or discharge of indebtedness prohibited by the preceding section of this article is hereby declared to be invalid, and shall not be held a bar to any suit for the collection thereof, and suit may be brought at any time within four years from the date of any such compromise, satisfaction or discharge to enforce the payment thereof, notwithstanding any existing law of limitation."

The preceding section referred to provides in substance that no indebtedness due to or claimed by "the state, any county, city, town, precinct or school district" should be compromised, satisfied, or discharged except upon payment in full of the amount due, or for which a judgment is rendered.

These statutes were passed in 1893, while the Act of 1880 was in force. The object was to exclude a special class of claims from the operation of general statutes of limitation, whether existing at the time this act was passed or subsequently enacted. It is not a necessary implication that there

existed at the time these statutes were enacted a statute of limitation applying to such claims.

We conclude that section 83-105, Comp. St.1929, has no application to actions by the State on claims in which it alone is interested.

There is a division among authorities as to whether sureties on official bonds are liable for claims of the character sued on. These differences depend generally upon whether there was a strict or liberal construction of the obligations of the sureties.

"The distinction is this: Acts done virtute officii are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done colore officii are where they are of such a nature that his office gives him no authority to do them." Feller v. Gates, 40 Or. 543, 67 P. 416, 417, 56 L.R.A. 630, 91 Am.St. Rep. 492.

If a surety is only liable for wrongful acts of its principal, done virtute officii only, following the view that official bonds are to be construed strictly in favor of the surety, then the case should be reversed; but if sureties are liable for wrongful acts done colore officii, and the claim sued on is one that comes within such classification and within the terms of the bond or statute fixing its terms, the case should be affirmed.

This court, in State v. Llewellyn et al, 23 N.M. 43, 167 P. 414, 424, in construing the bond of the secretary-treasurer of the New Mexico College of Agricultural & Mechanical Arts, stated: "The rule exempting sureties from liability, for acts colore officii, was doubtless adopted by many of the courts before the advent of surety companies, whose business it is, for a stipulated compensation, to guarantee the fidelity of officers and employees. The obligation of sureties was then ordinarily assumed without pecuniary compensation, and was not extended by implication or construction. Their liability was strictissimi juris. In this state no definite rule on the subject has been established by the courts, and we see no good reason for a departure from the apparent majority rule that the surety is liable for the acts of the principal colore officii. We believe the public interests will be more surely protected and safeguarded by the establishment of such rule here." Llewellyn, the secretary-treasurer of the college, had collected funds belonging to his principal and deposited them in a Las Cruces bank which failed. The State Treasurer was by statute made custodian of these funds, but they had been collected by Llewellyn without authority of law. A strict construction of the obligation of his surety would have released it, because the funds were not held by virtue of his office. But as the funds were held under color of his office, his surety was held liable for the loss, following the liberal rule of construction.

Roy obtained the money sued for by making a claim as delinquent tax collector for fees he was not entitled to receive. Except for the claim made as such official, such funds would not have been paid to him. The funds belonged to the State, and its delivery to him by the State Tax Commission did not change ownership and at this time the appellant's principal has funds belonging to the State, for which he has not accounted.

The case of Quaw v. Paff, 98 Wis. 586, 74 N.W. 369, 370, is quite similar. A taxpayer brought a suit in his own behalf, and in the behalf of all other taxpayers of the county, against a county treasurer, to declare a trust in funds wrongfully collected for services the treasurer claimed to have performed. The board of supervisors had allowed the treasurer pay for extra labors, on bills filed by him. The court, after holding his salary covered all remuneration authorized by law for his labors, stated: "All services performed, which are within the scope of his official duties, or which are voluntarily performed as such officer, by request or otherwise, are, in contemplation of law, covered by his official salary. [Authority.] Though he may by some means obtain possession of public funds as additional compensation, and by permission of the governing body of the corporation, the title of the money thus obtained does not thereby change from the public to him. He thereby places himself in the position of one holding money to which he has no right, and which, by every principle of legal and equitable duty as well, he is required to return to its rightful owner and possessor."

In Walling et al. v. Carlton, 109 Fla. 97, 147 So. 236, 239, it was said: "The record shows that the constable assumed to collect and did collect the sums of money mentioned in the foregoing findings under color of his office and it is immaterial whether he was in fact authorized to collect the money or not. The law appears to be well settled that for improper acts performed by an officer under color of his office the sureties upon his bond can be held liable and certainly the officer himself may be held liable. * * * In Hall v. Tierney [89 Minn. 407, 95 N.W. 219], it was held: 'The object of an official bond is to obtain indemnity against the misuse of an official position for wrong purposes; and that which is done under color of office, and which would obtain no credit except for its appearing to be a regular official act, is within the protection of the bond, and must be made good by those who signed it.'"

The condition of the bond in suit is as follows: "If the above bounden E. J. H. Roy shall from the 4th day of April, 1927, well and faithfully perform all his duties as such tax collector, during his term of office, and shall render a true account of his office and his doings therein as required by law, and shall carefully keep and preserve all books and papers and other property appertaining to his office and deliver the same to the proper authorities, then this obligation to be void."

It was a duty of Roy, as an official, to render true accounts for services. It was upon such accounts that he received his remuneration. He could not render a true account of his office and withhold moneys wrongfully paid him, and which belonged to the State.

The bond involved in Forest County v. Dawley et al., 149 Wis. 323, 136 N.W. 335, 336, was conditioned somewhat differently, but the facts are almost identical. In this case a county judge had rendered bills for more than he was entitled to receive and the suit was brought on his official bond to recover them. We copy from the opinion as follows:

"Appellant contends that the obligation of a surety is strictissimi juris, that nothing can be taken against him by construction, and that his liability cannot be extended beyond the very terms of the conditions of the bond. * * * Such indemnity bonds partake of the essential features of insurance contracts and should be construed most strongly against the party preparing and furnishing them. * * *

"But, even so construed, the liability of a surety upon an official bond must be held to be limited to acts done by the principal by virtue of his office or by reason of the fact that he held the office; that is, some breach of official duty must be shown in order to constitute a breach of the bond. * * * "Dawley was entitled to render bills against the county for extra services within the statute. Such authority was conferred upon him by virtue of his office. The bills rendered as shown by Exhibit B were for such alleged extra services. In presenting bills against the county it became his duty as county judge to render just and true bills, to render bills for services actually performed and for such services only for which he was entitled to compensation. This he did not do. The demurrer admitted that he was not entitled to compensation for the services claimed. In presenting such illegal claims and receiving money on them he breached his official duty. It was within his authority to present claims against the county for services rendered within the provisions of the statute, and they were presented by virtue of his office—certainly by reason of his holding the office. * * *

"Since the condition of the bond is that the principal 'shall faithfully discharge the duties of the office,' a breach thereof occurred when such duties were not faithfully discharged. The breach of official duty and the breach of the bond went hand in hand."

Also see: Imperial County v. Adams, 117 Cal.App. 220, 3 P.(2d) 953; Lewis v. State, 65 Miss. 468, 4 So. 429; City of Greenville v. Anderson, 58 Ohio St. 463, 51 N.E. 41; Campbell v. People, 154 Ill. 595, 39 N.E. 578; U. S. Fidelity & Guaranty Co. v. Gully, 168 Miss. 740, 150 So. 828; Jones v. Com'rs, 57 Ohio St. 189, 48 N.E. 882, 63 Am.St.Rep. 710.

Appellant cites certain cases, in which, under similar facts, courts have held that

sureties are not liable upon the official bonds of their principals. These courts have in every instance based their decisions upon the view that the surety is not liable for a wrongful act committed which is merely by color of the office; that such contracts are strictly construed in favor of the surety. We quote sufficient from a number of these cases to show the basis of the decision: "Upon this condition of the bond, the sureties have a right to stand, and are entitled *to a strict construction thereof.* The illegal allowances to said justice of the peace by said county commissioners, for which recovery is asked in this action, did not come into the hands of said justice of the peace by virtue of his office, and the sureties on said bond are not liable therefor." Board of Com'rs v. Vaughn, 51 Okl. 609, 152 P. 115.

We quote from State to Use of Brooks, v. Fidelity & Deposit Co., 147 Md. 194, 127 A. 758, 759, as follows: "The surety's obligation, therefore, is coextensive with the duties of the sheriff's office, but does not extend beyond this single limitation on the scope of the bondsman's contractual liability. In the ascertainment of whether the wrong complained of is within the stipulations of the bond, the Maryland rule, which was adopted after careful consideration of the opposite view and of the authorities supporting it, is that, if the act is done by virtue of the authority of the office, the surety is liable, but, if the thing committed is merely by color of his office, the surety is not responsible under the terms of the bond."

Also: "When he undertook that his principal should account for and pay over all moneys that should come to his hands as supervisor, the intendment is that such moneys as should, pursuant to law, be received by him in his official capacity, and in virtue of his office, were referred to, and not such as he might receive *by color of office, or because he was supervisor, but without right, and of* which some other official was the legal recipient and disbursing agent, having the right to receive them directly from the collector." San Luis Obispo County v. Farnum, 108 Cal. 562, 41 P. 445, 446.

The following cases are also cited by appellant, but those from which we have quoted are typical and in every instance the obligation is strictly construed in favor of the surety: City of San Jose v. Welch et al., 65 Cal. 358, 4 P. 207; Lowe v. City of Guthrie, 4 Okl. 287, 44 P. 198; City of Butte v. Bennetts et al., 51 Mont. 27, 149 P. 92, Ann.Cas.1918C, 1019; Maryland Casualty Co. v. Salmon, 45 Ga.App. 28, 163 S.E. 285; Hughes v. Board of County Com'rs, 50 Okl. 410, 150 P. 1029; McCrory v. Board of Commissioners, 48 Okl. 684, 150 P. 683; Stutsman v. State, 58 Okl. 113, 158 P. 1132; Shelton v. State, 62 Okl. 105, 162 P. 224.

Roy received the money, to recover which this action was brought, under color of his office; and his failure to account to the state therefor was a breach

of his official bond, for which appellant is liable.

The judgment of the district court is affirmed, and the cause remanded.

It is so ordered.

HUDSPETH, C. J., and ZINN, J., concur.

SADLER and BICKLEY, JJ., did not participate.

68 P.(2d) 168

CURRY et ux. v. JOURNAL PUB. CO. et al.

No. 4173.

Supreme Court of New Mexico.

May 3, 1937.

J. H. Paxton, of Las Cruces, for appellants.

Mechem & Hannett, of Albuquerque, for appellees.

BRICE, Justice.

This is an action on the case. The substance of the material facts alleged in the complaint are as follows:

The defendants (appellees here), in the year of 1932, published the Albuquerque Journal, a daily newspaper, circulating generally in New Mexico. On the 12th day of April, 1932, they published in that newspaper as a news item the following words:

"Hillsboro, N. M., April 11, (AP)—George Curry, 70, former territorial governor of New Mexico, Spanish-American war veteran and ex-congressman, died here Sunday afternoon."

The published statement was false. George Curry was not dead, but was alive and in good health at the time. The George Curry mentioned in said article was and is the father of the plaintiff, Clifford Curry, who read said published statement regarding his father, with the result that he suffered great pain and anguish, and which caused a nervous shock, resulting in a heart attack. His health is permanently impaired to the extent that he is unable to perform labor, all brought about by his reading the false published statement. The plaintiff Angelita Curry is the wife of plaintiff Clifford Curry. She also suffered a physical shock and prostration from reading the article, resulting in the permanent impairment of her health, by reason of which she cannot perform physical labor, is unable to bear children, and has suffered great pain and anguish. She was pregnant at the time she read such article, and the child, born the following June, was so permanently injured by reason of the shock to its mother that through life it will be sick, decrepit, timid, hysterical, and suffering. Specific items of expense incurred, such as physician's bills, loss of time, trips, etc., are set out. Total damages were claimed in the sum of $13,592.

The parties will be styled plaintiffs and defendants, as in the district court.

The defendants demurred separately to the complaint upon the ground that it stated no cause of action; and the demurrers were sustained by the court. Plaintiffs refusing to amend, the suit was dismissed, and appeal to this court allowed and perfected.

No objection was made to the complaint because of misjoinder of causes of actions; nor for failure to separately state causes of action; nor because the defendants were not specifically charged with negligence. The appellees content themselves with raising the vital questions that determine the case; two of which are decisive: (1) Are damages that result from words

negligently spoken or written, as distinguished from acts, actionable? and, if so, then, (2) Can damages be recovered from the publishers of a newspaper for the consequences of grief resulting in physical injury, occasioned by reading in such paper a negligently published false report of the death of the reader's parent?

We have found no precedent in the books for this suit, and only two cases that are similar. This is conceded by appellant, but he asserts that, though this be true, such absence of precedent is not conclusive that the right claimed does not exist. To this we readily agree (Pavesich v. New England Life Insurance Co., 122 Ga. 190, 50 S.E. 68, 69 L.R.A. 101, 106 Am. St.Rep. 104, 2 Ann.Cas. 561); but it suggests that the existence of such right is not probable, in view of the fact that thousands of similar negligent acts must have occurred in the business of publication of news in this country, and Great Britain and its dependencies, causing grief and worry; though the disastrous consequences here charged (and which we must accept as true) are not, in human experience, usual or probable.

We have stated there are two similar cases. We first make reference to Jaillet v. Cashman, 115 Misc. 383, 189 N.Y.S. 743, 744. The facts as stated in the opinion are as follows:

"The defendant is the treasurer of Dow, Jones & Co., an unincorporated association engaged in the business of supplying its subscribers with items of current news by what is known as a ticker service. On March 8, 1920, it incorrectly reported the effect of a decision of the United States Supreme Court on the taxable status of stock dividends as income. Plaintiff saw the report on a ticker in his broker's office, and, believing that prices were going down, he sold stocks instead of holding or buying. That was unprofitable because the market rose on receipt of a correct report of the decision, and the plaintiff figures out a loss that he claims is attributable to the incorrect report that he read."

From these facts, the court concluded:

"I think that the relation of the defendant association to the public is the same as that of a publisher of a newspaper, and that its duties and obligations are to be measured by the same standard. A mistake in the report of a fact by one or the other is different in its effect only as to the number of people who may be misled and the extent to which individuals may be misled a matter of degree only.

"There is moral obligation upon every one to say nothing that is not true, but the law does not attempt to impose liability for a violation of that duty unless it constitutes a breach of contract obligation or trust, or amounts to a deceit, libel, or slander. Theoretically a different rule might be logically adopted, but as a matter of practical expediency such a doctrine seems absolutely necessary. There is no privity between this plaintiff and the defendant. He is but one of a public to whom all news is liable to be disseminated. His action can

be sustained only in case there was a liability by the defendant to every member of the community who was misled by the incorrect report. There was no contract or fiduciary relationship between the parties and it is not claimed that the mistake in the report was intentional. The demurrer to the complaint is sustained, and judgment awarded dismissing the complaint, with $10 costs and costs of the action."

The case was affirmed by the Appellate Division (202 App.Div. 805, 194 N.Y.S. 947) without an opinion; and upon appeal to the Court of Appeals the judgment of the Appellate Division was affirmed by memorandum opinion (235 N.Y. 511, 139 N.E. 714) with the following statement:

"The plaintiff, a customer in a broker's office having ticker service, believing that this report would depress the value of securities, sold some of his own stock and sold 'short' other stock which he did not own; that as a matter of fact the Supreme Court had decided that stock dividends were not taxable, and the defendant corrected its false report 45 minutes after it had been issued; that before this correction the stock market had reacted, and the appellant suffered damages. The Special Term held that the relation of defendant to the public was the same as that of a publisher of a newspaper and that it was not liable to one with whom it had no contract or fiduciary relationship for an unintentional mistake in its report."

The New York courts evidently assumed that the legal principles supporting their conclusion that no such right existed, in the absence of a contract, fiduciary relationship, or intentional injury, were so well established that it was unnecessary to more than state the conclusion without giving reason or authority therefor. We might well follow this example; but appellant's exceptionally good presentation of their case, and apparent abiding faith that a cause of action had been stated, impels us to give our reasons for sustaining the judgment of the district court.

The other case referred to is Herrick v. Evening Express Publishing Co., 120 Me. 138, 113 A. 16, 17, 23 A.L.R. 358, the facts in which are quite similar to those in this case. The defendants in that case had published in their newspaper an account of the death of a boy then serving in the American Expeditionary Forces overseas, and in connection therewith a picture of another boy of the same name, who likewise was in the Army overseas. The mother of the boy whose picture was published saw it and read the article, from the shock of which she became seriously ill; and the suit for damages followed. In determining the case the court said:

"The question is therefore presented whether under such circumstances the plaintiff has any cause of action for her mental pain and anguish caused by the shock of the supposed death of her son and her sickness resulting therefrom. We think not.

"In case of injury to a child, the father may maintain an action based upon a loss of services, but generally a parent cannot recover damages for injury to parental

feelings. Wyman v. Leavitt, 71 Me. 227, 231, 36 Am.Rep. 303, note 306. There are exceptions to this rule, as in cases of seduction or forcible abduction, which are based upon loss of services, but also involve the element of intentional, wanton, and willful wrong."

The case, however, was decided mainly upon the proposition that, there being no physical injury from without, damages by reason of sickness from mental shock were outside the principle of compensation, following the rule in the leading case of Spade v. Lynn & B. R. Co., 168 Mass. 285, 47 N.E. 88, 38 L.R.A. 512, 60 Am.St.Rep. 393. We do not find it necessary to decide this question, though the rule that such damages are recoverable is supported by high authority. Cooley on Torts (4th Ed.) § 48; Restatement of the Law of Torts, § 313. See annotations in 11 A.L.R. 1119, 40 A.L.R. 983, and 76 A.L.R. 681, where the cases pro and con are collected.

The only two cases where similar facts have been before any court, so far as our search has disclosed, have been decided against the contentions of appellant.

It has been the general holding of the English courts that there is no such thing as liability for negligence by word as distinguished from act. These courts hold that a person is liable for a spoken or printed false statement not amounting to libel, only in case he willfully originates or circulates it, knowing it to be false and which is calculated to and does, as the proximate cause, injure another to his damage.

In Wilkinson v. Downton, 2 Q. B. 57, it was held that a defendant who, intending a practical joke, falsely reported to a woman that her husband had met with a serious accident whereby both his legs were broken, with the intent that she should believe such a statement and which she did believe to be true and from which she suffered a nervous shock that made her ill, was liable to her in damages.

The English cases are reviewed in Bielitski v. Obadiak, 15 Sask.Law Rep. 156, 65 D. L.R. 627, 23 A.L.R. 351, in which the question was whether one who originates and circulates a false report that a member of the community had hanged himself, which report was told to the mother of the supposed suicide, and who, believing the report to be true, suffered violent shock from the effects of which she became ill, is liable in damages for such injury.

The majority of the court held the defendant was liable, in damages, upon the theory that the injury was the proximate result of the willful false report originated and circulated by him with the intent that it should be communicated to her. One of the judges dissented because the report came to her indirectly, and (as he held) the act of the defendant could not have been the direct and proximate cause of the injury; but he stated: "If the illness of the plaintiff had been the result of nervous shock or sudden distress caused by a false statement made willfully to her by the defendant, he would have been answerable in damages for the consequences of his statement."

The Court of Appeals of New York, in International Products Company v. Erie Railroad Company, 244 N.Y. 331, 155 N.E. 662, 663, 56 A.L.R. 1377, on this subject, states:

"We come to the vexed question of liability for negligent language. In England the rule is fixed. 'Generally speaking, there is no such thing as liability for negligence in word as distinguished from act.' Pollock on Torts (12th Ed.) p. 565; Fish v. Kelly, 17 C.B.(N.S.) 194. Dicta to the contrary may be found in earlier cases. Burrowes v. Lock, 10 Ves. 471; Slim v. Croucher, 1 De Gex, F. & J. 518, discussed in Brownlie v. Campbell, L.R. 5 App.Cas. 925, 935. But since Derry v. Peek, L.R. 14 App.Cas. 337, although what was said was not necessary to the decision, the law is clearly to the effect 'that no cause of action is maintainable for a mere statement, although untrue, and although acted upon to the damage of the person to whom the statement is made, unless the statement be false to the knowledge of the person making it' (Dickson v. Reuter's Telegraph Co., Limited, L.R.(1877) 3 Com.Pl. 1), or, as said elsewhere, 'we have to take it as settled that there is no general duty to use any care whatever in making statements in the way of business or otherwise, on which other persons are likely to act' (9 Law Quarterly Review, 292). And the same principle has been applied in equity (Low v. Bouverie, L.R.(1891) 3 Ch. 82) although it had been supposed that here, at least, there was often a remedy for negligent misrepresentation."

But the right to recover damages occasioned by false words negligently spoken or written has been upheld under some circumstances by American courts and approved by high authority.

"The question has sometimes been presented to the courts, whether aside from any question of fraud or of breach of a contractual obligation, an action may be successfully brought based upon negligence in the making of representations of fact. In England, the rule has been established that 'generally speaking, there is no such thing as liability for negligence in word as distinguished from act.' In a few recent cases in this country, however, the courts have tended towards, and finally adopted, the more logical position that circumstances which impose an obligation on the part of one to another to use care in his acts, would impose the same obligation of care in the making of statements of fact upon which such other might rely." 3 Cooley on Torts (4th Ed.) § 497.

"If the actor unintentionally causes emotional distress to another, he is liable to the other for illness or bodily harm of which the distress is a legal cause if the actor

"(a). should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and

"(b). from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily

harm." Restatement of the Law of Torts, § 313.

Also see 45 C.J., Title, Negligence, § 125.

A leading case on the subject in America is International Products Company v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662, 663, 56 A.L.R. 1377. The facts were that the defendant had contracted with the plaintiff to store an ocean shipment on arrival at the defendant's docks. The plaintiff asked the defendant the location of such shipment for the purpose of taking out fire insurance thereon. A wrong description was given as to the dock in which the property was stored, and the policy of insurance written, as though stored therein. The property was destroyed by fire in another warehouse. It was held, in a suit to recover the amount of insurance plaintiff would have been entitled to had defendant given it the correct description so that the policy would have been valid, that the defendant was liable for the amount of such insurance because of its negligence.

The court then stated the rule in England, which we have quoted, and further with reference to the liability of one who has given false information upon which another has acted to his injury, as follows:

"The denial, under all circumstances, of relief because of the negligently spoken or written word, is, it is said, a refusal to enforce what conscience, fair dealing, and the usages of business require. The tendency of the American courts has been towards a more liberal conclusion. * * *

"In New York we are already committed to the American as distinguished from the English rule. In some cases a negligent statement may be the basis for a recovery of damages. * * *

"Liability in such cases arises only where there is a duty, if one speaks at all, to give the correct information. And that involves many considerations. There must be knowledge, or its equivalent, that the information is desired for a serious purpose; that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care. Jaillet v. Cashman, 235 N.Y. 511, 139 N.E. 714. An inquiry made of a stranger is one thing; of a person with whom the inquirer has entered, or is about to enter, into a contract concerning the goods which are, or are to be, its subject, is another. Even here the inquiry must be made as the basis of independent action. We do not touch the doctrine of caveat emptor. But in a proper case we hold that words negligently spoken may justify the recovery of the proximate damages caused by faith in their accuracy.

"When such a relationship as we have referred to exists may not be precisely defined. All that may be stated is the general rule. In view of the complexity of modern

business, each case must be decided on the peculiar facts presented."

This rule has been applied to trustees who, through negligence, falsely certified the amount of security supporting corporate bonds, Doyle v. Chatham, etc., Bank, 253 N.Y. 369, 171 N.E. 574, 71 A.L.R. 1405; to a carrier or other bailee who gave false information to a customer as to the time, or place of arrival, or storage of goods, annotation, 56 A.L.R. 1382; to a public weigher who, knowing that a buyer would rely on his certificate of weights in making payment for goods, falsely certified such weights, Glanzer v. Shepard, 233 N. Y. 236, 135 N.E. 275, 23 A.L.R. 1425, and note; to a contractor blasting an obstruction off a railroad track, who assured an employee of the railroad company that there was no danger from blasts he was exploding, and who was injured by acting on such assurance, Valz v. Goodykoontz, 112 Va. 853, 72 S.E. 730; to a searcher of records of title, employed by a landowner, who delivered his abstract to a purchaser, who, on the faith of it, purchased the property, where there was privity between the abstractor and purchaser, Dickle v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 896, 24 Am.St.Rep. 616; to a physician who assured a wife that she might safely treat an infected wound of her husband when such treatment resulted in damages, Edwards v. Lamb, 69 N.H. 599, 45 A. 480, 50 L.R.A. 160; Harriott v. Plimpton, 166 Mass. 585, 44 N.E. 992; to a telegraph company which falsely stated that a telegram had been delivered, Laudie v. Western Union Co., 126 N.C. 431, 35 S.E. 810, 78 Am.St.Rep. 668.

The rule is thus stated in Courteen Seed Co. v. Hong Kong, etc., Corporation, 245 N.Y. 377, 157 N.E. 272, 273, 56 A.L.R. 1186: "The court has had to deal recently with cases involving liability for information negligently given. They all rest on the principle that negligent words are not actionable unless they are uttered directly, with knowledge or notice that they will be acted on, to one to whom the speaker is bound by some relation of duty, arising out of public calling, contract or otherwise, to act with care if he acts at all." Also see 45 C.J., Title, "Negligence," § 125, p. 732.

No attempt has been made by any American court (International Products Co. v. Erie R. Co., supra), nor will be by us, to state rules which will apply generally to all conditions or circumstances, which will authorize a recovery for damages resulting from false words negligently written or spoken, and in the absence of contract, malice, intentional injury, or other like circumstance. We hold that in some such cases recovery may be had, but we will confine our decision to the facts of this particular case.

Generally, though not without dissent (Hambrook v. Stokes Bros., [1925] L. K.B.[Eng.] 141; Bowman v. Williams, 164 Md. 397, 165 A. 182), recovery for the physical consequences of fright at another's peril, caused by the negligence of a third person, has been denied; not only by the courts which hold that a physical impact is necessary to such recovery, but by

those courts which hold that it is not. The Wisconsin courts hold to the doctrine that recovery may in a proper case be had solely for the physical consequences of fright, without physical injury from impact, Pankopf v. Hinckley, 141 Wis. 146, 123 N.W. 625, 24 L.R.A.(N.S.) 1159; but also hold that recovery cannot be had for the consequences of physical shock caused by fright at the peril of another, resulting from the negligence of a third person, Waube v. Warrington, 216 Wis. 603, 258 N.W. 497, 98 A.L.R. 394. The authorities generally are reviewed, and the court concludes that one who sustains the shock of witnessing the negligent killing of her child cannot recover for physical injuries caused by such fright or shock. The action was by the husband to recover because of his wife's death from the shock; but the case depended upon whether she could have recovered for the injury had she lived. The Wisconsin court stated:

"The problem must be approached at the outset from the viewpoint of the duty of defendant and the right of plaintiff, and not from the viewpoint of proximate cause. The right of the mother to recover must be based, first, upon the establishment of a duty on the part of defendant so to conduct herself with respect to the child as not to subject the mother to an unreasonable risk of shock or fright, and, second, upon the recognition of a legally protected right or interest on the part of the mother to be free from shock or fright occasioned by the peril of her child. It is not enough to find a breach of duty to the child, follow the consequences of such breach as far as the law of proximate cause will permit them to go, and then sustain a recovery for the mother if a physical injury to her by reason of shock or fright is held not too remote."

The court then quotes from the opinion of Judge Cardozo in Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99, 59 A.L.R. 1253, as follows: "'Negligence is not actionable unless it involves the invasion of a legally protected interest, the violation of a right. * * * The plaintiff sues in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another. * * * The passenger far away, if the victim of a wrong at all, has a cause of action, not derivative, but original and primary. His claim to be protected against invasion of his bodily security is neither greater nor less because the act resulting in the invasion is a wrong to another far removed.'"

The Wisconsin court summed up as follows: "In jurisdictions following the liberal rule it has been held consistently, with but two exceptions, hereafter to be noted, that in order to give rise to a right of action grounded on negligent conduct, the emotional distress or shock must be occasioned by fear of personal injury to the person sustaining the shock, and not fear of injury to his property or to the person of another"; and finally quoted from Judge Cardozo's opinion in the Palsgraf Case, supra, as follows: "'Negligence is not a tort unless it results in the commission

of a wrong, and the commission of a wrong imports the violation of a right, in this case, we are told, the right to be protected against interference with one's bodily security. But bodily security is protected, not against all forms of interference or aggression, but only against some. One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended. Affront to personality is still the keynote of the wrong.' "

The same rule should apply to this case. The wrong, if any, was done to Governor Curry, not his relations or friends. That emotional distress may follow from acts of negligence it is quite apparent; but no more than to a mother who witnesses the negligent killing of her child, in which case the consequential damages cannot be recovered. Waube v. Warrington et al., supra. Not every negligent act that results in damage to some one is actionable. Palsgraf v. Long Island R. Co., supra. There must be a duty owing to the injured by the person whose negligent act inflicts the injury, and such duty does not extend to the protection of third persons not directly involved except under special circumstances not appearing in the facts alleged by plaintiffs. Cooley on Torts (4th Ed.) § 478. Restatement of the Law of Torts, §§ 313, supra, and 436.

Another consideration would preclude a recovery in this case. We must assume that plaintiffs were free of the physical infirmities alleged to have resulted from shock and grief on reading the account of Governor Curry's death. In this world of disease and death the families of aged persons, while never entirely prepared, yet may not be greatly surprised to hear of their death at any time; and such serious consequences to the plaintiffs, and particularly to Mrs. Curry (a daughter-in-law of Governor Curry), are so unusual and unlikely to happen under any circumstances, and certainly not to persons in good health (and nothing appears to the contrary), that it cannot be said there was an appreciable chance of such results; and defendants, as reasonable men, could not have realized that there was an appreciable risk to the health of plaintiffs from reading the article, though they had known of plaintiffs' existence, which does not appear.

"If the actor intentionally and unreasonably subjects another to emotional distress which he should recognize as likely to result in illness or other bodily harm, he is subject to liability to the other for an illness or other bodily harm of which the distress is a legal cause,

"(a) although the actor has no intention of inflicting such harm, and

"(b) irrespective of whether the act is directed against the other or a third person.

The following are comments on this text:

"(e) On the other hand, an act, which is merely negligent as threatening an immediate harm to a third person, is not negligent to another solely because of the possibility that the peril or harm of such a person may indirectly cause fear, grief or similar emotional disturbance to others because of their interest in and affection for the third person and the possibility that they may be in such a physical condition that the emotional disturbance may be physically harmful. This is so irrespective of whether the other witnessed the third person's peril or harm or is informed of it immediately thereafter or at some subsequent period, and irrespective of whether they are or are not members of the same immediate family."

"Illustration:

"3. A negligently inflicts harm upon B so severe as to threaten his death. C, a bystander, who knows B, calls B's wife, D, on the telephone and tells her of the injuries which her husband has sustained. The resulting shock causes D to miscarry. A is not liable for D's miscarriage." Restatement of the Law of Torts, § 312 and comments.

In line with Waube v. Warrington, supra, see: Feneff v. New York Cent., etc., R. Co., 203 Mass. 278, 89 N.E. 436, 24 L. R.A.(N.S.) 1024, 133 Am.St.Rep. 291; Michigan Sanitarium, etc., Ass'n v. Neal, 194 N.C. 401, 139 S.E. 841; Chrone v. Gonzales (Tex.Civ.App.) 215 S.W. 368; Sherwood v. Ticheli, 9 La.App. 507, 120 So. 109; Kalleg v. Fassio et al., 125 Cal.App. 96, 13 P.(2d) 763; Nuckles v. Tennessee Elec. Power Co., 155 Tenn. 611, 299 S.W. 775; Malone v. Monongahela, etc., Co., 104 W. Va. 417, 140 S.E. 340; Raymond & Whitcomb Co. v. Ebsary (C.C.A.) 9 F.(2d) 889.

There can be no difference in legal effect between the negligence which occasions a false writing and that of false spoken words. If one is actionable, then under the same state of facts the other will be.

Much has been said in the briefs regarding the freedom of the press. The First Amendment to the Constitution of the United States provides that Congress shall make no law abridging the freedom of speech or of the press; the effect of which was to prevent Congress from interfering with such rights as they existed at the time of the adoption of this amendment. Similar provisions are a part of the constitution of each of the forty-eight states. See section 17 of article 2 of the New Mexico Constitution.

"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for so doing, except so far as such publications, from their blasphemy, obscenity, or scandalous character, may be a public offense, or as by their falsehood and malice they may injuriously affect the standing, reputation, or pecuniary interests of individuals. Or, to state the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal

censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were in force when the constitutional guaranties were established, and in reference to which they have been adopted." Cooley on Constitutional Limitations (8th Ed.) p. 886.

A publisher of a newspaper has the same rights, no more or less, than individuals, to speak, write, or publish his views and sentiments, and is subject to the same restrictions. State ex. inf. Crow v. Shepherd, 177 Mo. 205, 208, 76 S.W. 79, 99 Am. St.Rep. 624. Appellees cite the case of Layne v. Tribune Co., 108 Fla. 177, 146 So. 234, 86 A.L.R. 466, to the effect that newspapers are not subject to the same strict duty with respect to press dispatches which they reproduce from gatherers of news as of that which the publisher holds himself or his agent out as the author and composer. This is thought to be against the weight of authority. Hotchkiss v. Oliphant, 2 Hill (N.Y.) 510. See annotation to Layne v. Tribune Co., 86 A.L.R. 475.

"The newspaper is also one of the chief means for the education of the people. The highest and the lowest in the scale of intelligence resort to its columns for information; it is read by those who read nothing else, and the best minds of the age make it the medium of communication with each other on the highest and most abstruse subjects. Upon politics it may be said to be the chief educator of the people; its influence is potent in every legislative body; it gives tone and direction to public sentiment on each important subject as it arises; and no administration in any free country ventures to overlook or disregard an element so pervading in its influence, and withal so powerful.

"And yet it may be doubted if the newspaper, as such, has ever influenced at all the current of the common law, in any particular important to the protection of the publishers. The railway has become the successor of the king's highway, and the plastic rules of the common law have accommodated themselves to the new condition of things; but the changes accomplished by the public press seem to have passed unnoticed in the law, and, save only where modifications have been made by constitution or statute, the publisher of the daily paper occupies to-day the position in the courts that the village gossip and retailer of scandal occupied two hundred years ago, with no more privilege and no more protection. * * *

"But a very large proportion of what the newspapers spread before the public relates to matters of public concern, in which, nevertheless, individuals figure, and must therefore be mentioned in any account or discussion. To a great extent, also, the information comes from abroad; the publisher can have no knowledge concerning it, and no inquiries which he could make would be likely to give him more definite information, unless he delays the publication until it ceases to be of value to his readers. Whatever view the law

may take, the public sentiment does not brand the publisher of a newspaper as libeler, conspirator, or villain, because the telegraph dispatches transmitted to him from all parts of the world, without any knowledge on his part concerning the facts, are published in his paper, in reliance upon the prudence, care, and honesty of those who have charge of the lines of communication, and whose interest it is to be vigilant and truthful. The public demand and expect accounts of every important meeting, of every important trial, and of all the events which have a bearing upon trade and business, or upon political affairs. It is impossible that these shall be given in all cases without matters being mentioned derogatory to individuals; and if the question were a new one in the law, it might be worthy of inquiry whether some line of distinction could not be drawn which would protect the publisher when giving in good faith such items of news as would be proper, if true, to spread before the public, and which he gives in the regular course of his employment, in pursuance of a public demand, and without any negligence, as they come to him from the usual and legitimate sources, which he has reason to rely upon; at the same time leaving him liable when he makes his columns the vehicle of private gossip, detraction, and malice." Cooley on Constitutional Limitations (8th Ed.) c. XII.

The common law (and as we have seen, the English law of today) does not recognize, as actionable, injuries resulting from negligently spoken or written words. To what extent, if any, the liberty of the press and speech as we understand it, is involved, we need not decide. An American doctrine has grown up in recent years holding that in certain instances such negligence is actionable, but this case does not come within any rule or decision on the question.

We hold that damages cannot be recovered from the publishers of a newspaper for the consequences of grief resulting in physical injury, occasioned by reading in such paper a negligently published false report of the death of the reader's parent.

The judgment of the district court is affirmed and the cause remanded.

It is so ordered.

HUDSPETH, C. J., and SADLER and ZINN, JJ., concur.

BICKLEY, J., did not participate.

68 P.(2d) 663

MILLER v. PRINCE STREET ELEVATOR CO.

No. 4163.

Supreme Court of New Mexico.
May 17, 1937.

[redacted]

[redacted]

[redacted]

Hatch, Grantham & Manson, of Clovis, for appellant.

James A. Hall, of Clovis, for appellee.

ZINN, Justice.

Appellee sued appellant for the conversion of appellee's wheat stored in the grain elevator of appellant. The case was tried to the court without jury, and from a judgment for appellee, this appeal is prosecuted.

Appellant, a domestic corporation, was engaged in the grain and elevator business in Curry county. It bought and sold wheat and accepted wheat for storage. Appellee delivered approximately five thousand bushels of wheat to the elevator of appellant under the following conditions: The wheat was accepted by appellant for storage to be held until September 1, 1931, free of storage rental. The last load was delivered on or about August 17, 1931. Rental to be paid subsequent to September 1, 1931, was on the basis of 1½ cents per bushel. Appellant was making advances to his customers in the amount of 15 cents per bushel. Appellee, after selling some of his wheat, had in storage with appellant on August 19, 1931, 3,489 bushels and 10 pounds of wheat. On this amount appellant advanced to appellee 15 cents per bushel, or the sum of $523.50. Such advance was to be deducted from the final sale price of the wheat in storage. The wheat of appellee was mixed with other wheat of like grade in appellant's elevator, it being the duty of appellant to restore

to appellee wheat of like kind and amount upon demand.

It appears that the elevator of appellant changed ownership, and on October 17, 1931, without notice to appellee, appellant sold appellee's wheat for the price of 28 cents per bushel, the then prevailing market price. Appellant made deductions for the amount previously advanced together with storage charges and drew a check payable to appellee for the difference. To the check appellant's manager attached a "Settlement Sheet," accounting to appellee, and to which was attached a note signed by Helm, manager of appellant company. This note reads as follows:

"Mr. Miller

"As you possibly know the Elevator changed hands and I have Positive instruction to Close up all acct. The Elevator changed hands Oct. 5th, but last I talked with you you wanted to hold to the 15th so I was in to see this morning & could not find you—basis today's market find statement & check.

"G. W. Helm."

The check, settlement sheet, and note were delivered to a brother-in-law of appellee. Shortly thereafter these items came into the possession of appellee, and on October 24, 1931, appellee went to appellant's elevator and protested vigorously the entire transaction and told Helm it was appellee's intention not to sell the wheat but hold for a higher price. Appellee tendered the check to Helm. Helm offered to buy an equal amount of wheat on the "futures" market. This appellee refused. Appellee was informed by Helm that the transaction would have to stand as made. Appellee then took the check and on the same day cashed it. The prevailing market price for wheat at that time had reached the figure of 33 cents per bushel. On January 7, 1932, two and one-half months after the cashing of the check, appellee brought this action.

The one issue presented by appellant, which we deem determinative of the case, is the appellant's claim of an accord and satisfaction. In detail the conversation that took place between appellee and Helm on October 24, 1931 and upon which the claim is based, follows. This is taken from the evidence of the appellee. His testimony is as follows:

"Q. All right, what was the conversation? A. Well, I asked him what he meant by mailing the check when I put the wheat in there for storage. He said he had lost the elevator and had to give possession of it. I said that was not my understanding when I put the wheat in there. He said the wheat was sold and that is all he could pay for it. I offered him the check; I was not ready to sell the wheat.

"Q. You never agreed to sell the wheat then? A. No, sir.

"Q. Mr. Miller, after receiving this check and when you went down to talk this over with Mr. Helm, the Manager, I wish you would relate, as near as you can, the substance of that conversation.

I don't expect you to say, word for word? A. That is, after I received the check?

"Q. Yes, Sir? A. Well, I went down there and asked him why he had sold the wheat; and he said he had to sell the wheat to give possession of the elevator, and I told him, I say, 'I want the wheat, I can't accept your check. If you have got to give possession of your elevator I want my wheat, and I will get a truck and move it out of the elevator.' And he says, 'your wheat is in Chicago, so far as I know, we don't have it here at the elevator.'

"Q. Was anything further said in that conversation? A. Well, I got kind of smart myself, I got pretty tough about it, but it didn't do me any good. All I demanded was the wheat and I could not ever get it, unless I taken a gun on down there. I might have got it then.

"Q. Did you ever tender that check back to Mr. Helm? A. Yes, Sir.

"Q. Down there at that time? A. Yes, Sir.

"Q. You tried to get him to take it back? A. Yes, Sir, taken it in and throwed it on the desk to him."

The appellee having cashed the check tendered him by appellant, this the appellant contends is an accord and satisfaction. The court ruled in favor of appellee on all issues and made findings accordingly.

After making adjustments for storage charges and money received by appellee from appellant, the court awarded appellee judgment for the difference, in the sum of $659.10, plus interest and costs.

To be effective, an accord and satisfaction must involve an unliquidated or disputed claim, as an existing dispute is one of the elements necessary to make such an agreement and its performance binding upon either party. The law has been clearly enunciated by Justice Bratton, in the case of Frazier v. Ray, 29 N.M. 121, 219 P. 492, 493, where, speaking for this court, he said:

"An accord and satisfaction is a method of discharging a contract, or settling a cause of action arising either from a contract or a tort, by substituting for such contract or cause of action an agreement for the satisfaction thereof and the execution of such substituted agreement. It is an agreement and the performance thereof, whereby one of the parties undertakes to perform and the other to accept in satisfaction of a claim or demand something other and different from that to which each considers himself entitled. To be effective, it must involve an unliquidated or disputed claim, as an existing dispute is one of the elements necessary to make such an agreement and its performance binding upon either party. Where no dispute exists with regard to the sum due, no consideration exists to support the agreement of the creditor to receive less than the agreed sum, or to release the debtor from the unpaid portion thereof. * * * When the appellee accepted and cashed such check and appropriated unto

himself the proceeds thereof, well knowing that such payment was burdened with such condition, he thereby accepted it as tendered. He could not accept the benefit of such tender without likewise accepting its condition.

"When a tender is made by a debtor to a disputed claim, under such circumstances that the creditor must understand it is offered in full payment, he has but one of two alternatives open to him—either to accept it as tendered, or to reject it and after accepting it he will not be heard to say that it was accepted under protest or upon any terms and conditions different from those imposed by the debtor who has the right to prescribe the conditions under which he makes the tender. Such a creditor is conclusively estopped to say that he did not accept such tender in full payment of his demand. The moment the appellee cashed the check, the minds of the parties met, and they mutually agreed that it constituted full payment."

At the time when appellee made a demand upon Helm for a return of the wheat, the sum due appellee for the conversion of the wheat was unliquidated. The amount of damages was still undetermined and the claim was not a liquidated demand at that time. If the claim had been liquidated, it would clearly come within the rule laid down by this court in the case of Buel v. Kansas City Life Ins. Co., 32 N.M. 34, 250 P. 635, 52 A.L.R. 367.

In the Buel Case we quoted a definition of "liquidated" from Swindell v. Youngstown Sheet & Tube Co., 230 F. 438, 442, 144 C.C.A. 580, as follows: "'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.'" In the same case we said: "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."

If we attempt to paraphrase some of the language of the Buel Case to accord with the facts in this case, we are unable to do so. Paraphrased it would read as follows: "There was dispute as to any liability for conversion (accidental death) but none as to the amount to be paid if conversion took place (if the death were accidental)."

In the case at bar there was a dispute as to the amount to be paid if the transaction were held to be a conversion rather than a sale. (The appellant claimed it was a sale.) If the latter, of course, the sale price agreed upon controlled. If a conversion, even if we consider the parties in agreement on the market value of the wheat upon the day of the conversion (which we doubt our right to do), nevertheless they were widely apart on the amount to be paid by reason of the conversion. Certainly, that amount was unliquidated from any point of view.

The defendant urged the amount to be paid as the market value on the day of the conversion plus lawful interest. The extreme claim open to plaintiff under the authorities was the highest market value attained between the date of the conversion and the date of the trial. Between the high and low of the claims there are various modifications of the rule for measuring damage. The trial court adopted the rule of the highest market value between conversion and a reasonable time thereafter, fixed at six months. The soundness of the rule is questioned by appellant. However, we do not have to pass on that issue. So that, at the time of the claimed accord, there was truly uncertainty as to which of these measures of damages would be adopted by the court even if liability for conversion should be adjudged as it ultimately was. The least defendant could be called upon to pay was market value at the date of conversion.

There is nothing in the record to determine whether the parties at the time of the tender and cashing of the check mutually agreed on what that market value was. In addition, there were deductions to be made from such market value on account of storage charges after a certain time and an advance of 15 cents per bushel.

Do these circumstances render the demand unliquidated? We quote from 3 Words and Phrases, Second Series, 148, as follows: "The word 'liquidated,' in the sense of the rule that payment of a lesser sum is a discharge of the remainder where the amount in dispute is unliquidated, but that it is not a discharge where it is liquidated, means that the amount due has been ascertained and agreed on by the parties or fixed by operation of law. The rule does not apply where there is a bona fide dispute as to the amount actually due. A demand is not liquidated, even, if it appears that something is due, unless it appears how much is due; and when it is admitted that one of two specific sums is due, but there is a general dispute as to which is the proper amount, the demand is regarded as 'unliquidated' within the meaning of the term as applied to the subject of accord and satisfaction. T. B. Redmond & Co. v. Atlanta & B. Air Line Ry., 129 Ga. 133, 58 S.E. 874–876."

We necessarily conclude that the claim of appellee at the time of the conversion was an unliquidated demand, and the amount due appellee undetermined.

So finding we are brought to the proposition of the appellant when he claims that as a matter of law Miller could not accept the check under the circumstances and afterward claim a further payment.

An "accord" is an agreement, an adjustment, a settlement of former difficulties, and presupposes a difference, a disagreement, as to what is right. A "satisfaction," in its legal significance in this connection, is a performance of the terms of the accord; if such terms require a payment of a sum of money, then that such payment has been made. Harrison v. Henderson, 67 Kan. 194, 72 P. 875; 62 L.R.A. 760, 100 Am.St.Rep. 386.

To constitute an "accord and satisfaction" in law dependent upon an offer of the payment of money, it is necessary that the money be offered in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that if the money be accepted it is to be in full satisfaction and to be of such character that the creditor is bound so to understand such offer.

In Kingsville Preserving Co. v. Frank, 87 Ill.App. 586, it was held: "To constitute an accord and satisfaction of a claim unliquidated and in dispute, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that if the money is accepted it is to be in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that if he takes it he takes it subject to such condition."

In the case of Fuller v. Kemp, 138 N.Y. 231, 33 N.E. 1034, 1035, 20 L.R.A. 785, the court said: "To constitute an accord and satisfaction, it is necessary that the money should be offered in satisfaction of the claim, and the offer accompanied with such acts and declarations as amount to a condition that, if the money is accepted, it is accepted in satisfaction, and such that the party to whom it is offered is bound to understand therefrom that, if he takes it, he takes it subject to such condition. When a tender or offer is thus made, the party to whom it is made has no alternative but to refuse it, or accept it upon such condition."

If the check had been indorsed or there had been written on it "payment in full," "balance in full," "in full," or some equivalent and then tendered in satisfaction of a disputed account, accord and satisfaction would have been accomplished as an incident to payee's cashing same. This much must surely be conceded. The writings on and accompanying the check here involved, of themselves, declared no less certainly that the check was tendered in full and final discharge of defendant's liability, if there were present the element of dispute. What were the writings? The check was accompanied by a short note heretofore quoted in this opinion. The "statement" mentioned was marked "settlement sheet"

and was complete, showing 3,489.10 bushels of wheat to be settled for at 28 cents per bushel, amounting to $976.96, less storage of $78.49 and previous advance of $523.10, leaving a balance due of $374.97. The check was for $374.97, amount claimed to be due, and itself bore the writing on lower left-hand face of check, "For 3489.10 wheat," indorsed on the back when cashed, "J. C. Miller."

But it is suggested that such writings and indorsements constitute no more than an accounting by defendant conforming to his theory of the transaction at a time when for aught he knew no dispute existed or was likely to arise. Hence, it is said accord cannot, as a matter of law, rest upon the writings themselves and the mere subsequent cashing of the check. We are impressed by this argument and will so concede.

But the matter does not rest there. It must be looked through to the end before appraising the legal effect of what was done. If the condition were not fastened to the check when appellee attempted to compel its return, and if no dispute existed theretofore in reference to the account, certainly both the condition and the dispute arose coincidentally with what transpired on that occasion. The appellee enters the office of appellant's manager and demands a return of the wheat. He is told this is impossible, that the wheat is in Chicago, and that the amount tendered is all he could pay for it. The face of the writings accompanying the check's transmission disclosed that the amount of the check was tendered in full settlement, though at a time before appellant knew its amount would be disputed. But it now becomes disputed and vigorously. With Manager Helm's statement scarcely uttered, appellee Miller throws the check down on the desk before Helm, saying, "I can't accept your check," the equivalent of declaring: "I won't accept your check. It was tendered as a purported settlement. You had no right to sell my wheat and I refuse to accept it as such. Take it back."

Why did appellee momentarily refuse to accept the check? Unquestionably because of the condition which now, if not before, he appreciated as accompanying its acceptance.

If appellee had clung to his announced resolution, he would have been all right. There the parties faced each other, the one holding a check with a statement accompanying same to which the one (as payee) objected, and by reason of which the one tossed it over the desk to the other, saying, "I can't accept your check." He voiced his objections heatedly, testifying: "I got kind of smart myself. I got pretty tough about it, but it didn't do me any good." The check lies on the desk before them. The other says in effect: "I can pay no more. You can take it or leave it." The obvious implication from the situation described is that a condition clings to the check as it lies there before them. When appellee, moved by a "bird in the hand"

policy, reached out and reclaimed the check, and certainly after a sufficient time for reflection when he wrote his name on the back of it, and took from defendant's account and appropriated to his own uses its amount, he swallowed the condition. It is now too late, and has been too late ever since he cashed the check, to back up. See Warren v. New York Life Ins. Co., 40 N.M. 253, 58 P.(2d) 1175.

The law is clearly stated in Gulfport Wholesale Lumber Co. v. Boeckeler Lumber Co. (St. Louis Ct. of App.Mo.) 287 S.W. 799, 800, as follows: "If there is a controversy between the creditor and the debtor as to the amount which is due, and if the debtor tenders the amount which he claims to be due, but tenders it on condition that the creditor accept it in discharge of his whole demand, and the creditor does accept it, that will be an accord and satisfaction, as a conclusion of law, the principle being that one who accepts a conditional tender assents to the condition. And this is true, although the creditor protests at the time that the amount paid is not all that is due, or that he does not accept it in full satisfaction of his claim."

Upon what theory the appellee can justify his act in cashing this check, we are unable to understand. When he cashed it he knew, or is charged with knowing, that it was held subject to the condition that it was in full payment for the wheat involved. We are constrained to hold that the facts in this case accomplished an accord and satisfaction.

For the reasons given the judgment of the district court must be reversed, the cause remanded, with directions to dismiss the plaintiff's complaint and for costs.

It is so ordered.

HUDSPETH, C. J., and SADLER and BICKLEY, JJ., concur.

BRICE, Justice (dissenting).

To constitute an accord and satisfaction in law, dependent upon the offer of the payment of money, it is necessary that the money should be offered in full satisfaction of the demand or claim of the creditor, and be accompanied by such acts or declarations as amount to a condition that, if the money is accepted, it is to be in full satisfaction, and be of such a character as that the creditor is bound to so understand such offer. The mere sending of a statement of account showing a balance due, with a check for such balance, is not an accord; and if the check is cashed by the creditor it is not a satisfaction of the debt. Harrison v. Henderson, Adm'r, 67 Kan. 194, 72 P. 875, 62 L.R.A. 760, 100 Am.St. Rep. 386; M. A. Phelps Lumber Co. v. Bradford-Kennedy Co., 96 Wash. 503, 165 P. 376; Childs v. St. Louis Basket & Box Co. (St. Louis Ct. of App.Mo.) 271 S.W. 859; Gulfport Wholesale Lumber Co. v. Boeckeler Lumber Co. (St.L.C. of App.Mo.) 287 S.W. 799; Grapes v. Rocque, 97 Vt. 531, 124 A. 596; Three Rivers Growers' Ass'n v. Pacific Fruit & Produce Co., 159 Wash. 572, 294 P. 233; Bahren-

burg et al. v. Conrad, etc., Co., 128 Mo. App. 526, 107 S.W. 440; Pitts v. National Independent Fisheries Co., 71 Colo. 316, 206 P. 571, 34 A.L.R. 1033, and annotation beginning at page 1035; and annotations 75 A.L.R. 919.

If there was an accord and satisfaction, it resulted from the subsequent interview mentioned in the majority opinion, in which appellee first demanded his wheat, and was informed it had been shipped to Chicago. The appellant stated, *"That is all I can pay for it,"* which was as much as to say, "The check which I have tendered *is all I can pay for the wheat.*" But that is far from saying: "If you accept this check it will be in full payment of all that I owe you on the transaction." The mere statement that, "It is all I can pay," might mean a number of things. It might mean that he was not financially able to pay more, or that he would not pay more; but that is not sufficient. The acts and words of the parties must have amounted to a contract resulting from appellant's tender of the check in full payment of the amount he owed on the wheat transaction; and appellee, knowing this was the condition of the tender, accepted the check with such condition attached.

It is stated in the majority opinion: "Why did appellee momentarily refuse to accept the check? Unquestionably because of the condition which now, if not before, he appreciated as accompanying its acceptance." I can see nothing in the evidence quoted in the majority opinion that authorizes any such conclusion. It was not accepted originally because appellee did not want to sell the wheat and he made that plain to appellant.

The majority concluded that the sending of the check, with the statement of account showing that it was intended as in full payment of the account, would not have been an accord and satisfaction if the check had been accepted. I am unable to understand how a different conclusion can be reached by anything that was said in the conversation between the appellee and the representative of the appellant.

There is not one circumstance to show that either party had in mind an accord and satisfaction, or that either knew their effect. The appellant never at any time, either by words or acts, made it a condition that if appellee accepted the check it would be in full settlement of the debt. This court by the majority opinion supplies a contract for the parties which they never made themselves, or, so far as the facts show, ever thought of.

Unliquidated debts cannot be settled by the delivery and acceptance of a less amount than due, if the delivery is accompanied only by a statement that "this is all that I can pay." That is not an accord and satisfaction.

The judgment of the district court should be affirmed.

68 P.(2d) 918

SECURITY STATE BANK v. CLOVIS MILL & ELEVATOR CO.

No. 4172.

Supreme Court of New Mexico.

May 20, 1937.

Hatch, Grantham & Manson, of Clovis, for appellant.

James A. Hall, of Clovis, for appellee.

BRICE, Justice.

This suit was brought by appellee against the appellant to recover the value of grain alleged to have been converted to the use of appellant, and on which the appellee held a crop mortgage executed by one Hufstedler, from whom appellant purchased the grain.

The facts as found by the court are in substance as follows:

Prior to the 7th day of February, 1931, one Ed Hufstedler, who is now deceased, entered into a written contract to purchase from the owner 640 acres of land approximately 7 miles west and 3 miles north of Clovis, Curry county, N. M. The contract of purchase and deed therefor was not placed of record, but was delivered in escrow to a Clovis bank, and so held during all times material. The appellant had no actual knowledge of the existence of this contract and deed.

On February 7, 1931, Hufstedler executed to appellee a chattel mortgage on "all of the crops I may raise or cause to be raised during the year 1931, and being 300 acres on my place 10 miles northwest of Clovis, in Curry County, New Mexico, in corn, kaffir, higeria, cane, maize, sudan, etc." to secure notes aggregating the principal sum of $900 made by the mortgagor and payable to the mortgagee. This chattel mortgage was duly filed in the office of the county clerk of Curry county, N. M. on May 17, 1931, but appellant had no actual knowledge thereof.

At the time the notes and mortgage were executed and for some time prior thereto Hufstedler was residing on the farm mentioned, and continued to reside thereon during the crop year of 1931, and in that year raised a grain crop thereon. A part or all of this grain was sold by Hufstedler, which at the time of such sale was of the value of $1,031.22, to appellant. Hufstedler did not farm any other land during that year; nor was he at any time the record owner of any land in Curry county, N. M., nor did the records of Curry county indicate that at any time he held, owned, or had contracted to buy land in that county.

The court concluded that appellant had constructive notice of the chattel mortgage; that he converted grain of the value of $1,021.33 covered by the chattel mortgage to his own use; that he was liable to appellee in damages in that amount, for which the court entered its judgment.

The district court did not err in holding that appellant had constructive notice of the contents of the chattel mort-

gage mentioned. It was filed in the office of the county clerk, and by the terms of the statute gave constructive notice to all the world of its existence and contents. Sections 21-401; 21-102 (amended Laws 1935, c. 54, § 1); 21-104 (amended Laws 1935, c. 54, § 3); 118-108; and 118-109 of N.M.Sts.1929.

The description of the property mortgaged, while not as full as it might have been, was sufficient to put appellant on inquiry as to whether the grain offered for sale by the mortgagor was covered by this chattel mortgage. He was charged with the knowledge that Hufstedler had mortgaged to appellant a grain crop growing, or to be grown, on his farm 10 miles northwest of Clovis. With this knowledge the appellant, or any reasonably prudent person, would have made inquiry of Hufstedler upon his offering grain for sale, if it was of the kind covered by the mortgage in question. If the mortgagor had denied that it was mortgaged property, no prudent man would have bought the grain without further inquiry. The very nature of the crop calls for more careful inquiry on the part of purchasers than that of any other class of chattels. If the land had been described particularly by government subdivisions, the appellant would not have been in possession of any more substantial information than it constructively had. Grain has no brands or marks, nor is it capable of description. An inspection will not give the information of where it was grown. So the failure to particularly describe the land did not add to appellant's difficulty in determining the ownership of the grain. It was in the possession of Hufstedler; he had mortgaged grain grown on a farm that could have been easily located from the knowledge that it was about 10 miles northwest of Clovis and that Hufstedler lived and made a grain crop on it that year. Appellant made no search of the records or he would have discovered the chattel mortgage on file, and its contents alone would have been sufficient to have prevented any prudent man from purchasing the grain; and any reasonable inquiry would have led to the information that the grain was mortgaged.

Appellant cites Commercial State Bank v. Interstate Elevator Co., 14 S.D. 276, 85 N.W. 219, 86 Am.St.Rep. 760, a very similar case. The crop mortgaged in that case was described as:

"All the crops of every name, nature, and description, consisting of 340 acres of wheat, 15 acres flax, 10 acres oats; all the property now being in the possession of said first party in the county of ——— and county of Miner and state of South Dakota,"

The court, in holding the description insufficient, stated:

"This court has laid down the rule that 'a mortgage of personal property is sufficient, as to description, if it be such that a prudent, disinterested person, aided only and directed by such inquiry as the instrument itself suggests, is able to identify the property.' [Citing authorities.] The

rule above stated was adopted and applied in cases involving ordinary personal property, which can be easily identified, but has little application to grain, which can only be identified by the description of the particular real property upon which the the grain is to be raised. In a chattel mortgage, therefore, of growing grain, it is necessary that there should be a particular description of the land upon which the grain is to be grown."

That court fails to advise why a particular description of the land will identify grain grown on it after it is removed. It is as difficult to identify grain grown on lands particularly described as that not so described. Neither can be identified by inspection; but each requires the same character of inquiry. The land would be a little more difficult to locate in the latter case, but ordinarily an inquiry would result in the required information. The great weight of authority is opposed to this decision.

"In this connection, it is necessary to note the decision of the South Dakota supreme court to the effect that a mortgage of a growing crop is not valid unless it designates the range, section and township upon which the crop is growing. Such a rule not only departs from the established rule, but the additional description serves no useful purpose. Farms are known in common parlance by the name of the farmer occupying them, and not by the number of the township, range and section. A purchaser of grain, by making inquiry, would learn the name of the man on whose land it was raised and, if he finds that the man has mortgaged his grain, he will be warned not to buy. It would be extremely unusual for the legal description of the land to be mentioned in the course of such inquiry.

"In general, a mortgage on crops must be sufficiently definite to enable strangers to find it, by the description itself, in conjunction with such investigations as a reasonably prudent person would be prompted thereby to make, to identify the property intended to be mortgaged. If the description meets this test, the record of the mortgage is constructive notice to such strangers." Jones on Chattel Mortgages (Bowers Ed.) § 55A.

The rule is that a description in the mortgage which, aided by such inquiries as a reasonably prudent man would make under the circumstances and which the mortgage itself indicates, will lead a third person to the information, is sufficient. First National Bank of Bristow v. Rogers, 24 Okl. 357, 103 P. 582; Johnson v. Grissard, 51 Ark. 410, 11 S.W. 585, 3 L.R.A. 795. The description of the crop was not so indefinite as to invalidate the chattel mortgage.

There is substantial evidence to support the court's finding of a conversion of the grain (Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601), but only to the value of $1,001. The only evidence of value was the statement of an employee of the appellant, in charge of its books,

made to a representative of the appellee, that the books of the appellant company showed it had bought grain from Hufstedler of the value of $1,001 or "possibly a little more." Anderson (appellee's representative) was at the time making inquiries about this particular grain. He testified: "I asked him (appellant's employee) if he bought the grain from Ed Hufstedler, and he said he had. I said I would like to know how much. He looked at the books out there and showed me he bought $1001.00 worth, possibly a little more." Anderson testified that this conversation was in the month of April, 1932. He was asked: "Q. Do you remember when he bought it? A. In November, 1931, I remember being one of the dates. I don't recall the rest."

The evidence shows that Hufstedler farmed no other land during 1931. We think there was substantial evidence to prove that the grain in question was converted by the appellants and that it was of the value of $1,001. 23 C.J., title, Evidence, § 1802. The court erred in allowing judgment for more than that amount. A remittitur should be entered to the extent of the excess, which is $20.33.

After the parties had concluded the case, the court, not being satisfied with the evidence, ordered a further hearing before a referee, over appellant's objection. A hearing was had, and the parties appeared by their attorneys and other testimony was taken, and thereafter considered by the court in the final disposition of the cause. A point is made that the court erred in failing to render judgment for appellant after both sides had closed, and in appointing a referee to take further testimony on his own motion. The court did not abuse its discretion in ordering a reference on his own motion. The object of a trial is to do justice between the parties, and, if in the judgment of the court it is necessary to have further evidence to assist at arriving at a just decision, it is within his discretion to order it. Hohn v. Pauly, 11 Cal.App. 724, 106 P. 266.

Appellant contended, and introduced testimony tending to prove, that there was a custom in Curry county at the time the grain in question was bought, for purchasers dealing in grain to rely upon evidence furnished them by mortgagors as to the existence of mortgages on grain crops, so that grain dealers would be protected against buying mortgaged property. The custom, however, cannot prevail against a statute which requires purchasers of mortgaged property to take notice of such chattel mortgages when filed in the office of the county clerk. A custom will not prevail against a statute or the terms of a contract in conflict with it. Basey v. Gallagher, 20 Wall. 670, 22 L.Ed. 452; Higgins v. Cauhape, 33 N.M. 11, 261 P. 813; Romero v. Romero, 29 N.M. 667, 226 P. 652.

The case will be affirmed, with costs, upon condition that appellee shall enter in this court a remittitur of $20.33, with in-

terest on that amount; otherwise it will be reversed, with instructions to the district court to determine the market value of the grain converted by appellant and enter judgment in favor of appellee therefor.

It is so ordered.

HUDSPETH, C. J., and SADLER, and ZINN, JJ., concur.

BICKLEY, J., did not participate.

68 P.(2d) 921

GREENFIELD v. BRUSKAS.

No. 3988.

Supreme Court of New Mexico.

May 18, 1937.

Rehearing Denied June 22, 1937.

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Joseph Gill, John F. Simms, and D. M. Bushnell, all of Albuquerque, for appellant.

George C. Taylor, of Albuquerque, for appellee.

BRICE, Justice.

This action was brought to recover damages for the negligent killing of plaintiff's intestate. Certain of the facts, which are taken from the uncontested findings of the court, are as follows:

On the morning of the 8th day of October, 1932, at a few minutes before 8 o'clock, the deceased, Claire Frank, a young man twenty-one years of age, and his brother, Austin Frank, nineteen years of age, were riding a motorcycle, going east on Central avenue in the city of Albuquerque, up a 3½ per cent. grade, at a speed in excess of twenty, but less than twenty-five miles an hour. The motorcycle was equipped with a special seat larger than the ordinary seat, and Claire Frank was sitting in the back of the seat, while his brother, Austin, who was driving the machine, was sitting on the forward part of the seat and had hold of the handle

bars. Claire Frank was carrying a book and a package of drawing instruments in one hand and the other hand was around his brother's waist. Claire's feet were on the footboard provided for that purpose. The motorcycle was in good working order, and the brakes were in such condition as when applied they would slide the tires. Both boys were experienced motorcycle drivers, and each had owned a machine of that kind for a considerable period of time; each had taken part in driving around the city and in cross-country driving, and understood how to ride and handle a motorcycle.

It had been raining on the morning in question, but the shower had passed, the atmosphere was clear, and the asphalt paving on East Central avenue was still wet. The two boys were proceeding on the right side of the street, and as they approached the intersection of South Ash street with East Central avenue, the wife of the defendant was driving west on East Central avenue and approaching the intersection of South Ash and East Central, and was plainly seen by Austin Frank, who was looking east as he was driving in that direction.

The wife of the defendant, who was driving the automobile, turned left from Central avenue on Ash street and gave no signal with the horn of her intention to so turn. Austin Frank threw on the brakes of his motorcycle and swung it sharply to the left in an effort to go behind the automobile, and, due to the use of his brakes on a wet pavement and the making of the sharp turn to the left, the motorcycle skidded and swung around, coming in contact with the right rear wheel of the defendant's car, throwing the motorcycle and the riders to the pavement. By reason of the fall upon the pavement, Claire Frank suffered a broken leg, and was soon thereafter taken to a hospital, where, on the following morning, he died as a result of the accident, from a cerebral embolism or blood clot which lodged in his brain.

The authorities of the city of Albuquerque have not modified the state law with reference to turning at the intersection of South Ash and East Central avenue by placing buttons, markers, or other direction signs thereon.

The defendant is the owner of a De Soto automobile, of the kind and number specified in the complaint, which he kept for the use of himself and his wife for both business and pleasure, and the wife of the defendant was permitted at all times to drive the automobile, and at the time in question was using the car for the purpose of making a visit to her sister, who lived on the east side of South Ash street.

The plaintiff, Myrtle Greenfield, is the administratrix of the estate of Claire Frank, deceased, who died intestate, and brings this suit as such administratrix. Claire Frank left surviving him a father, who lives in Kansas, and two minor brothers, one nineteen years of age, and one fourteen years of age. Claire Frank was a senior in the University of New Mexico,

taking a course in mechanical engineering, was a member of an honorary undergraduate engineering fraternity, based on scholarship; was a boy of good habits, studious, diligent, and of upright life and deportment, and was interested in the education of his two younger brothers. He was employed by the State Health Laboratory at the University of New Mexico during the school term at $40 a month, and during the summer made $100 a month salary, besides certain extras in attending lawns and doing other work. He was in good health at the time of his death, and had an expectancy of forty-two years of life. The average earning power of a mechanical engineer in New Mexico and vicinity, for the first five years after graduation from college, is approximately $1,800 a year, and thereafter from $4,000 to $8,000 a year.

The evidence shows that Ash street begins at Central avenue running at right angles south therefrom.

The following findings of fact, requested by appellant, were refused by the court, and such refusal assigned as error:

"7. That as the two Frank boys approached the intersection of South Ash with East Central, their view was unobstructed, and they could see the wife of the defendant coming west on Central avenue, driving on the right side of the street going west.

"8. That the defendant's wife turned her car to the left before reaching the center of the intersection between Central and Ash, and without looking west, from which direction the two Frank boys were coming.

"9. That, at the time the defendant's wife crossed the center line of Central Avenue turning left, the motorcycle ridden by the two Frank boys had gotten past the center of the intersection of South Ash and Central, and, upon her making the left turn, (the remainder of this requested finding was adopted by the court).

"10. That, at the time Mrs. Bruskas turned left across Central Avenue, the motorcycle was about fifteen feet away."

"12. That, if the wife of the defendant, before turning left on Central Avenue, had looked west for approaching traffic, she could have seen the two Frank boys approaching on the motorcycle in time to have stopped and to have avoided the collision."

"21. That, at the time the defendant's wife turned left on Central Avenue, she did not make any sign or warning with her arm or hand of her intention to turn."

"23. That, at the time the defendant's wife turned her automobile left on Central Avenue and crossed the center line of Central Avenue, the motorcycle was so close that the application of its brakes could not stop it before a collision would result with the automobile."

The contention is that the court erred in refusing to make each of the requested findings.

In regard to requested finding No. 7, there is no evidence in the record that both boys

could see the wife of the defendant at the time mentioned, although the evidence shows that the driver, Austin Frank, could and did see Mrs. Bruskas at that time, and the court so found by his finding No. 10, incorporated in the facts we have set out. The district court did not err in refusing this request.

Regarding requested finding No. 8, the evidence of Mrs. Bruskas, the driver of the automobile in question, was as follows: She testified that she was going west on East Central avenue to her sister's home. That she saw a car coming and waited for it to pass; then she turned in and looked back up east Central, and when she looked around the boys' motorcycle was real close to her. That before she turned she held out her hand; that she did not see the motorcycle until she had already turned in, and until her front wheels were almost on Ash street; that they were even or past the curbing. She thought the motorcycle was close to the curb, which would be the south side of Central avenue. She never saw the motorcycle at the time she saw the car that passed in front of it; but this was before she turned across Central avenue. She came to almost a complete stop, waiting for the car to pass. It was near the intersection when she saw it. She had perfect control of her car and could have stopped it in less than a car length and was going only about six miles per hour.

"Q. When that car went by you you said you looked behind you but you did not look down Central again at all did you? A. No, not until I was clear turned.

"Q. Until you turned in in front of these boys you did not look? A. No, they did not see me either, because when I saw them you could see the startled expression on their faces.

"Q. Do you recall positively that you lowered your window and put your hand out? A. And I looked *up* the street, if I had looked down I probably would have seen the boys.

"Q. Mrs. Bruskas, we don't think you did it on purpose. You admit though, that you cut the corner and did not look down Central before you turned, you admit that? A. Yes.

"Q. If you did not look down Central why did you stop to let the car in front of the motorcycle pass? A. Because I saw that one car, I did not see any more cars; I did not think it was necessary to look again."

A number of other witnesses testified that she "cut the corner" in making the turn; and as she, the only witness who could know, testified that she made the turn without looking west, and that if she had looked west she would have seen the boys going east on the motorcycle and admitted she "cut the corner"; and as there is no evidence to the contrary, and no reason appears why the court should not believe the undisputed testimony given by the witnesses for both parties—we find that the court erred in refusing the request.

Regarding that part of requested finding No. 9, refused by the court (supra), if the boys had gotten *past the center* of the intersection of Ash street and Central avenue when the automobile crossed the *center line* of Central avenue, then they were in less than 15 feet of the east line of Ash street and on the west side of Central avenue. They were traveling from 30 to 35 feet per second and the automobile at less that half that speed. Considering these facts, it is doubtful if the motorcycle could have been turned to the left in a fraction of a split second and avoided a head-on collision; or that the boys could not have passed in front of the automobile in safety if so far advanced into the intersection at the time Mrs. Bruskas crossed the center of Central avenue. Notwithstanding the testimony of witnesses as to such distance, there is substantial evidence to support the court's refusal to make the requested finding.

Regarding the requested finding No. 10, there is no definite testimony upon which the court could have found that "when Mrs. Bruskas turned left across Central Avenue the motorcycle was only 15 feet away."

In regard to requested finding No. 12, the evidence we have set out regarding requested finding No. 8 may be considered without reproducing it. From Mrs. Bruskas' testimony, alone, no other conclusion can be reached. She testified that her car came almost to a "complete stop" just before she made the turn without looking west, and she drove across the lane of eastbound traffic without a glance to see if there were more cars or other vehicles coming toward her. She testified she probably could have seen the motorcycle if she had looked west. Her car was facing west and the motorcycle was coming east, not far off, and nothing appears in the evidence to show her view was obstructed. It is proper to infer that had she looked down the street before making the turn she would have seen the motorcycle which, according to the facts, must have been but a short distance away.

Requested finding No. 21 is contradicted by the testimony of Mrs. Bruskas, and therefore its denial by the trial court will not be disturbed.

It is error for a trial court to refuse to make a finding of fact requested by a party to the suit, which is abundantly supported by the uncontradicted testimony, and particularly by that of the principal witness and wife of the opposing party, against whom the finding would operate. Kennedy v. Porter et al., 109 N.Y. 526, 17 N.E. 426; Post v. Hartford Street Ry. Co., 72 Conn. 362, 44 A. 547; Alexandre v. Machan, 147 U.S. 72, 13 S.Ct. 211, 37 L.Ed. 84, 85; Bedlow v. New York Floating Dry-Dock Co., 112 N.Y. 263, 19 N.E. 800, 2 L.R.A. 629.

The question raised is one of law equally with one upon the question of whether a finding of fact is supported by substantial evidence.

The question now presented is whether the findings of the trial court, supplemented by appellant's requested findings that should have been approved by the trial court, will

support a judgment. State ex rel. McFann v. Hately, 34 N.M. 86, 278 P. 206, Op. by Justice Sims.

If the facts found by the court, supplemented by those he should have found, will support a judgment for appellant, then the case should be reversed.

The following state statutes were in force at the time of this accident and are applicable:

"* * * the driver of a vehicle * * * when intending to turn to the left shall approach such intersection in the lane for traffic to the right of and nearest to the center line of the highway and in turning shall pass beyond the center of the intersection, passing as closely as practicable to the right thereof before turning such vehicle to the left. For the purpose of this section, the center of the intersection shall mean the meeting point of the medial lines of the highways intersecting one another." Section 11-816 N.M.Comp.St.1929.

"The driver of any vehicle upon a highway before starting, stopping or turning from a direct line shall first see that such movement can be made in safety and if any pedestrian may be affected by such movement shall give a clearly audible signal by sounding the horn, and whenever the operation of any other vehicle may be affected by such movement shall give a signal as required in this section plainly visible to the driver of such other vehicle of the intention to make such movement.

"(b) The signal herein required shall be given either by means of the hand and arm in the manner herein specified, or by an approved mechanical or electrical signal device, except that when a vehicle is so constructed or loaded as to prevent the hand and arm signal from being visible both to the front and rear the signal shall be given by a device of a type which has been approved by the department.

"Whenever the signal is given by means of the hand and arm, the driver shall indicate his intention to start, stop or turn by extending the hand and arm horizontally from and beyond the left side of the vehicle." Section 11-817 N.M. Comp.St.1929.

"(*o*) 'Highway.' Every way or place of whatever nature open to the use of the public, as a matter of right, for purposes of vehicular travel." Section 11-801, N.M. Comp.St.1929.

The findings that should have been made by the trial court established negligence per se on the part of Mrs. Bruskas, in that she "cut the corner" or failed to pass beyond the center of the intersection of the highways before turning, and failed to see that she could turn across the lane of eastbound traffic with safety, each of which acts violated a state statute. Pettes v. Jones, 41 N.M. 167, 66 P.(2d) 967; Towne v. Godeau, 70 Cal.App. 148, 232 P. 1010; Pettera v. Collins, 203 Wis. 81, 233 N.W. 545; Mertens v. Lake Shore Y. C. & T. Co., 195 Wis. 646, 218 N.W. 85; Thieme v. Weyker, 205 Wis. 578, 238 N.W. 389; Geisen v. Luce, 185 Minn. 479, 242 N.W. 8; Abel v. Gulf

Refining Co. (La.App.) 143 So. 82, and Id. (La.App.) 138 So. 708; Catalano v. Pritchard, 19 La.App. 262, 140 So. 100.

There must not only have been negligence on the part of Mrs. Bruskas, but such negligence must have been the proximate cause of the death of plaintiff's intestate. Appellant made no request of the court for a finding on the question of proximate cause and none was made.

The Frank boys had a right to assume that Mrs. Bruskas would obey the statutes we have quoted; and if the collision (which the court found caused the death of Claire Frank) resulted from her negligent act in cutting the corner, or failing to signal, or neglecting to look and ascertain that she could turn into Ash street across the lane of eastbound traffic on Central avenue with safety to those using it, then her negligence was the proximate cause of Claire Frank's death. Towne v. Godeau, supra.

The "proximate cause" of an injury is "the 'cause which, in natural and continued sequence, unbroken by any efficient, intervening cause, produced the result complained of, and without which that result would not have occurred.'" Gilbert v. New Mexico Construction Co., 39 N.M. 216, 44 P.(2d) 489, 490. It is an ultimate fact, and is usually an inference to be drawn by the jury from the facts proved. It only becomes a question of law when the facts regarding causation are undisputed and all reasonable inferences that can be drawn therefrom are plain, consistent, and uncontradictory.

"The question of proximate cause is usually for the jury upon all the facts. Proximate cause is said to be a mixed question of law and fact which must be submitted to the jury under proper instructions. But where the facts are undisputed and the inferences to be drawn from them are plain and not open to doubt by reasonable men, it is the duty of the court to determine the question as a matter of law." 1 Cooley on Torts (4th Ed.) 50; Hellan v. Supply Laundry Co., 94 Wash. 683, 163 P. 9.

Appellant made no request of the court to find the amount of damage sustained by appellant. This is likewise a question of fact to be inferred from all the pertinent facts proved; the principal ultimate fact to be established, and its determination, is the province of the jury or court trying the case. It does not become a question of law unless the amount of damage is plain, certain, and definite, so that only a certain, specific sum would be consistent with the facts; and that is not the case here. Appellant should have requested a finding of the amount of such damage, assuming the liability of defendants.

We are requested by appellant to determine the case in this court. It is argued that if any of the requested findings should have been made by the district court, then they may be supplied by this court and judgment entered or ordered thereon. This court, however, is not authorized to make such findings, nor draw inferences therefrom. That is peculiarly the province of the district court. But in any case the facts

found by the court, supplemented by those we hold he should have made, would not authorize us to enter judgment for appellant.

We cannot say, as a matter of law, that the negligent act of "cutting the corner" by Mrs. Bruskas, in turning off of Central avenue, into Ash street, or her failure to look for eastbound traffic, was the proximate cause of the accident resulting in Claire Frank's death.

It is not enough to find that the collision which resulted in Claire Frank's death would not have occurred except for Mrs. Bruskas' negligence, as we have held the court should have found; but the court must have further found that one of these acts of negligence, unbroken by any intervening cause, produced the result; and no such finding was made or requested, and we cannot supply it.

Likewise we are not authorized to determine the amount of damage from the evidentiary finding of the district court by which no specific amount is established.

The case was not determined upon its real facts; therefore it may be stated that a judgment was entered upon an unauthorized state of facts. This will not justify us in reversing the case, however, unless the facts found by the court, supplemented by those he should have found, will support a judgment for appellant. State ex rel. McFann v. Hately, supra.

We cannot determine what the attitude of the district court would have been had he adopted requested findings Nos. 8 and 12, which we hold he should have done. In other words, he has not passed upon the case, and if, under any circumstances, these facts would support a judgment in appellant's favor, the cause should be reversed that the district court may have an opportunity to pass upon the question.

In determining this issue we must look at the case from appellant's standpoint; that is, assuming that the district court had entered judgment for appellant under this different state of facts, would such judgment be sustained in this court?

The findings must sustain the judgment of course, but they are to receive such construction as will uphold rather than defeat the judgment; and if from the facts found the other necessary facts to support the judgment may be reasonably inferred, it will not be disturbed by us. Paine et al. v. San Bernardino, etc., Co., 143 Cal. 654, 77 P. 659; Perkins v. West Coast Lumber Co., 129 Cal. 427, 62 P. 57; Lynch's Adm'r v. Murray, 86 Vt. 1, 83 A. 746; Wood v. City of Montpelier, 85 Vt. 467, 82 A. 671, Ann.Cas.1914D, 500.

"As to the first objection, it may be said that it was decided in Fraser v. State Savings Bank, 18 N.M. 340, 137 P. 592, 594, that:

"'Findings are not to be construed with the strictness of special pleadings. It is sufficient if, from them all, taken together with the pleadings, the court can see enough upon a fair construction to justify the judgment of the (trial) court, notwithstanding their

want of precision and the occasional intermixture of matters of fact and conclusions of law.'

"While it is the better practice for the court to find conclusions of fact and law separately, failure to do so is not ground for reversal, unless appellant has been prejudiced thereby. See Monaghan Bay Co. v. Dickson, 39 S.C. 146, 17 S.E. 696, 39 Am.St. Rep. 704; 8 Standard Encyclopedia of Procedure, 1020. Appellant has not shown any prejudice resulting to it from the findings being objectionable as to form, if in fact they are so objectionable." La Luz Community Ditch Co. v. Town of Alamogordo, 34 N.M. 127, 279 P. 72, 75.

It may be reasonably inferred from the facts found, that appellant was damaged in some amount; and likewise it may be reasonably inferred from the facts surrounding Mrs. Bruskas' negligent acts, that such negligence was the proximate cause of the injury. The parties were approaching each other, each on the proper side of the street, and when each was approaching the intersections of Ash street, Mrs. Bruskas, without blowing her horn, or looking for oncoming vehicles, "cut a corner" and turned across the lane of traffic, which placed her car in the way of the motorcycle. These facts are sufficient from which the court might infer that one or more of her several negligent acts was the proximate cause of the death of Claire Frank.

The district judge who heard the case is not available for the purpose of another trial, so it will be necessary to reverse the case for a retrial of certain issues.

The cause will be reversed and remanded, with instructions to grant a new trial; that such trial, in the court's discretion, may be limited to the issues of the proximate cause of the death of Claire Frank and the consequential damages if any; that the court make his findings and conclusions thereon, and from all the facts found and to be found, enter judgment.

It is so ordered.

HUDSPETH, C. J., and SADLER and ZINN, JJ., concur.

BICKLEY, J., did not participate.

68 P.(2d) 928

GOLDEN v. GOLDEN.

No. 4187.

Supreme Court of New Mexico.

April 24, 1937.

Rehearing Denied June 21, 1937.

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R. A. Prentice and J. V. Gallegos, both of Tucumcari, and E. R. Wright and Donovan N. Hoover, both of Santa Fe, for appellant.

Myron B. Keator and C. H. Hittson, both of Tucumcari, and H. A. Kiker and Manuel A. Sanchez, both of Santa Fe, for appellee.

ZINN, Justice.

Margaret Golden, hereinafter referred to as appellee, sued Ernest M. Golden, the appellant, for divorce. He defended on two grounds. First, that a decree of divorce had been granted to him from Margaret by the civil district court of Brevos district, City of Juarez, state of Chihuahua, Mex., upon petition signed by both, and that such decree is a bar to the present suit and appellee is estopped from bringing the instant suit because the identical issue had been litigated in the Mexican court. Second, that the marriage between them was not a valid marriage having been solemnized by the probate judge of Curry county, N. Mex., which official appellant contends is not a civil magistrate within the meaning of Comp. St. 1929, § 87-102. Thus two issues of law are squarely presented for our determination. Two other minor issues are raised on appeal.

The trial court ruled in favor of appellee granting the divorce and awarding her a lump sum in settlement of her property rights and as alimony. This appeal is prosecuted by appellant.

Facts necessary to a clearer understanding of the issue will be recited from the record in this opinion as the questions are determined. The transcript and briefs are voluminous. Counsel for both parties by their research and brief have ably presented this case.

The first point assigned in the brief presents the question of the validity of a marriage solemnized by a probate judge.

The Organic Act establishing the Territory of New Mexico, approved September 30, 1850, fixed the judicial powers of the courts. Probate courts in the Territory, as now, were courts of special and limited jurisdiction. Appellant contends that such judges cannot solemnize marriages, being confined to the administration of personal estates, and other duties specifically assigned to such tribunal by the Legislature, and are not "civil magistrates" within the meaning of Comp. St. 1929 § 87-102.

It is conceded that the Legislature never expressly authorized judges of the probate courts of New Mexico to solemnize marriages. Neither do we find where judges or justices of any other court are expressly authorized by statute to solemnize marriages. To us is left a determination of who constitute "civil magistrates" within the meaning of section 87-102. This must be determined in the light of the meaning of the phrase "magistrado civil" or civil magistrate as found in the act of February 2, 1860, C. L. 1865, c. 75, § 1, now Comp. St. 1929, § 87-102. This section was originally section 2 of "An Act to Incorporate the Mesilla Mining Company" of the laws of the Territory of New Mexico passed by the Legislative Assembly, Session of 1859-1860, p. 120, approved Feb. 2, 1860. It would be very interesting to know how a section authorizing ministers and magistrates to solemnize marriages found its way into an act incorporating a mining company. At this late date we might only speculate. Nevertheless, it became the law and is the law to this date.

Probate courts during the year of 1850 when the Organic Act was approved, and for many years thereafter, had a far more extensive jurisdiction than at the present time. The statute books of the time and later show that such courts were vested not only with probate jurisdiction, but also with jurisdiction of other civil and criminal matters as well. Their jurisdiction would justify their denomination at that time as courts intermediate between the justice of the peace courts and the district courts. They were courts of record, having a clerk and seal. Certain causes tried in the courts of the justices of the peace were appealable to the probate courts. See "An Act to Regulate and conduct Causes in Appeal in all the Courts of this Territory," adopted January 30, 1862. Laws 1861-1862, p. 50. Throughout the entire period of time from the passage of the Organic Act and many years thereafter, laws

were enacted giving the probate court jurisdiction over matters beyond the limited scope of a court having strictly probate jurisdiction.

A very clear example of the more extensive jurisdiction of the probate courts is indicated by a law approved the very day section 87-102 was approved, which gave probate courts extensive jurisdiction in civil and criminal causes. This act so far as material reads as follows:

"Sec. 2. The probate courts shall have jurisdiction in civil suits upon open and liquidated accounts, replevin, debts of any nature, when the sum claimed does not exceed five hundred dollars. Said courts shall also have jurisdiction in all criminal cases which pertain to the jurisdiction of justices of the peace, having concurrent jurisdiction with them in such causes, and shall receive appeals according to and under the same restrictions as now provided by law relative to appeals, touching such crimes, taken from justices of the peace to said probate courts.

"Sec. 3. That the practice in the said courts of the judges of probate shall be the same as that in the district courts, in all its parts and provisions."

The remaining sections of the act relate to the drawing of the petit jurors, for service in the probate court, their compensation, the number of peremptory challenges available to each party, the time of holding terms in the various counties, and other matters not pertinent to the question under consideration. See Laws of 1859-60, p. 90.

It is clear to our minds that the phrase "presiding magistrate" found in section 905 of the Organic Act (Rev.St.U.S. § 905, 28 U.S.C.A. § 687) included probate judges. Counsel for appellant argue that probate judges are not the same as those magisterial officers who at the time of the military occupation of the Territory (after the Treaty of Guadalupe Hidalgo, [9 Stat. 922]) and before the adoption of the Organic Act were known as prefects. The Revised Statutes of 1850 (Kearney Code), c. 12, compiles all the various statutes theretofore enacted relating to courts and judicial powers. Article 3 of said chapter clearly indicates that the probate judges were the same as the prefects. It is too apparent to even admit of argument that the probate judge in 1860 was no other than the officer theretofore known as prefect. For example: In 1859-60 (and throughout that period), upon the creation of a new precinct, the Territorial Legislature imposed the duty upon the probate judge to order an election to be held in such newly created precinct to elect a justice of the peace and a constable for the newly created precinct. Habit, which is sometimes strong, permitted the use of the word prefect where probate judge was intended in one of the acts creating such a precinct. See "An Act creating an additional Precinct in Rio Arriba County." Laws of New Mexico, 1859-60, p. 24. Compare with "An Act creating Precinct of the Preciosa Sangre de Cristo, Number 10, of the County of

Valencia." Laws of New Mexico, 1859-60, p. 56. Also p. 82, and others. Clearly the prefect was the probate judge and the alcalde the justice of the peace.

From a reading of the various statutes in existence at that time, it clearly appears to us that a probate judge was a magistrate even in the narrower sense contended for by counsel for appellant.

We must, however, look to the meaning of the term "magistrate" as found in the statute itself. That is, who comprised the body of men known in 1860 as "civil magistrates."

"In its most enlarged signification, this term (Magistracy) includes all officers, legislative, executive, and judicial. *In a more confined sense, it signifies the body of officers whose duty it is to put the laws in force; as, judges, justices of the peace and the like.* In a still narrower sense, it is employed to designate the body of justices of the peace. It is also used for the office of a magistrate." (Italics ours.) 38 C.J. 332.

In Gordon v. Hobart, Fed. Cas. No. 5,609, 2 Sumn. 401, Justice Story said: "I know of no other definition of the term 'magistrate' than that he is a person clothed with power as a public civil officer." Citing 1 Bl.Com. 146. This definition is quoted approvingly in Compton v. Alabama, 214 U.S. 1, 29 S.Ct. 605, 53 L.Ed. 885, 16 Ann.Cas. 1098.

Paraphrasing Justice Story, we know of no other definition of the term "magistrate" than that he is a person clothed with power as a public civil officer. The Territorial Legislature of 1859-60 clearly understood that probate judges were judges of courts of record, with a clerk and seal, and clothed with power as public civil officers. The members of the Legislative Assembly of 1859-60 were largely natives of the then Territory of New Mexico. They and their ancestors had lived in the Territory prior to the annexation of the same by the United States of America. This is evidenced by the fact that almost all of the laws and resolutions adopted at that session were in the Spanish language. To these legislators the prefect and the judge of the probate court were the same. A prefect was a "magistrate" designated as such in law. See Kearney Code, p. 85, under the heading "Practice of Law in Criminal Cases." When a change was made by law enlarging the group who could thereafter solemnize marriages and such act added "magistrado civil" to ordained clergymen as authorized to solemnize marriages, such civil magistrate clearly meant, not only justice of the peace, the judges of the district courts, but also included the judges of the probate courts. This has been the understanding of the law for more than eighty-five years. To hold otherwise would invalidate the marriages of many people who in good faith have had their marriages solemnized by judges of the probate courts of New Mexico, and would bastardize the children of such marriages.

We deemed it best to decide this point squarely rather than decide the issue upon the theory that the appellant is estopped

from questioning the validity of the marriage, having participated therein, as urged upon us by appellee. We hold that the marriage of Ernest and Margaret Golden, solemnized by the judge of the probate court of Curry County, was a valid marriage.

We come next to the claim of appellant that the decree of divorce granted to him from Margaret by the civil district court of Bravos district, city of Juarez, state of Chihuahua, Mex., is a valid decree, and therefore a bar to the present suit. Appellant also claims that the wife by her own words, writing, and conduct, having consented to the Mexican decree, is now estopped from attacking the validity of said decree. Appellant further contends that the validity of the Mexican decree cannot be attacked herein, but must be attacked directly in a suit to set the same aside.

A recital of a few of the facts is necessary. Ernest and Margaret left Tucumcari, N. Mex., about 8:45 p. m., drove all night to El Paso, Tex., arriving there about 10 or 11 the next morning. The car, containing accessories, was left on the El Paso side of the International bridge, and both parties walked across the bridge to Juarez, Mex. In Juarez they walked up and down the main street, and Ernest would emerge from the various shops several times and would remark to Margaret that "they was too high." Accompanying Ernest and Margaret was a "hitch-hiker" of the female variety that had accompanied the Goldens to El Paso from Tucumcari. While Ernest and the hitch-hiker took a glass of whisky, Ernest gave Margaret the key to the car and told her to get the marriage license. She walked back across the bridge to the car in El Paso and secured the license and returned to Juarez where she found Ernest accompanied by one Rodolfo Silva, a citizen of the Republic of Mexico, who informed Ernest that he, Rodolfo, could arrange to get a divorce for the Goldens for a "little bit or nothing." The Goldens then went to another saloon with Silva who talked to several places by telephone. Silva then informed Ernest that "he thought he had the man." They all then repaired to a "lawyer's place" who said "he would do it for $50.00" which was apparently agreed to. This lawyer, one Victores Prieto, then prepared some papers in Spanish which were signed by both Ernest and Margaret, neither of whom could read Spanish. Margaret testified that these papers were not translated to the Goldens, though she testified she knew what was contained in the papers. The record is silent as to how she knew the contents of the papers. Ernest, Silva, and Prieto testified that the entire proceedings were interpreted in English. After a period of time, during which the Goldens were doing some shopping, they returned to the office of Prieto and accompanied him to a place which the lawyer said was the courthouse. The Goldens did not go into this place but waited outside for the lawyer. He came out in about one-half hour and the Goldens again accompanied him to a place in another building. In this place they were

given a couple of chairs, presumably to sit on, and they waited another half hour while their lawyer talked to some man. Neither was sworn to testify. It is claimed the divorce was a "consent" divorce, that is, a decree agreed to by both parties. The Goldens then accompanied Prieto to his office at which place he gave them some papers, which appellee in her testimony said was a copy of "that divorce." All parties then returned to El Paso, and went to Hot Springs, N. Mex., where the Goldens stayed that night living together as man and wife. Appellant claimed to be an American citizen at all times, voting about two months after the divorce was granted.

The trial court found the Goldens were at all times residents of and domiciled in Quay county, N. Mex., and at no time was either a resident of or domiciled in the Republic of Mexico.

We quote from the court's own findings, as follows:

"From all of the evidence introduced:

"The Court finds that the parties hereto were married in Clovis, Curry County, New Mexico, in September, 1932, and that the officer solemnizing the marriage was the Probate Judge of Curry County at the time.

"The Court further finds that there are no children issue of this marriage.

"The Court further finds that the plaintiff has sustained the allegations of her complaint.

"The Court further finds that in said Cause No. 5441, the defendant herein filed suit for divorce, alleging the existence of the marriage relation, and later dismissed the same.

"The Court further finds that in September, 1933, the defendant carried the plaintiff with him to the City of Juarez, in the Republic of Mexico, and that after a stay there of a few hours, the complaint for divorce was filed, and the decree of divorce was granted. The Court finds that at said time both of the parties to this action were residents of Quay County, and had been for a number of years prior thereto, and that neither of said parties was a resident of the Republic of Mexico, and that neither of said parties was ever, at any time, a resident of said country."

From which, among other things, the court concluded: "VI. That the purported divorce which defendant caused to be obtained in the Republic of Mexico is wholly null and void as a fraud upon the courts and laws of the State of New Mexico, and upon the laws and courts of the Republic of Mexico, and of the State of Chihuahua in said Republic of Mexico."

From the facts found, it is apparent that the Goldens were at no time domiciled in Juarez, Mex. Ernest Golden appeared at the office of the Municipal Presidency in Juarez and said that he was an actual resident of the city of Juarez, giving as his residence in said city the Hotel Koper, a place at which he never resided. This was done by him in order to fulfill the

requirement of article 24 of the divorce laws of the state of Chihuahua, Mex., which article is as follows: "Art. 24. Residence for the observance of Article 22 of the present law shall be acquired by the respective certificate issued by the Municipal Registry of the place."

Article 22, which relates to jurisdiction of the court to hear a suit for divorce, reads as follows: "Art. 22. Jurisdiction to hear a suit for divorce for cause lies in the Court of the plaintff's residence: And in an action for divorce by mutual consent the jurisdiction is fixed by the residence of either of the spouses."

Out of the recited facts arises the law to damn the validity of the Mexican divorce decree.

Jurisdiction over the subject-matter of divorce rests upon domicile. This is not only the law as established by the great weight of authority in the United States (note, 39 A.L.R. 677), but is the law in the state of Chihuahua, Mex., as clearly appears from article 22, supra.

We are not here concerned with the "full faith and credit" clause of the Constitution of the United States (art. 4, § 1), for that provision is not applicable to judgments of foreign countries, nor is our attention called to any treaty existing between the United States and Mexico dealing with questions of divorce. A decree of divorce rendered in one state may be impeached and denied recognition in another upon the ground that neither of the parties had such domicile or residence at the divorce forum; and this, notwithstanding the recitals in the decree or record from the other state or county of the jurisdictional fact of domicile or residence. Cases in note, 39 A.L.R. 677. Neither of the parties had established a "residence" in Juarez, under any known definition of residence. They went to Juarez, Mex., for one sole purpose, to secure a decree of divorce, and then depart. They did not even take their automobile across the International bridge, but left it on the American side that they might quickly depart, which they subsequently did. They might just as well have transacted the entire proceedings by phone or mail from Tucumcari, N. Mex., and have saved the all night drive, in so far as the efficacy of their efforts amounted to the establishment of a residence in Mexico for the purpose of securing a divorce.

Both parties were amenable to the laws of the state of New Mexico. Ernest Golden who appeared at the offices of the Municipal Presidency and claimed to have established residence in Juarez within a short period thereafter voted in New Mexico, where residence is required by N.M. Const. art. 7, § 1, for a period of twelve months. If he had abandoned his residence in New Mexico and had established a pretended residence in Juarez, such bona fides would have been shown to be false and fraudulent by his subsequent voting, if not alone by the facts above recited. A fraud was committed on the Courts of Mexico and on the solicitude of the state of New Mexico for the marriage status. We deem it

needless to cite many authorities. They are collected in the annotation found in 39 A.L.R. 677.

The California case of Ryder v. Ryder, 2 Cal.App.(2d) 426, 37 P.(2d) 1069, 1070, decided November 26, 1934, rehearing denied January 24, 1935, is so closely akin to the instant case that we quote therefrom with approval:

"The general rule is that jurisdiction over the subject-matter of divorce rests upon domicile, or at least residence, of one of the parties, and a decree of divorce rendered in a foreign jurisdiction may be impeached and denied recognition upon the ground that neither of the parties had such domicile or residence at the divorce forum notwithstanding the recitals in the decree. Note, 39 A.L.R. 677, and cases cited. Neither recitals in the decree or consent of the parties can confer jurisdiction in the face of evidence that plaintiff in the divorce action did not have a bona fide residence. It is a general rule that domicile is changed from one place to another only upon the abandonment of the first place of domicile with the intent not to return and by taking up a residence in another place with the intention of permanently residing in that place. 9 R.C.L. 542. The first essential for the validity of a decree of divorce between parties is that it should be pronounced by a competent court of jurisdiction, and one of whom at least is a bona fide subject of that jurisdiction. Even in this country, where it is prescribed by the Constitution that full faith and credit must be given in each state to the judicial proceedings of another, it is well settled that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if the want of jurisdiction appears on the face of the record or is shown either as to subject-matter or the person, the record will be regarded as a nullity. Thompson v. Whitman, 18 Wall. (85 U.S.) 457, 21 L.Ed. 897. The rule is certainly as strong, if not stronger, when applied to a court of a foreign country. It would be unfair to the courts of Mexico to presume that it would have been a party to such a proceeding if it had known that neither plaintiff nor defendant therein had ever been in Mexico during the year 1933, that during all of the time in question defendant maintained his residence and his employment in California, and that plaintiff had never consented to submit to the jurisdiction of the Mexican courts.

"A foreign divorce obtained through simulated residence and not in good faith is open to attack in the state of the real matrimonial domicile, and the party sought to be bound by it may always impeach its validity and escape its effect by showing that the court which rendered it had no jurisdiction over the parties or the subject-matter, and the jurisdiction of such court may be controverted by extraneous evidence. Kadello v. Kadello, 220 Cal. 1, 29 P.(2d) 171; Delanoy v. Delanoy, 216 Cal. 27, 13 P.(2d) 719, 86 A.L.R. 1321;

Galloway v. Galloway, 116 Cal.App. 478, 2 P.(2d) 842; Broder v. Broder, 122 Cal. App. 296, 10 P.(2d) 182; Warren v. Warren, 127 Cal.App. 231, 15 P.(2d) 556, 560; Steinbroner v. Steinbroner, 30 Cal.App. 673, 159 P. 235; Fox v. Mick, 20 Cal.App. 599, 129 P. 972; Thompson v. Whitman, 18 Wall. (85 U.S.) 457, 21 L.Ed. 897; Hanley v. Donoghue, 116 U.S. 1, 6 S.Ct. 242, 29 L.Ed. 535.

"As was said in the case of Warren v. Warren, supra: 'A bona fide residence, however, is essential to jurisdiction, and a valid divorce decree cannot be founded upon a simulated domicile or a residence undertaken for the purpose of securing such a decree.'

"However, in the instant case it is apparent from the face of the record that a fraud had been perpetrated upon the courts of Mexico, for it is recited in the decree itself that 'said plaintiff had established his domicile in compliance with the existing laws,' and 'that the court's jurisdiction was established by the certificate of the plaintiff's domicile duly registered in the Public Registry.'

"There is nothing in the record to indicate what the law of Mexico is concerning divorce. We have been directed to no statute or code or other law of that country governing the subject of divorce. If, however, it be assumed that the laws of that country require no residence nor the presence of the parties within its territory as a basis of jurisdiction, and that the formal requirements established by Mexican law were met, then the divorce cannot be recognized under the laws of this state. A decree of divorce rendered by any jurisdiction in which neither of the parties have domicile is not entitled to full faith and credit and will not be recognized and enforced in California."

We quote from an early (1892) Wisconsin case with approval:

"It is conceded by both parties that the only question for determination is whether that decree of divorce is valid, and operated as a legal separation of Adolph and Elise at the time it was rendered.

"In this country it is prescribed by constitutional compact that full faith and credit must be given in each state to the public acts, records, and judicial proceedings of every other state; and yet it is well settled that the record of a judgment rendered in another state may be contradicted as to the facts necessary to give the court jurisdiction, and, if want of jurisdiction appear upon the face of the record, or is shown either as to the subject-matter or the person, or, in proceedings in rem, as to the thing, the record will be regarded as a nullity. Thompson v. Whitman, 18 Wall. 457, 21 L.Ed. 897; Pennoyer v. Neff, 95 U.S. 714 [24 L.Ed. 565]; Simmons v. Saul, 138 U.S. 439, 11 S.Ct. 369 [34 L. Ed. 1054]; Bartlet v. Knight, 1 Mass. 401 [2 Am.Dec. 36]; Starbuck v. Murray, 5 Wend. [N.Y.] 148 [21 Am.Dec. 172]; Taylor v. Barron, 30 N.H. 78 [64 Am.Dec. 281]; Rape v. Heaton, 9 Wis. 328 [76 Am.Dec. 269]; Renier v. Hurlbut [81 Wis.

24] 50 N.W. 783 [14 L.R.A. 562], 29 Am. St.Rep. 850. The rule is certainly as strong, if not stronger, when applied to a judgment rendered in a court of a foreign country, towards which no such duty is enjoined, and especially where the jurisprudence of such foreign country is in no sense based upon the common law. * * * In speaking of the residence in this state essential to give the court jurisdiction, Ryan, C. J., aptly said: 'No mere pretense of residence, no passing visit, no temporary presence, no assumption of residence here pro hac vice only, nothing short of actual abode here, with intention of permanent residence, will fill the letter or the spirit of the statute.' Dutcher v. Dutcher, 39 Wis. [651] 658; Cook v. Cook, 56 Wis. [195] 206, 14 N.W. 33, 443 [43 Am.Rep. 706]. 'The legislature was legislating for the citizens of this state, not for others.' Id. [Dutcher v. Dutcher, 39 Wis. (651) 658]. These propositions are still more significant when applied to any statute, law, or custom of any foreign country like Sweden." St. Sure v. Lindsfelt, 82 Wis. 346, 52 N.W. 308, 309, 19 L.R.A. 515, 33 Am.St.Rep. 50.

In Newton v. Newton (May 22, 1935) 179 A. 621, 13 N.J.Misc. 613, a Mexican decree of divorce was obtained by the husband, whose sole purpose in going to Mexico, where he remained for less than a week, was to obtain a divorce. He and his wife had been residents of New Jersey for eighteen years. The court held that the Mexican decree of divorce was void, and that the wife was entitled to a divorce from the husband on the ground of adultery, he having after the entry of the Mexican decree married another woman and lived with her as his wife.

In the case of Wells v. Wells (May 30, 1935) 230 Ala. 430, 161 So. 794, 795, appellant went to Mexico for no other purpose than to obtain a divorce. The court said: "We note that the proceedings in the Mexico court do not recite that Mr. Wells was a resident of that republic. But had it done so, since that recital is of a fact essential to the jurisdiction of that court, it may be contradicted in this suit to show that the decree there rendered was null and void."

The decree which the Mexican court undertook to grant in the case at bar is wholly invalid. There is no claim that either Golden or his wife ever resided for any length of time, or had their marital domicile, in Mexico. Every fact in the case shows that Golden had no intention at any time of residing in Mexico, notwithstanding he registered as a resident of the state. He left his business at Tucumcari to go to Mexico to get a divorce. He left his car on the American side of the International bridge, in order that he might not be delayed in his return to his domicile. We know of no rule of law by which any validity at all could attach to the purported decree of divorce granted by the Mexican court. There is nothing in the public policy of this state that requires or suggests that a divorce granted under these circumstances should be recognized and given effect as a

dissolution of the matrimonial relations of parties whose matrimonial domicile is in this state. To give recognition and effect to such a divorce would be contrary to the public policy of this state.

Paraphrasing (and applying to this case) the language of the Supreme Court of Mississippi in Miller v. Miller, 173 Miss. 44, 159 So. 112, the state of Chihuahua and the Republic of Mexico have the undoubted right to make such laws for the government of their own inhabitants as they may deem proper, and the courts of that state have the right to render judgments and decrees pursuant to such laws, fixing the rights, relations, and status of their citizens, but when such judgments or decrees, which affect or purport to determine the marital status and rights of citizens of this state, are contrary to the public policy of this state, our courts will determine for themselves the jurisdiction of that court to render such a decree or judgment, and the consequent validity thereof, and this notwithstanding the recitals of the decree of the jurisdictional facts of residence or domicile.

We are faced with a more serious problem, however, in view of the fact that the appellant contends that the appellee is estopped from attacking the Mexican decree. Nevertheless we hold, from the facts before us, the appellee is not estopped from attacking the judgment of the Mexican court in the instant case.

Ordinarily, a party cannot invoke the jurisdiction of a court for the purpose of securing important rights from his adversary through its judgment, and, after having obtained the relief desired, repudiate the action of the court on the ground that the court was without jurisdiction.

This doctrine of estoppel to assert invalidity of a judgment proceeds upon the theory that it would be intolerable to permit the parties to enter into collusion to defraud the court, and, each of the parties having enjoyed the fruits of their wrongful conduct, to permit one of them to afterwards assail the judgment collaterally. See Freeman on Judgments, § 1438.

However, neither the doctrine of estoppel, assuming that the appellee voluntarily appeared and submitted to the jurisdiction of the Mexican court, nor the rule which would deny to appellee the right to attack collaterally a decree which is apparently valid on its face, is applicable here.

"A decree of divorce may be impeached collaterally in the courts of another state by proof that the court granting it had no jurisdiction because of the plaintiff's want of domicil, even when the record purports to show such jurisdiction and the appearance of the other party." German Savings & Loan Society v. Dormitzer, 192 U.S. 125, 24 S.Ct. 221, 48 L.Ed. 373.

The Mexican divorce decree was void. It is as invalid as though it had been decreed by the probate judge who solemnized the marriage ceremony. It is as void as though it had never been issued. It can be disregarded anywhere. Its validity can be questioned in any suit where it is proposed

as valid, and appellee is not estopped to question it in this case any more than she would be denied the right to question a divorce granted appellant by a justice of the peace before whom both appeared and consented to a decree. To hold otherwise would permit couples impatient of marital restraints, and in moments of emotional impulses, irrespective of their duty to their children, their families, or the state, to cross over the International bridge to Jaurez, and by a mere flourish of the pen dissolve the matrimonial tie and then remarry at will irrespective of consequences. There may be no children of the body of the Goldens in the instant case concerned with the outcome. However, the rule we establish here would become a rule of construction and decision in the future.

The marriage status is not one which concerns the parties to the ceremony alone. New Mexico, though recognizing the validity of marriages which are celebrated beyond the limits of this state, and which are valid according to the laws of the country wherein they were celebrated or contracted (Comp.St.1929, § 87-105), considers only valid those marriages which are solemnized within this state in accord with our laws. In re Gabaldon's Estate (Gabaldon v. Gabaldon), 38 N.M. 392, 34 P. (2d) 672, 94 A.L.R. 980. The state of New Mexico, the children, and the parties to the marriages are all equally concerned in the marriage status. The parties cannot throw off their marital ties as they would a worn out pair of shoes. Proper machinery of the court is set up to sever the marital bonds when they become beyond endurance, and even then only on certain statutory grounds. In the operation severing the bonds of matrimony, all interested parties are placed under the jurisdiction of a court of competent jurisdiction that the rights of all may be protected. To permit a foreign state or Nation to assume jurisdiction over residents of this state and grant divorce upon request, like a slot machine in which you deposit a fixed sum of money, press the lever, and out comes a divorce decree, is a condition which New Mexico does not yet tolerate.

That the state is a party interested in the legality of the dissolution of the marriage status of its citizens is well supported by competent authority.

Ryder v. Ryder, supra, while denying the claim of estoppel, deals very briefly with the question, being content to hold that estoppel cannot confer jurisdiction over the subject-matter. However, a later California case, citing the Ryder Case, Kegley v. Kegley (Cal.App.) 60 P.(2d) 482, 484, treats the subject more fully and more satisfactorily, denying estoppel upon the broad ground of the state's public policy. The court said:

"All sovereignties jealously guard the status of its citizens and will resent any attempt of a foreign state to disturb the domestic relations of those residing within its borders. Therefore, before a state can lawfully presume to pass upon such a problem as here presented, one of the

parties at least must have been a bona fide resident therein. It is here claimed, however, that, the defendant having submitted in writing to the jurisdiction of the foreign tribunal, she cannot now be heard to question its authority. An action in divorce, however, is not an action between the parties alone; it is the theory, here at least, that there are three parties involved, the husband and the wife who represent their respective interests, and the state protecting the morals of the community, to see that neither by collusion nor connivance the status of marriage will be reduced to a matter of temporary convenience. If the state is a party, then of course neither plaintiff nor defendant could by consent confer jurisdiction upon the courts of Mexico over the third party, viz., the state, and, the state not having consented to the courts of Chihuahua passing upon the marriage status of those domiciled within its boundaries, the decree cannot be binding within its jurisdiction. Under the theory of appellant, a foreign state could enact a law that, merely upon the appearance of a dissatisfied husband or wife, a final decree could be granted merely by the making of a request, but such a revolutionary procedure we are sure would not be tolerated by the courts of California. Although the courts in such a proceeding would perhaps have jurisdiction of the individuals, they could not have jurisdiction of the subject-matter of the action, that is, the marriage relation, the status of the parties. The courts of this state also have sole and exclusive jurisdiction over the status of those domiciled within its boundaries. Delanoy v. Delanoy, 216 Cal. 27, 13 P.(2d) 719, 86 A.L.R. 1321. This case is itself a brief on the invalidity of the Mexican decree.

"The rule is also well settled that a decree of divorce may be attacked collaterally in the court of another state by proof that the court granting it had no jurisdiction because of want of domicile by the plaintiff even when the record purports to show such jurisdiction. That jurisdiction of the subject matter cannot be conferred by estoppel is declared in Lindsay-Strathmore Irrigation Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056, and the many cases there cited. If the subject matter is not within the jurisdiction of the court, that defect cannot be supplied by consent or estoppel of the parties. Marin Municipal Water District v. North Coast Water Co., 178 Cal. 324, 173 P. 473; Yore v. Superior Court, 108 Cal. 431, 41 P. 477."

Judge Cooley in the leading case of People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260–268, was the first to emphasize the position of the state in such matters. He said: "But it is said that if the parties appear in the case, the question of jurisdiction is precluded. That might be so if the matter of divorce was one of private concern exclusively. But such is not the case under our laws, nor will it ever be until it comes to be understood that parties have the right to marry and unmarry at pleasure, and that if they choose to trade

spouses, it is the concern of nobody but themselves. Such an understanding would require a considerable change in the existing laws of this state. As those laws now are, there are three parties to every divorce proceeding; the husband, the wife, and the state; the first two parties representing their respective interests as individuals; the state concerned to guard the morals of its citizens, by taking care that neither by collusion nor otherwise, shall divorce be allowed under such circumstances as to reduce marriage to a mere temporary arrangement of conscience or passion."

In Hollingshead v. Hollingshead, 91 N.J. Eq. 261, 110 A. 19, 21, the Court of Chancery of New Jersey had before it for consideration a decree of divorce granted in Nevada. Vice Chancellor Buchanan presents strong argument against an estoppel, even where both parties participated in the procural of the decree. He said:

"Logically, of course, where an estoppel is claimed to exist against an assertion set up by one of the parties, the determination of the issue as to whether or not such party is estopped from asserting his contention precedes any inquiry into the issue upon the contention itself; and, if the estoppel be found to exist, the inquiry into the truth or falsity of the contention against which the estoppel exists is never reached. But in this case the answer to the claim of estoppel is not that the estoppel *does not* exist, but that it *cannot* exist.

"The contract of marriage is one which may not be dissolved or abrogated by the will of the parties; the state must consent and act to accomplish such dissolution. If the husband and wife signed an agreement purporting to terminate the marriage relation, it would, of course, be void, and neither party would be heard to claim that the other party was estopped from asserting its invalidity. The question of whether or not the acts of the litigant had or had not been such as to estop him from asserting the invalidity of the 'agreement'—whether or not the alleged estoppel *did* exist—would be precluded from consideration by the answer, and the fact, that it *could not* exist.

"So, too, if, instead of signing a mutual agreement of dissolution of the marriage, the parties had gone to the minister who married them and procured him to sign a certificate purporting to divorce them. Wherein is there any difference between the last hypothesis and what the parties in this case actually did? They went to a Nevada court and procured from it what purports to be a decree of divorce; the Nevada court, under the circumstances, having no more jurisdiction, power, or authority in the matter than the minister aforesaid would have had, and its decree being of no more value or validity than the minister's 'certificate' in the supposititious case.

"Is it not clear, therefore, that there *cannot* be any estoppel against the contention of complainant that the Nevada de-

cree is, as the Legislature has said, 'of no force or effect in this state'? To hold otherwise would obviously be to hold that spouses, residents of this state, may do in this way that which they are not and cannot be permitted to do, namely, divorce themselves without the consent and act of this state, through its sole constituted agent in that behalf, the Court of Chancery."

Chancellor Buchanan says, however, that it by no means follows "that a party who has obtained such a void decree will be granted relief in this court as though he or she had been guilty of no misconduct in regard thereto." He then lays down what we believe is a sound rule, to wit: "The true rule, then, would seem to be that, where a suitor comes into equity and asks for relief, notwithstanding a foreign decree of divorce, which, if valid, would be a bar to his or her suit, which decree is void for lack of jurisdiction, but which was obtained by the present complainant, equity will examine into all the facts, and will accord or refuse its aid upon general equitable principles, according to whether or not it deems it conscionable so to do."

The Hollingshead Case is very interesting and rather exhaustive. It is true in the Hollingshead Case the court dealt with a statute, but says: "Furthermore, the same result must needs be reached, irrespective of that legislation." See, also, Reik v. Reik, 109 N.J.Eq. 615, 158 A. 519.

That there are some leading cases against the view advanced here cannot be denied. See Ellis v. Ellis, 55 Minn. 401, 56 N.W. 1056, 1058, 23 L.R.A. 287, 43 Am.St.Rep. 514; Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193, 93 Am.St.Rep. 631; Smith v. Smith, 43 La.Ann. 1140, 10 So. 248, 251. However, it is the application of other equitable principles which control the denial or award of relief. It will be found to be the case in many decisions, if not most of them, seeming to apply the doctrine of estoppel to challenge the former decree that the civil effects of the second marriage have become "complete and indestructible," as said in Smith v. Smith, supra. For instance, in that case the second wife had brought her suit to recover "the marital fourth of his estate" from his former wife as guardian of the children of the former marriage.

In Starbuck v. Starbuck, the action was one brought by plaintiff as widow of William H. Starbuck, deceased, to recover dower in the real estate of which he died seized, and Ellis v. Ellis portrays a contest between the former wife and the one married following a reputed divorce from her over administration of his estate.

The decision in each of these cases can be explained upon the application of some well-known equitable maxim, such as that no one shall profit from his own wrong or that he who comes into equity must come with clean hands, without upholding the doctrine that the person denied relief was estopped by the former decree. Indeed, as Vice Chancellor Buchanan points out in Hollingshead v. Hollingshead, if the estop-

pel be sustained, inquiry into the equities is beside the point.

The Supreme Court of Minnesota in Ellis v. Ellis classifies the cases in which the question of jurisdiction may arise in the following language, to wit: "But when in the court of a state an action for divorce is brought, and a decree of divorce rendered, the court is presumed to have determined the facts essential to its jurisdiction, among them the residence of the parties. When, as between whom, and to what extent is such determination binding in the state in which the parties are in fact residents? The cases in which the question may arise may be divided into three classes: First, in proceedings between the state of the parties' actual residence and one of the parties; second, in proceedings between the parties in the state of their actual residence, where the divorce in the other state was procured on the application of one of them, the other not appearing in the action to procure it; third, in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended. In the second class of cases, since it was settled that a judgment of another state can be assailed on the ground of want of jurisdiction in the court to render it, the decisions have been practically uniform that the party who did not submit to the jurisdiction is not bound by the judgment."

Coming to the case before us, we hold that no estoppel confronts appellee's challenge to the validity of the decree. Upon the application of equitable principles, we see nothing aside from appellant's remarriage which may be relied upon as a ground for denying relief. In many, if not most, of the cases touching upon this question, a remarriage had occurred, yet that fact was not deemed sufficient to deny relief. The appellee received no material benefits under the purported decree of divorce in Mexico, and began her own suit for divorce within less than one year. This would hardly sustain a charge of laches or acquiescence.

We come now to the question of claimed error in the award of alimony. We are bound by the record before us. When the decree of divorce was granted by the trial court in the instant case, a very liberal sum of money was awarded the appellee. This award is claimed by appellant to be excessive. The court, pursuant to Comp.St.1929, § 68-506, awarded appellee the sum of $4,000, out of which sum she was to bear her own attorney's fees and the expense of this suit. The court found that the property of the appellant was worth the sum of $8,000.

The record before us discloses that at the beginning of the trial appellant's counsel sought to file an amended answer to the first amended complaint. A so-called plea in bar theretofore had been filed. Defense counsel contended that

the plea in bar was aimed only at the motion for alimony and attorney's fees, and that they thought the time to answer to the main action, the suit for divorce, would be tolled until action on the motion. But unfortunately for this contention, the answer in bar was filed before the motion for alimony, although the right to alimony and attorney's fees had been asserted in the complaint. The plea in bar apparently left undenied the allegations setting up grounds for divorce, including the claim that the property involved was community property.

The trial court did not permit the amended answer to be filed so that as the matter stands the appellee procured her divorce without offering proof of the grounds thereof, otherwise than by admissions through failure to deny. In view of such failure to deny the record shows, and in finding true the allegations of the complaint the court found, that the appellee and appellant were married September 4, 1932, approximately two years before the divorce proceeding was instituted in New Mexico; that at the time of the marriage the appellee was about eighteen years old; that during the marriage some community property was acquired. (The record is silent as to the amount of community property and the amount of separate property owned by appellant. This question was never decided by the court.) That no children were born of the marriage; that a few months after the marriage the appellant mistreated the appellee and brutally beat her; that she become pregnant and that the appellant compelled her with force to take medicines and drugs with the avowed purpose of inducing an abortion against her will; that although the appellee begged her husband to permit her to have the child he forced her to undergo an operation which produced an abortion, by reason of which she was subjected to torture and suffering and for a period of time her life was endangered, during which time appellant failed to care for appellee or have her cared for; that the appellee is destitute and in ill health, and is in such physical and mental condition as to render it impossible for her to obtain steady employment for her support; that the appellee is also without means to employ counsel or prosecute the instant case.

Though there are other allegations of acts of cruel and inhuman treatment of the appellee by the appellant, and of acts of infidelity on the part of appellant (all of which are admitted by failure to deny), yet they are immaterial in a determination of the question presented as to the claim of excessive award of alimony.

There is one other fact disclosed by the record that merits consideration in determining whether the court abused its discretion in the award of alimony. The record discloses that all of the property of the appellant has been conveyed away. Appellant admits that this was done to avoid the payment of any judgment that might be awarded against him. The appellee, to collect the amount of the award,

will be compelled to engage in further litigation to establish her right. She is without means to do so. This element must have also been taken into consideration by the court in his award.

In view of the admitted facts, we cannot say that an award of $4,000 in a lump sum, out of a total estate of $8,000, part of which is community property, and out of which sum appellee has to pay attorney's fees, costs of the suit, and with which to support herself when she is destitute and in ill health, is an abuse of discretion. Cassan v. Cassan, 27 N.M. 256, 199 P. 1010. This award the court had authority to make even though it may not have been community property. Comp. St.1929, § 68-506.

It becomes unnecessary to determine whether the court erred in finding that the appellant had exercised undue influence and duress on the appellee in compelling her to go to Mexico.

For the reasons stated, finding no error, the judgment of the district court is affirmed. It is so ordered.

SADLER and BRICE, JJ., concur.

HUDSPETH, Chief Justice (concurring in part and dissenting in part).

I am in full accord with the holding of the majority that a probate judge has authority to perform the marriage ceremony, but am not able to concur in the affirmance of the judgment awarding $4,000 to appellee and her attorneys, nor in the ruling on the plea of estoppel.

A satisfactory solution of the divorce problem has not yet been found. Mr. Justice Swift, after administering the English divorce laws for seventeen years, lately pronounced them wicked and cruel. The Russians, at the other extreme, found their too liberal divorce laws unsatisfactory. Our own Legislature only a few years ago added "incompatibility" to the eight grounds for divorce theretofore existing (Laws 1933, c. 54). This is one of the grounds for divorce in Mexico. See Bethune v. Bethune (Ark.) 94 S.W.(2d) 1043, 105 A.L.R. 814. The main difference between voluntary divorces granted to residents of Mexico and divorces granted on the grounds of incompatibility under our statute is that the latter is a home product. It is in the province of the Legislature to make the law and establish the public policy with reference to divorce. The Catholic Chancellor who does not believe in divorce may assuage his conscience with the thought that if he carries out the will of the Legislature he will have performed his full duty under his oath of office. It is, I believe, generally conceded that if a judge permits his decision to be colored by his personal predilections or prejudices against a cause, a law, or a litigant, the result is likely to lend support to those who charge the courts with usurping the powers of the legislative branch of the government. Such seems to have been the case here. On no other theory can I reconcile the award of $4,000—one-half of

appellant's property—to appellee, who resided with him less than a year. Able counsel for the appellee in her complaint pictured the defendant as a brute, guilty of high crimes and misdemeanors. If guilty, he richly deserves punishment, but such punishment should come after conviction in a criminal court. It may be remarked, however, that two of the allegations of the complaint investigated, one charging that appellee was coerced into appearing in the Mexican court and consenting to the decree, and the other, that all the property was community property, proved to be without verity. But the learned chancellor evidently felt strongly on the subject of the allegations—remarked: "Considering the conduct of the defendant"—and apparently permitted his feelings to enter into the award to appellee. The recited facts in the majority opinion alone are sufficient to discredit the charge of coercion. The court, at the close of the final hearing, said: "The Plaintiff has introduced no proof to controvert the testimony of the Defendant, further than that that has been elicited on cross examination, and the Court will amplify to this extent in sustaining this motion of Defendant permitting them to put on this proof; it amounts to this, all before judgment, to permit the Defendant to allege that this was separate estate, and to submit proof in that particular."

The following are from the findings of fact requested by the appellee:

"V. That at the time of the marriage of plaintiff and defendant, the defendant was the owner of the following described real estate, situate in the City of Tucumcari, County of Quay, State of New Mexico, to-wit:

"Lots One (1) and Two (2) in Block One (1) of the McGee Second Addition to the town, now City, of Tucumcari, New Mexico. Lots One (1) to Six (6) in Block One (1) of the Barnes Addition to the town, now City, of Tucumcari, New Mexico. Adopted. Harry L. Patton, Judge.

"VI. Defendant was further the owner of certain personal property consisting of an automobile and of household furniture and camp equipment, he being then engaged in the occupation of a Tourist Camp in said City of Tucumcari, New Mexico. Adopted, Harry L. Patton, Judge.

"VII. That the reasonable value of the property so owned by the defendant is the sum of $8,000.00, exclusive of indebtedness thereon; and that defendant owned a considerable portion of said property at the time of the marriage of the parties hereto, but that the earnings from the marriage community have gone into, and have increased the value of said property, and that certain portion thereof is now community property. Adopted. Harry L. Patton, Judge.

"VIII. That the defendant is a strong, well and able bodied man, capable of earning a good support for himself and all who are dependent upon him, including the plaintiff. Refused. Harry L. Patton, Judge.

"IX. That the plaintiff is untrained and unskilled in any particular line of employ-

ment and is unable to earn for herself the reasonable or respectable living and has for a long time been dependent upon her relatives for her support. Refused, Harry L. Patton, Judge."

The appellant testified that there was no community property, testimony which, of course, the chancellor was at liberty to disbelieve, but the appelleee, the only other witness on this point, only claimed that the receipts of the business were $50 a week, and stated that she did not know what was paid to the help. After the overhead charges of the business and the family expenses were deducted [In re Winston's Will (Winston v. Fitch), 40 N.M. 348, 59 P. (2d) 904] and a reasonable amount allowed for the "rents, issues and profits" of the separate property on which the business was conducted—which adhere to the separate estate under our statute (Comp.Stat.1929, § 68-303)—taking into consideration that considerable money was spent by the parties in travel, there was necessarily very little, if anything, left out of the earnings of the community.

If the unsupported allegations of the complaint were sufficient to satisfy the divorce laws and the third party to the suit referred to in the opinion of the majority—the state—they certainly were not sufficient to meet the constitutional guaranties affecting criminal trials.

"It would not be just to convict a defendant by reason of a judgment obtained against him civilly by a mere preponderance of evidence." 15 R.C.L. 1004.

The taking of the appellant's property for alleged crimes would not be unlike the procedure inveighed against by Mr. Justice Field in the case of Windsor v. McVeigh, 93 U.S. 274, 280, 23 L.Ed. 914 (quoting Mr. Justice Story in the case of Bradstreet v. Neptune Ins. Co., Fed.Cas.No.1,793, 3 Sumn. 600, 601) as follows: "'It is a rule,' said the learned judge, 'founded in the first principles of natural justice, that a party shall have an opportunity to be heard in his defence before his property is condemned, and that charges on which the condemnation is sought shall be specific, determinate, and clear. If a seizure is made and condemnation is passed without the allegation of any specific cause of forfeiture or offence, and without any public notice of the proceedings, so that the parties in interest have no opportunity of appearing and making a defence, the sentence is not so much a judicial sentence as an arbitrary sovereign edict."

Aside from the appellant, other parties are concerned. The hands of three women have touched funds involved in this cause, viz.: The first wife of appellant, who labored with him for a dozen years in the accumulation of the property, and died. Her children survive. The childless second wife, the appellee, who resided with appellant for less than a year, and who is now a party to this, the third divorce proceeding filed for the dissolution of this marriage—the first complaint having been filed February 7, 1933, five months and two days after the marriage. The third wife, who married appellant after

the Mexican divorce was granted, and who brought into the community some hundreds of dollars which went into betterments of the property. Appellee's counsel magnanimously stated, "We are perfectly willing that she have the $450," but the matter was overlooked in the drawing of the final decree and a lien fixed on all appellant's property in favor of the appellee.

If I do not mistake the meaning of the opinion of the court, the majority are in accord with the view that the alleged crimes should be given no weight in determining the amount of alimony. The basis of the court's rule affirming the award of $4,000 is not clearly stated. Reference is made to the illness and destitution of appellee, but the refusal of the chancellor to make requested finding IX, quoted above, indicates that he at least has misgivings as to these claims, having seen and heard appellee, and possibly thought these allegations were as wanting in verity as others more thoroughly investigated. If she had no property at the time of the trial, she was in no worse condition in that regard than when she married appellant. As pointed out in the majority opinion, the court's decision is setting a precedent. No doubt the same rule will apply to the rich as well as to this ignorant, ill-advised man with a capital of $8,000. It seems that a man may expect a decree in favor of the wife who has lived with him a year giving her one-half of his separate estate, whatever that may amount to, to be upheld in this jurisdiction. And if the feminist view, that the surviving husband should regard half of the community property on the death of his wife as a trust fund descending to her children, prevails in the minds of the court, then he may expect a decree giving to his helpmate of one year all of his separate property to be affirmed by this court. That is what the man in the street has come to call "the alimony racket." This allowance of alimony appears clearly to be an abuse of discretion.

Perhaps it will be well to take up the question of estoppel where the majority left off in the quotation from Ellis v. Ellis, 55 Minn. 401, 56 N.W. 1056, 1058, 23 L.R.A. 287, 43 Am.St.Rep. 514. That court held in that case that in the third class of cases, i. e., "* * * in proceedings between the parties when both voluntarily appeared in the action in which the divorce was granted, and consented to the jurisdiction, or that the court might determine the facts on which the jurisdiction depended," that the determination could not be contradicted. The court said: "But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: 'It is true that by a false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury.' Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the

judgment they procured that court to render."

In Curry v. Curry, 65 App.D.C. 47, 79 F. (2d) 172, 174, a case in which the court found that at the time the Nevada divorce was granted on appearance of both parties in that jurisdiction they were in reality residents of the District of Columbia, the Court of Appeals said:

"Where a party litigant has invoked the jurisdiction of a court, and the other party has voluntarily appeared and submitted thereto, it is not consonant with ordinary conceptions of justice for another court to countenance an attempt to repudiate that jurisdiction, particularly when such attempt involves considerable sums of money expended, and the unsettlement of domestic relations created under color of the judgment. Loud v. Loud, 129 Mass. 14; Chapman v. Chapman, 224 Mass. 427, 113 N.E. 359, L.R.A.1916F, 528; Parmelee v. Hutchins, 238 Mass. 561, 131 N.E. 443; Kaufman v. Kaufman, 177 App.Div. 162, 163 N.Y.S. 566; Kelly v. Kelly, 118 Va. 376, 87 S.E. 567; Harding v. Harding, 198 U.S. 317, 25 S.Ct. 679, 49 L.Ed. 1066.

"And, of course, this salutory principle is of general application, not confined to the active parties in matters of divorce, as in the cases above cited, for it can never lie with a litigant either by passive consent, or by affirmative action, to lead a court to find a fact justified and fit to be carried into judgment, and then to contend in another court that the same fact at the same time and within his own knowledge, was otherwise and competent to support a contrary judgment.

"For a consent decree, within the purview of the pleadings and the scope of the issues, is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. 'A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree.' Nashville, etc., Railway Company v. United States, 113 U.S. 261, 266, 5 S.Ct. 460, 462, 28 L.Ed. 971. And so, even where the consent decree is of an interlocutory nature. In re Metropolitan Railway Receivership [In re Reisenberg] 208 U.S. 90, 28 S. Ct. 219, 52 L.Ed. 403; Parish v. McGowan, 39 App.D.C. 184, 201."

See, also, the Restatement of Conflicts of Law, §§ 111, 112; Freeman on Judgments (5th Ed.) par. 1438; Annotation, 105 A.L.R. 817.

For the reasons stated, I dissent.

BICKLEY, Justice (concurring in part and otherwise dissenting).

I am in accord with the holding that a probate judge had authority to perform a marriage ceremony.

I think the award of alimony was excessive, but from the way the case was presented to the trial court, appellant is not entitled to relief.

I am unable to subscribe to the majority view that a party may practice a fraud on the courts of this state, then go into the courts of a neighboring Republic and there practice a fraud upon its courts,

and having enjoyed the fruits of her conduct, return to her own repudiated courts and find sanctuary for a plea to be allowed to profit by her own wrong. I doubt that the trial court committed itself to any such unusual doctrine.

As appraised by the majority opinion, the trial court found on request of appellee that appellant had exercised undue influence and duress on the appellee in compelling her to go to Mexico. The majority say it is unnecessary to pass on the correctness of this finding. I think it should have been passed on. This writer early in consideration of this case declared in conference that if this finding is sustained by substantial evidence, there would be nothing to appellant's claim that appellee is estopped to challenge the Mexican decree. I am authorized to say that a majority of the court think such finding is not supported by substantial evidence. That the trial court and appellee considered this finding material and vital is manifest. There is little to suggest that without it the decree complained of would have been rendered.

I think it proper to set forth some further reasons in explanation of my dissent.

It is urged that public policy requires that a decree of divorce entered without jurisdiction should be vacated. The argument would have much force if plaintiff was trying to sustain the status of wife to the defendant. It is for the purpose of sustaining the marital relations of the parties which impels the courts to say that for the protection of society the state is interested in the regularity of divorce proceedings. In the case at bar, plaintiff does not seek to sustain the marriage status, but seeks to further destroy it, and where there are no children involved, the state has no interest in the question whether the plaintiff accomplishes the termination of the marriage status through a court of her domicile or through courts of some other jurisdiction. See McGraw v. McGraw, 48 R.I. 426, 138 A. 188. When courts set aside or disregard decrees invalid because obtained by collusion or fraud, it is not out of regard to the parties concerned but from motives of public policy, and it should appear that the party moving is not acting merely for a mercenary purpose.

In Todd v. Rhodes, 108 Kan. 64, 193 P. 894, 896, 16 A.L.R. 423, the court said: "The motive for the assault upon the decree may well be a determining factor in case of doubt."

It is suggested that the plaintiff, in addition to her mercenary motive of securing alimony, had a right to invoke the equity jurisdiction of the courts of this state to procure a valid divorce. The divorce she had obtained in Mexico was valid in Mexico until set aside. She should have been relegated to a direct attack upon the judgment in the court which rendered it.

It is said that the public has an interest in the proper maintenance of the marriage

relation, and public policy forbids that the parties shall agree to its dissolution, or shall enter into any collusion to bring about that result. As Mr. Chief Justice HUDSPETH says, a satisfactory solution of the divorce problem has not yet been found.

Mr. Nelson, in his work on Divorce & Separation, at § 289, says: "Courts often comment upon the folly of refusing divorce to parties where they are irreconcilable and so alienated that a reunion will not take place, and the denial of divorce will cast them upon the world, in the dangerous position of husbandless wives, and wifeless husbands; and if the court had the discretionary power that courts of equity have in regard to other matters relating to kindred rights, it would be proper to grant a divorce. But in the absence of statutory permission, a divorce will not be granted because the parties are unable to live together."

Our 1933 Legislature molded the public policy in this state along the broad and liberal lines suggested by Mr. Nelson when there was imported into our statute a new ground for divorce, namely, "incompatibility." If the parties in good faith conclude that they are incompatible and cannot continue to live together as husband and wife, then, without the existence of any of the other grounds of divorce, the court may dissolve the marriage. I do not criticize this legislative policy. There are many who think it a wise one. There are many who hold to the theory that the state has as much interest to see an unhappy marriage terminated as it has to see a happy one endure. I agree with Mr. Chief Justice HUDSPETH that since the importation into our law of "incompatibility" as a ground for divorce, the so-called interest of society in preserving the marriage relation by making divorces difficult to obtain has very largely disappeared.

Since the plaintiff did not seek to restore the situation to the status quo ante, it is difficult to see how public policy is promoted by destroying the marriage relation existing between defendant and the woman whom he married after plaintiff had acquiesced for eight months in the Mexican decree, thus entangling her in a web of intolerable difficulties woven with the assistance of the unclean hands of plaintiff. This thought has found expression elsewhere.

The Georgia Supreme Court in McConnell v. McConnell, 135 Ga. 828, 70 S.E. 647, 649, refused to countenance the conduct of a husband who permitted his wife to obtain a decree of divorce without objection and without bringing to the attention of the court the fact that he did not reside in the county presided over by the superior court granting the decree. The Supreme Court called attention to the fact that the husband waited for nine months to bring a suit to set aside the decree, and went on to say: "In McNeil v. McNeil, 170 F. 289, 292, 95 C.C.A. 485, 488, the court said: 'The safety of so-

ciety imperatively demands that one who seeks to overthrow an apparently valid decree of divorce should proceed with the utmost promptness upon discovery of the facts claimed to show its invalidity. It must be apprehended that a man who has secured a decree of divorce, valid on its face, may endeavor to marry again, thus entangling some innocent woman in most intolerable difficulties, should the divorce be afterwards annulled. In such a case, one who seeks the aid of equity should, in limine, make it appear that she has proceeded in good faith and with reasonable diligence.' In this connection, see 2 Black on Judgments, §§ 929, 930; 2 Nelson on Divorce & Sep. §§ 1055, 1056; Bledsoe v. Seaman, 77 Kan. 679, 95 P. 576."

In Poston v. Delfelder, 39 Wyo. 163, 270 P. 1068, 1071, 273 P. 176, the court recognized the principle that jurisdiction of the subbject-matter cannot be conferred by consent, nevertheless deciding that a party consenting to a decree could not without claim of fraud or mistake have a decree vacated. The court quoted a note in 3 A.L.R. 535, as follows: "The party at whose instance a judgment is rendered is not entitled, in a collateral proceeding, to contend that the judgment is invalid. Neither want of jurisdiction, defect of procedure, or any other ground of invalidity can be availed of collaterally, by the party who is responsible for the existence of the judgment."

The court said that the principle on which the cases supporting this declaration rest is not technically the doctrine of estoppel, but that it is unimportant "whether the principle applied be described as estoppel, quasi estoppel, waiver, ratification, election, or as a requirement of consistency in conduct."

The Court of Appeals of New York in Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193, 194, 93 Am.St.Rep. 631, thought if it were important to find an element making the conduct of the party truly "estoppel," it could be found in some cases, saying: "If Starbuck had gone to that state and had contracted a marriage with a woman there, who acted upon the faith of the decree that the plaintiff had obtained, it may be that a question of estoppel would have been presented. Moore v. Hegeman, 92 N.Y. 521, 44 Am.Rep. 408. But we do not deem it necessary to determine that question at this time. We prefer to rest our decision upon the principle that the plaintiff, having invoked the jurisdiction of the Massachusetts court and submitted herself thereto, cannot now be heard to question the validity of its decree."

The court also said: "There are a number of cases in which the courts of this state have refused to recognize the validity of divorces obtained in other states upon grounds insufficient for that purpose in this state, when the defendant resided here and was not personally served with process and did not appear in the action. Matter of Kimball, 155 N.Y. 62, 49 N.E. 331; Williams v. Williams, 130 N.Y. 193,

29 N.E. 98, 14 L.R.A. 220, 27 Am.St.Rep. 517; De Meli v. De Meli, 120 N.Y. 485, 24 N.E. 996, 17 Am.St.Rep. 652; Cross v. Cross, 108 N.Y. 628, 15 N.E. 333; O'Dea v. O'Dea, 101 N.Y. 23, 4 N.E. 110. But in none of these cases did the party procuring the decree seek a benefit by having it held invalid. A party cannot avail himself of a defense or of a right to recover by means of an invalid decree or judgment obtained by him; but, on the other hand, he may not be heard to impeach a decree or judgment which he himself has procured to be entered in his own favor."

The foregoing decision was followed by the New York Supreme Court in Weber v. Weber (1929) 135 Misc. 717, 238 N.Y.S. 333, 335. The proceedings were similar to those in the case at bar. The court said: "Plaintiff contends and alleges in his complaint that the conduct of the parties constitutes a fraud upon the people of the state of New York, and upon its laws, because neither of the parties left the state of New York to obtain such decree. It may possibly be that such a fraud was committed, although I do not decide that question here, but it does not lie in the mouth of either of them to now cry 'fraud' when each of them was a party to such alleged fraud. It is a general fundamental maxim of the common law that no one shall be permitted to profit by his own fraud, to take advantage of his own wrong, to found any claim upon his own iniquity, or to acquire property by his own crime. Riggs v. Palmer, 115 N.Y. 506, 22 N.E. 188, 5 L.R.A. 340, 12 Am.St.Rep. 819; Kelsey v. Kelsey, 204 App.Div. 116, 197 N.Y.S. 371, affirmed 237 N.Y. 520, 143 N.E. 726. The plaintiff having appeared in the Mexican court proceeding, and later accepted benefits under the decree granted there, should not be permitted to come into a court of equity and endeavor to profit by his own wrong. The parties, having invoked the jurisdiction of the Mexican court, cannot now be heard to attack the decree of that court. See Starbuck v. Starbuck, 173 N.Y. 503, 66 N.E. 193, 93 Am.St.Rep. 631, and cases there cited."

A decision though on dissimilar facts is in principle applicable is Loud v. Loud, 129 Mass. 14. In that case a husband who had been married and was domiciled in Massachusetts left his wife there and went to Maine, where he straightway filed a libel for divorce. The wife appeared and later withdrew her opposition on being paid a substantial sum of money. A divorce was granted. The husband married again and the first wife brought against him a libel for divorce grounded on the cohabitation incident in this second marriage. It was said by Chief Justice Gray: "The conclusive answer to this libel is, that the wife not only appeared in the suit brought by the husband, but that she afterwards executed a release, reciting the divorce therein obtained by him, and for a pecuniary consideration discharging all her claims upon him or his estate. Having done this, she cannot treat his subsequent marriage and cohabitation

with another woman as a violation of his marital obligations to herself. The defence is allowed, not upon the ground of a strict estoppel, but because her own conduct amounts to a connivance at, or acquiescence in, his subsequent marriage."

In Carson v. Carson, 141 Okl. 106, 283 P. 1015, the court decided: "Party procuring divorce decree under verified petition setting forth jurisdictional facts respecting residence and accepting benefits thereunder is estopped from challenging court's jurisdiction."

The court quoted from the Ellis Case, cited by Mr. Chief Justice HUDSPETH in his dissenting opinion herein, as follows: "One reason why they ought not to be permitted, by going into another state and procuring a divorce, to escape accountability to the laws of their state, is that their act is a fraud upon the state, and an attempt to evade its laws, to which it in no wise consents, and it may therefore complain. But the parties do consent, and why should they be heard to complain of the consequences to them of what they have done? Why should they be permitted to escape those consequences by saying: 'It is true that by a false oath made by one of us, and connived at by the other, we committed a fraud in the Wisconsin court, and induced it to take cognizance of the case; but now we ask to avoid its judgment by proof of our fraud and perjury or subornation of perjury.' Because we do not think it can be done the parties must, so far as their individual interests are concerned, abide by the judgment they procured that court to render."

In the case at bar it appears that the plaintiff and defendant left Tucumcari and drove to El Paso, Tex., and thence to Juarez, Mex., with the intention of securing a divorce by the Mexican courts. They carried their marriage license along with them to be introduced in proof as part of their case. They set out upon this enterprise with an intention of practicing a fraud upon the courts of this state and accomplished that purpose. Why should one of the parties, after obtaining the benefits of the decree of the Mexican court secured by her connivance, and having returned to this state and acquiesced in that decree for eight months, during which interval her erstwhile spouse had remarried, be permitted to come into a court of equity and say: "It is true that I have practiced a fraud upon your court by going to Mexico and there practicing a fraud upon that court through false statements inducing it to take cognizance of the case and grant a divorce, but I forgot to ask for alimony, and although the defendant has since remarried, I ask you to disregard two of your controlling maxims,—that he who comes into equity must come in with clean hands, and that one will not be permitted to secure an advantage arising from his own wrong,—and give me a decree of divorce with alimony." I agree with Mr. Freeman's text, cited, that, "such a practice cannot be tolerated." Therefore, I dissent.

69 P.(2d) 924

MORRIS et al. v. STATE BY STATE TAX COMMISSION.

No. 4209.

Supreme Court of New Mexico.

May 28, 1937.

A. M. Fernandez, Special Tax Atty., of Santa Fe, for appellant.

Harris K. Lyle, of Gallup, and Rodey & Dickason, of Albuquerque, for appellees.

BRICE, Justice.

This special proceeding was brought under sections 141-306, 141-307, New Mexico Statutes 1929. The first of these sections provides that: "If the treasurer shall discover any errors of other kinds [not clerical errors] in said assessment roll by which any injustice would be done to any taxpayer, it shall be his duty to report the same to the district attorney; and any taxpayer complaining of any such injustice may submit

his complaint to the district attorney, who shall promptly forward to the state tax commission a copy of such complaint. Such complaint, filed by the district attorney, shall be acted upon by the district court without cost to the taxpayer injuriously affected. Should the district attorney refuse to permit the filing of any such complaint without cost to the taxpayer such taxpayer may proceed thereon in his own name and at his own expense."

Provision is made by section 141-307 for notice to the State Tax Commission before a hearing is set on the complaint, and the Tax Commission is authorized to appear and represent the taxing authorities in such hearings.

The amended petition is styled "Amended Petition for the Correction of the Tax Roll." It alleges in substance that the petitioners are the owners of real estate in block 44 of the town of Gallup; that for the year 1934 such property was assessed at certain values named in the petition; that the assessed values are based upon that of $140 a front foot plus one-third for corner lots, less 10 per cent. reduction made in 1932; that "said assessments are, and each of them is, excessive and in excess of the fair and reasonable value of said land and unjust to the taxpayers, insofar as the basic valuation of $140 a front foot exceeds the sum of $100 a front foot."

Paragraph 4 of the amended petition is as follows: "That on or about the 7th day of May, 1934, your petitioners and all of them duly protested the aforesaid assessment to the County Board of Equalization, and that Board declined to pass upon the question, or to grant the taxpayers any relief. That on or about the 13th day of July, 1934, your petitioners and all of them duly protested the aforesaid assessments and the action of the County Board of Equalization to the State Tax Commission; that a record of the said protest and the evidence given therein was taken by the State Tax Commission at said time and place, but that the State Tax Commission never ruled on said protest, and on information and belief petitioners allege that the said Tax Commission mislaid the record of said protest, and have never passed upon the question of the reasonable and true value of the property involved, and that by the failure of the County Board of Equalization and of the State Tax Commission to hear the protest and to rule thereon in accordance with the evidence, your petitioners and all of them have been deprived of property without due process of law."

The petitioners state: "That your petitioners are lawfully entitled to have the aforesaid assessments reduced in accordance with the following table." There follows a tabulation in which the assessment as made is shown, and under "New Assessment" the assessment, as petitioners contend is correct, is set out.

The prayer is as follows: "Wherefore, your petitioners pray that this Honorable Court shall be pleased to make its order to correct the 1934 Tax Rolls of McKinley County, State of New Mexico, on the pages, lines, and in the amounts as alleged in Par-

agraph V hereof, and that petitioners may have such other and further relief as may be meet and proper in the premises."

To this amended petition a demurrer was directed, upon the ground that the amended petition fails to state facts sufficient to constitute a cause of action in certain particulars mentioned in the opinion, which was overruled and the case tried to the court.

From the facts proved the court found: "That the allegations of the Amended Petition are, and each of them is, true and correct, and the Court adopts the same as the Findings of Fact in this matter."

The court entered judgment reassessing the property at the value which appellees alleged "was just and correct."

Sections 141-306, 141-307, N.M.Sts.1929, were originally sections 307 and 308, respectively, of chapter 133, N.M.Session Laws of 1921, which were amended by sections 19 and 20, respectively, of chapter 102, N.M.Sess.Laws 1925, but not in reference to the powers and jurisdiction conferred on the district court by the original act. For the purposes of this case the decisions of this court construing the original act are applicable.

We have held that these statutes do not authorize the court to set aside assessments duly made by the assessing authorities; nor do they authorize the district court to assess property. This is settled by Bond-Dillon Co. v. Matson, 27 N.M. 85, 196 P. 323, 326, First State Bank of Bernalillo v. State, 27 N.M. 78, 196 P. 743, 745, and In re Blatt (State v. Blatt), 41 N.M. 269, 67 P.(2d) 293. In the First State Bank Case we said: "If the term 'injustice' is used in its ordinary sense, the taxpayer could by presenting his petition to the court and satisfying the judge that an injustice had been done him set at naught the whole system of assessment and collection of taxes and place in the hands of the courts the final determination of all questions of fact, law, and policy regarding taxation. We do not believe that the legislature by this section intended to thus turn over to the courts the power and authority to pass upon all these questions."

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

The petition shows upon its face that the sole object of this proceeding is to obtain a reassessment of appellee's property, not to correct "errors" in the assessment as made.

We might well close this opinion here; but appellees urge that, by paragraph 6 of their petition, which we have copied in full herein, it is charged that there was in fact no legal assessment; that they have been deprived of property without due process of law. The statute under which this proceeding is brought is for the correction of errors in assessments; and it gives the court no authority to cancel or hold assessments invalid upon equitable grounds or to reassess property.

The case of South Spring Ranch & Cattle Co. v. State Board of Equalization, 18 N.M. 531, 139 P. 159, cited by appellees, was reviewed by this court in the Bond-Dillon Co. Case, and First State Bank Case, supra, in which it was held that the first-mentioned case is not authority for appellee's contention. That case was a proceeding by prohibition in which the jurisdiction of the State Tax Commission was called in question and upheld. State v. Superior Lumber & Mill Co., 23 N.M. 606, 170 P. 58, was an action by the State to recover delinquent taxes; the defense was that there was an excessive valuation, which was admitted by the demurrer of the State. It was not a proceeding under the statute to correct errors.

State Tax Commission v. Dick et al., 28 N.M. 218, 210 P. 392, was a proceeding brought under the statute in question before amendment. It is stated in this case "As before stated, no ground for equitable relief is alleged, and the theory upon which the court acted was that the valuations in the assessments were excessive, and should be reduced." That was not an equitable action, and the statement was inadvertently made. The statutory proceeding was never intended as a substitute for actions to procure equitable relief against illegal, fraudulent, discriminatory, or arbitrary assessments. This special proceeding is summary and has no provision for process or parties except notice to the State Tax Commission, and that it "may appear * * * and represent the taxing authorities at such hearing." If appellees have a remedy by reason of the facts alleged, it is not in this proceeding.

The case of Maxwell Land Grant Co. v. Jones, County Treasurer, 28 N.M. 427, 213 P. 1034, and W. S. Land & Cattle Co. v. McBridge, 28 N.M. 437, 214 P. 576, 579, were actions to enjoin the collection of taxes upon equitable grounds. We stated in the last-mentioned case: "It is only where valuations have been increased by some taxing official without actual notice to the taxpayer to a sum which exceeds the actual value of the property, or against whom a discrimination has occurred, that he may resort to a court of equity."

State v. Persons, etc., 29 N.M. 654, 226 P. 886, 889, was a proceeding brought by the district attorney to recover judgment for all delinquent taxes. Appellant defended on the ground that his property had been

assessed in excess of its actual cash value, which the district court held to be true, though held that this was not ground for reduction or cancellation of the assessments. This court stated: "There being no lack of notice to the taxpayer of the successive steps in the valuation of its property, and no fraud or other equitable ground of relief present in this case, it would seem that the point has been conclusively adjudicated adversely to appellant, unless it can derive aid from the provisions of chapter 133 of the Session Laws of 1921. Without such aid, overvaluation alone is not sufficient to entitle the taxpayer to relief where he had notice of the valuation so fixed, and had been given a hearing or an opportunity to be heard before the taxing officials; but such relief can be obtained in the courts only where valuations have been increased by some taxing official without notice to the taxpayer to a sum beyond the actual value, or where some other ground of equitable relief is present."

To question assessments upon equitable or constitutional grounds, resort must be had to the usual civil action in court in the absence of special proceedings enacted for such purpose.

The judgment of the district court will be reversed, with instructions to dismiss the proceeding.

It is so ordered.

HUDSPETH, C. J., and SADLER and ZINN, JJ., concur.

BICKLEY, J., did not participate.

69 P.(2d) 927

ANIMAS CONSOLIDATED MINES CO. et al. v. FRAZIER et al.

No. 4222.

Supreme Court of New Mexico.

June 7, 1937.

Rehearing Denied July 16, 1937.

E. L. Medler, of Hot Springs, and A.W. Pollard, of Deming, for appellants.

Edward D. Tittmann, of Hillsboro, for appellees.

BRICE, *Justice.*

A suit was brought by the appellees against the John I. Hallett Construction Company (hereinafter called "construction company") to recover royalties, which it was alleged had accrued under a lease of mining properties. The construction company filed an affidavit, as provided by section 1 of chapter 156, N.M.Laws 1931, averring that it had in its possession $1,908.94 which it owed to the owner of the mining property as royalties; and, further, that in addition to the appellees the royalties were also claimed by appellants. The court entered an order which provided that the construction company should deposit the royalty money in court; that the appellants each appear within twenty days from the date of service upon them of a true copy of the order thus made, and "maintain or relinquish their claim, if any, against the said defendant, John I. Hallett Construction Company"; and, further, that unless they so appeared and maintained their claim, or claims, against the construction company within twenty days from the date of service of a copy of the order, "that they or such one of them as fails to appear shall be barred of all or any claim in respect to the subject of this action against the defendant herein."

On the 6th day of July, 1935, appellees (plaintiffs below) filed in the cause a motion for default judgment against the appellants, and on the 17th day of July, 1935, there was filed and entered in the cause a judgment dated the 16th day of July, 1935, reciting the fact of the filing of the motion for judgment, the proper service of copies of the order of the court on the appellants and their default; and a finding that appellant Fanning had no interest in such royalties, they having accrued prior to the sale of an interest in the property to him. That the appellees were entitled to the royalties, and the impleaded parties had no interest therein. The clerk was directed to pay such royalties to the appellees, which was done.

On the 17th day of September, 1935, a motion, supported by affidavits, to set aside the judgment for irregularities was filed al-

leging, among other things, the fact that on the morning of the 16th day of July, 1935, an answer was filed in behalf of appellants, and appellees' attorney, Tittmann, personally notified thereof and a copy mailed to him. The judgment was dated the day that appellants' answer was filed, but was not filed or entered until the following day. The record does not disclose whether the signing of the judgment or the filing of the answer was first in time.

We held in the case of Ortega v. Vigil, 22 N.M. 18, 158 P. 487, that an answer filed after the statutory time for filing had expired, and before judgment by default had been entered by the court, is not a nullity and so long as the answer remains on file and undisposed of the plaintiff in the cause is not entitled to judgment by default, and the rendition of such a judgment constitutes an irregularity for which it may be set aside upon motion filed at any time within one year, as provided by section 105-846, N.M.Comp.St.1929.

The question, therefore, is whether the filing and entry of the judgment after the answer was filed was such irregularity as would authorize the setting aside of the judgment. We think this is settled by State v. Capital City Bank, 31 N.M. 430, 246 P. 899, in which we held that a judgment does not become complete and effective until "a proper record is made" as provided by section 34-339, N.M.Comp.St.1929, which is as follows: "* * * the journal or record of the court shall show all proceedings of the court." Similar statutes were cited from Iowa, Ohio, Kentucky, and Washington, and cases from the courts of these states, which hold that such judgments are not effective until entered in the journal of the court. The cases cited are: Case v. Plato, 54 Iowa, 64, 6 N.W. 128; Coe v. Erb, 59 Ohio St. 259, 52 N.E. 640, 69 Am. St.Rep. 764; Smith v. Smith, 103 Ohio St. 391, 133 N.E. 792; Ewell v. Jackson, 129 Ky. 214, 110 S.W. 860; State v. Brown, 31 Wash. 397, 72 P. 86, 62 L.R.A. 974. The court also cited 1 Freeman on Judgments (5th Ed.) § 49.

The judgment in question did not become effective until one day after the filing of the answer and as, according to the Ortega Case, supra, its entry was irregular and the application to set it aside for irregularity should have been sustained unless some disposition was made of the answer.

Judge Harry Owen, who tried this case in the district court, is no longer the district judge, and as the case will have to be reversed, we think the judgment should be set aside and the case regularly heard.

The cause is reversed and remanded with instructions to set aside the judgment and proceed with the trial of the cause.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

69 P.(2d) 929

HARTMAN v. ELIAS.

No. 4206.

Supreme Court of New Mexico.

June 21, 1937.

H. O. Waggoner and George C. Taylor, both of Albuquerque, for appellant.

J. S. Vaught, of Albuquerque, and G. O. Caldwell, of Mountainair, for appellee.

BICKLEY, Justice.

Defendant conducted a store at Mountainair under the name of Leader Store and employed one L. Heyman to manage the business. Plaintiff sued defendant on account of six loans of cash made to manager Heyman for defendant's use. Defendant denied that the said manager, L. Heyman, had authority

to borrow money for the defendant's business and asserted that plaintiff knew of such lack of authority. The answer alleged that plaintiff was an agent of the United States government in charge of the crop and seed loan department at Mountainair and under the rules of said department could not speculate or deal in beans; that the plaintiff and said L. Heyman operating under defendant's trade-name, unknown to the defendant, engaged in a course of transactions between themselves involving beans, money, and general merchandise and that they failed and refused to account to defendant in regard to same; that the items sued on were part of a series and that the account was still open, unsettled, and unbalanced; that defendant believed that if the accounts were settled and balanced, it would appear that plaintiff was indebted to defendant and prayed that an accounting be had between plaintiff and defendant; and that upon a balance being struck a judgment for any balance be rendered. Plaintiff replied by way of denials and admissions.

Upon a survey of the pleadings and motion of plaintiff for a bill of particulars filed prior to answer, we find no error in overruling the motion and denial of an accounting. The prayer for an accounting was renewed at the close of plaintiff's case and appellant says in his brief that the failure of the court to order an accounting at that stage of the proceeding is "one of the important assignments of error, in fact perhaps the most important," and invites our consideration of the entire transcript of testimony in support thereof. The moving party is not entitled to an accounting as of course. 1 C.J.S., Accounting, p. 680. Whether or not equity will assume jurisdiction to order an accounting in a particular case rests within the sound discretion of the court. 1 Am.Jur. p. 300. We have examined the testimony carefully and are unable to say that the trial court abused its discretion in refusing to order an accounting. In reaching this conclusion, we assume that though this is an action at law the court had power to order an accounting for the purpose of discovery merely and also for discovery and relief as was sought in the case at bar.

"When discovery and relief are sought in the same action, the court, in passing on the right to discovery may consider whether the matter sought for has only a remote and indirect bearing on the cause of action or matter of defense." 9 R.C.L., Discovery, p. 165.

The trial court patiently heard a minute and grilling cross-examination of plaintiff and his principal witness, L. Heyman, the defendant's store manager, and it is manifest that the court agreed with plaintiff that much of what was elicited had no bearing on plaintiff's cause of action although the testimony was admissible for the purpose of proving that these witnesses were engaged in irregular conduct in violation of rules and regulations of the United States government controlling the conduct of its employee, the plaintiff in this action, and thereby tended to affect their credibility as witnesses. The same is true of testimony

developed to sustain the charge that the witness, L. Heyman, the discharged manager of defendant's store, was hostile to defendant. But, notwithstanding this testimony of an impeaching character, the court believed plaintiff and his witness Heyman on the issue of agency in the face of denials by defendant as a witness; the court believed from the testimony that the money had been borrowed from plaintiff by manager Heyman upon authority of his principal, the defendant, and that no part of it had been repaid.

The defendant produced as a witness in his behalf an expert and accredited accountant who had gone over all the available records, but was unable to show anything due defendant from plaintiff. It is true this witness expressed the belief that there were missing records which if produced might show a different state of facts. But the witness Heyman testified that he left all the records reflecting the various transactions in the store when he was discharged therefrom, defendant remaining in possession thereof, and the plaintiff stoutly maintained that none of the records were in his possession. He said the money transactions were simple and informal. In other similar transactions, he would lend the money to the defendant's manager and a slip in the nature of a receipt would be given him and when the money was repaid the slips or receipts would be surrendered. He said none of the records relative to the bean transactions were in his possession. The court had a right to, and apparently did, believe these witnesses on the matter of possession of the records as well as on the issue of authority of manager Heyman to borrow money.

The court undoubtedly had a right to consider convenience and expense to the parties and take into consideration the probabilities as to whether in view of the testimony before him it would be futile to order an accounting. "Equity may refuse to order an accounting when the rights of the parties cannot satisfactorily be ascertained and the true balance determined." 1 C.J.S., Accounting, p. 661. All of these considerations, as we have said, lead to the conclusion that the court did not abuse its discretion in withholding an exercise of its power to order an accounting in this particular case.

Other points do not require discussion. The evidence supports the finding of the court on the question of agency and the contention of appellant that some of the court's findings are so inconsistent with the judgment as to destroy it is without merit. Likewise we find no merit in appellant's contention that the court erred in refusing certain findings requested by him.

Finding no error in the record, the judgment is affirmed and the cause remanded for further proceedings on the supersedeas bond and otherwise as may be proper.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

69 P.(2d) 931

STATE v. PATTEN et al.
No. 4152.

Supreme Court of New Mexico.

June 21, 1937.

G. L. Reese, Jr., of Carlsbad, and O. O. Askren and Neil B. Watson, both of Roswell, for the State.

W. H. Patten, of Hobbs, and Tom W. Neal, of Lovington, for appellees.

ZINN, Justice.

From an order of the district court of the Fifth judicial district for the county of Lea, sustaining a demurrer to an information for contempt, this appeal is prosecuted.

On March 22, 1935, the district court of Lea county entered a final decree in cause No. 2212 enjoining the holding of an election in the town of Hobbs, N. M., called for the purpose of determining whether the citizens desired to change the existing town form of municipal government to the so-called commission form of municipal government in the manner provided by Comp.St.1929, c. 90, art. 38. The plaintiffs in cause No. 2212 were residents, taxpayers, and voters within the corporate limits of the municipality of Hobbs.

The injunction suit was predicated on the theory that all of the proceedings preliminary to the election and the proposed election itself would be void. Many reasons were set forth by the plaintiffs in cause No. 2212 which they claimed would make the proposed election void. The plaintiffs therein also alleged that the election was called to deprive the trustees of the town of Hobbs of their offices as such trustees.

The information in the instant case charges that immediately after the rendition of said injunction decree, the defendants in this cause (appellees here) entered into a plan to defeat the terms of the final decree by various means, though having full knowledge of the terms and conditions of the final decree, and proceeded to execute the plan and conducted a purported election. The information for contempt concludes with the allegations that each and all of the acts of the appellees were done in flagrant disrespect of the court and constituted an unwarrantable interference with the orderly and effective administration of justice and prayed that each of the appellees should be adjudged in contempt of court by reason thereof.

To this information for contempt the appellees demurred. The demurrer is based on the theory that the information in contempt does not state any cause of action against appellees for the reason that a court of equity is without jurisdiction to enjoin an election which does not involve any property rights but pertains solely to the political administration of government. It is the appellees' theory that the whole proceeding in cause No. 2212, out of which the information for contempt was issued, was void and of no force and effect. In other words, it is the claim of the appellees that if the district court had no jurisdiction to enter the original decree enjoining the conducting of the election, such decree was void, and being void—that is that there was an absolute lack of power to issue such decree—then there is no contempt in disobeying the order of the court, because the order and process of the court was void. In re Sloan, 5 N.M. 590, 25 P. 930; Ex parte Barrett, 120 Tex. 311, 37 S.W.(2d) 741; 6 R.C.L. 505.

On the general proposition of the power of a court of chancery to enjoin the holding of an election, much has been written and said by the text-writers and by courts of other jurisdictions. Notes, 33 A.L.R. 1376, 70 A.L.R. 733, and cases therein cited. (See, also, later cases 1936 Revision of A.L.R. Blue Book of Supplemental Decisions, p. 472, under 70 A.L.R. 733.) From a reading of many cases, we find that the authorities are divided on the proposition of whether courts of chancery ought to interfere by injunction to prevent the calling or holding of an election.

We believe that in New Mexico a court of equity ought to interfere if property or personal rights are affected when the suit is brought by a proper party. R.C.L. 988; City of Murray et al. v. Irvan et al., 170 Ky. 290, 185 S.W. 859; Crampton v. Zabriskie, 101 U.S. 601, 609, 25 L.Ed. 1070. We believe such a rule in this jurisdiction is sound. It may be that in jurisdictions where the distinction still exists between courts of equity and law it is a sound theory, that in the organization of courts of equity and the machinery for the exercise of the powers of such courts, that the chancellor is better circumstanced to try and determine questions of property and maintenance of civil rights and that law courts are better circumstanced for the determination of questions which might involve political or quasi political rights. We do not question the historical logic of such a rule.

However, N.M.Comp.St.1929, § 105-101, provides: "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." We are aware that we have said that this Code has not assumed to abolish the distinctions between law and equity considered as two complementary departments of our system of jurisprudence, nor to substitute any primary rights, duties, or liabilities for those imposed in either department of the law. Yet, where the

same judge is to be both chancellor and also the presiding judge in the law court and the judge having the power under the Code to administer both legal and equitable relief, it seems rather absurd to say that there may not be a case so plain that where election officials are about to hold an election which when held would be absolutely void and carrying in its wake such results as waste of public funds, inconvenience to public officials and the citizenry in general, and yet say that the chancellor, being convinced that something futile, accompanied by waste of funds, could not stop such futility. It seems absurd to say that he as chancellor would have to wait until after the event, and then as the presiding judge of the law court undo the results of the evil as far as he could. It is apparent that he could not completely undo the results of the futile election because the money would have been spent and the inconvenience have been incurred and no way to get the money back or to restore the status quo of those who had been inconvenienced and possibly damaged.

Viewing the subject-matter as we do, we arrive at the conclusion that our courts in certain cases have the power to issue injunctions to restrain the conducting of an election wherein the personal or property rights of the complainant are involved. Upon a proper showing by proper parties plaintiff (Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573) the court does not have to wait until after the election, and then undo that evil which it could have prevented by its injunction. The proper showing, however, must be determined from the facts in each individual case. It necessarily follows that the district courts of New Mexico have jurisdiction over the subject matter, to wit, the enjoining of illegal elections.

This being true, it becomes totally unnecessary to decide whether the trial court in cause No. 2212 decided the proposition presented to it erroneously. We are confronted with an entirely different question of law. The proposition is whether or not the court in cause No. 2212, having jurisdiction of the parties and the subject-matter generally, was so devoid of jurisdiction of the particular subject-matter to an extent that its judgment was totally void.

We stated in In re Field's Estate, 40 N.M. 423, 60 P.(2d) 945, 947: "There are three jurisdictional essentials necessary to the validity of every judgment, to wit, jurisdiction of parties, jurisdiction of the subject matter, and *power or authority to decide the particular matters presented,* Protest of Gulf Pipe Line Company, 168 Okl. 136, 32 P.(2d) 42; Windsor v. McVeigh, 93 U.S. 274, 23 L.Ed. 914, and the lack of either is fatal to the judgment, Reynolds et al. v. Stockton, 140 U. S. 254, 11 S.Ct. 773, 35 L.Ed. 464." (Italics ours.)

Each of three elements necessary to confer jurisdiction, that is, subject-matter generally, parties, and power or au-

thority to decide must be present to make a decree or judgment of a court of competent jurisdiction valid and binding so that such judgment or decree cannot be subject to collateral attack.

The test of the jurisdiction of a court is whether or not it had *power to enter upon the inquiry;* not whether its conclusion in the course of it was right or wrong. Board of Com'rs of Lake County v. Platt, 79 F. 567, 25 C.C.A. 87.

"* * * the right to adjudicate concerning the subject-matter in the given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be present; and, third, the point decided must be, in substance and effect, within the issue." Reynolds v. Stockton, 140 U.S. 254, 268, 11 S.Ct. 773, 777, 35 L.Ed. 464.

A clear distinction must be made between "Jurisdiction" and "Exercise of Jurisdiction." The authority to decide a cause at all, and not the decision rendered therein, is what makes up jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction. In order that jurisdiction may be exercised, there must be a case legally before the court, and a hearing, as well as a determination. 15 C.J. 729.

Every presumption not inconsistent with the record is to be indulged in favor of the jurisdiction of courts having unlimited jurisdiction, and their judgments, however erroneous, cannot be questioned when attacked collaterally, unless it be shown affirmatively that they had no jurisdiction of the case. Kempe v. Kennedy, 5 Cranch, 173, 3 L.Ed. 70; Voorhees v. Jackson ex dem. Bank of U. S., 10 Pet. 449, 9 L.Ed. 490; Ex parte Watkins, 3 Pet. 193, 7 L.Ed. 650; Grignon v. Astor, 2 How. 319, 11 L.Ed. 283; Harvey v. Tyler, 2 Wall. 328, 17 L.Ed. 871, 873.

We quote from a South Dakota decision: "It is true that jurisdiction is said to depend upon various things—for instance, upon service of process, and that the subject-matter must be one upon which the court is given authority to exercise judicial authority. But these various things upon which jurisdiction may depend do not in themselves constitute 'jurisdiction.' When parties are before the court and present to it a controversy which the court has authority to decide, a decision not necessarily correct, but appropriate to that question, is a proper exercise of judicial power or jurisdiction. So far as the jurisdiction itself is concerned, it is wholly immaterial whether the decision upon the particular question be correct or incorrect. Were it held that a court had 'jurisdiction' to render only correct decisions, then, each time it made an erroneous ruling or decision, the court would be without jurisdiction, and the ruling itself void. Such is not the law,

and it matters not what may be the particular question presented for adjudication, whether it relate to the jurisdiction of the court itself, or affects substantive rights of the parties litigating; it cannot be held that the ruling or decision itself is without jurisdiction, or is beyond the jurisdiction of the court. The decision may be erroneous, but it cannot be held to be void for want of jurisdiction." Calhoun v. Bryant, 28 S.D. 266, 271, 133 N.W. 266, 269.

In State of Rhode Island v. State of Massachusetts, 12 Pet. 657, 717, 9 L.Ed. 1233, Mr. Justice Baldwin, delivering the opinion of the majority of the Supreme Court of the United States, said: "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them; the question is, whether on the case before a court, their action is judicial or extra-judicial; with or without the authority of law, to render a judgment or decree upon the rights of the litigant parties. If the law confers the power to render a judgment or decree, then the court has jurisdiction; what shall be adjudged or decreed between the parties, and with which is the right of the case, is judicial action, by hearing and determining it."

As was said in People v. Sturtevant, 9 N.Y. 263, 59 Am.Dec. 536: "Jurisdiction does not relate to the right of the parties, as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in any one else. The case we are considering illustrates the distinction I am endeavoring to point out, as well as any supposed case would. It presents these questions: Have the plaintiffs shown a right to the relief which they seek? and has the court authority to determine whether or not they have shown such a right? A wrong determination of the question first stated is error, but can be reëxamined only on appeal. The other question is the question of jurisdiction. It is that alone with which we now have anything to do. Whether the plaintiffs are the proper persons to maintain the suit, or whether the attorney-general should have brought it, or whether the facts show a right in either to have a decree in their favor, are questions which we are not in this proceeding called upon to consider. They relate to the equity of the claim, and not to the power of the court. We are entirely satisfied that the decree of a court of equity restraining a public nuisance is not void, even though the attorney-general be not plaintiff, and though no special injury to the actual plaintiff is averred. It is quite possible that such a decree would be erroneous, perhaps even very clearly wrong, but it would not be void;

and the party who was dissatisfied with it would be compelled to seek his remedy by an appeal, and not by setting at defiance the authority of the court."

The above-quoted statements of the law point to the true line of inquiry to determine the question of jurisdiction. We are not called upon to say whether the court decided right or not in granting the injunction, but whether it became the duty of the court to decide either that it should be granted or denied. If such was its duty, then it had jurisdiction, and its decision, be it correct or erroneous, is the law of the case until it shall be reversed upon appeal; and can only be questioned upon a direct proceeding to review it, and not collaterally.

In cause No. 2212, the court had jurisdiction, as a court of equity, to enjoin the holding of an improper election. Whether the personal or property rights of the plaintiffs in said cause were in jeopardy, we need not now concern ourselves. Whether the complaint in cause No. 2212 stated facts sufficient to constitute a cause of action likewise does not concern us at this time.

We held in Acequia Del Llano v. Acequia De Las, etc., 25 N.M. 134, 179 P. 235, also in the Field's Case, that if the court had jurisdiction of the persons and subject-matter and of the particular matter sued on that the judgment entered is not void merely because the complaint failed to state facts constituting a cause of action.

If the court ruled erroneously, it was nevertheless a judgment, and until reversed, such judgment cannot be disregarded.

Our district courts are courts of general jurisdiction. The defendants were properly in court. The court rendered judgment. Here we find all the usual accompaniments of a judicial proceeding, to wit, a court of competent jurisdiction, parties, plaintiffs and defendants, a subject-matter of consideration, and a judgment of the court, restraining the election. No appeal was taken. The judgment was conclusive against collateral attack.

The record does not have to show that every fact was proved upon which the judgment of the court must be supposed to rest. Upon a review of the matter on appeal in cause No. 2212 we may not have agreed with the trial court. We might have said that the parties ought not to have been permitted to bring the suit; that the facts pleaded in cause No. 2212 did not show that the plaintiffs were being injured in their personal or property rights, and that the claimed damage was imaginary and only speculative, and if such damage occurred, the same could be subsequently corrected in a law court. Nevertheless the trial court may have had facts before it contrary to this view and which are not before us now.

The plaintiffs in cause No. 2212 may have been in the same position as the plaintiffs were in a case recently before

this court. In the case of Tadlock v. Smith, 38 N.M. 288, 31 P.(2d) 708, 709, we said:

"What interest has the plaintiff to qualify him as a suitor?

"If one's own right to an office is not such a right as equity recognizes (Guadalupe County Commissioners v. Anaya [31 N.M. 182, 242 P. 335], supra), the right of a third person certainly cannot be subject-matter of a suit. The plaintiff can have no higher standing here than as a volunteer interested in seeing that the village of Santa Rosa shall conduct its election according to law. If a threatened violation of the Constitution does not, of itself, afford a cause of action to the citizen (Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573), how can a violation of statute afford one. No civil or property right of the plaintiff is here threatened with irreparable, or any, injury. His right to vote is not endangered. Of course, usurpation of power will always affect the citizen with a sense of outrage, but unless it affects his civil or property rights, his remedy is political, not legal. Courts of equity are not constituted as guardians of the affairs of municipalities. We cannot assume to take charge of their election proceedings. We can only decide justiciable questions as they come to us. These principles were fully discussed in Asplund v. Hannett, supra. Without abandoning them, we cannot entertain the present complaint."

However, having failed to appeal from the original decree awarding an injunction in cause No. 2212, the same cannot now be attacked. The appellees, having disobeyed the injunction, cannot now claim that the injunction decree was erroneous. The judgment of a court having jurisdiction is to be obeyed, no matter how clearly it may be merely erroneous. The method of correcting error is by appeal, and not by disobedience. A party proceeded against for disobedience to an order or judgment is never allowed to allege as a defense for his misconduct that the court erred in its judgment. He must go further, and make out that in point of law there was no order and no disobedience by showing that the court had no right to judge between the parties upon the subject. The point has been held over and over again in reference to the very case of disobedience to injunctions. This proposition is well stated in general terms in Wilcox v. Jackson, 13 Pet. 498, 511, 10 L.Ed. 264: "'Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities; they are not voidable, but simply void.'" The appellees in the instant case, admitting by their demurrer that they violated the injunction decree rendered in cause No. 2212, are in contempt of court.

For the reasons given, the cause will be remanded, with directions to overrule the demurrer of the appellees.

It is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and BICKLEY, JJ., concur.

69 P.(2d) 936

COMER v. STATE TAX COMMISSION OF NEW MEXICO.

No. 4212.

Supreme Court of New Mexico.

June 7, 1937.

Bryan G. Johnson and Gino J. Matteucci, both of Albuquerque, for appellant.

Frank H. Patton, Atty. Gen., and J. R. Modrall and Quincy D. Adams, Asst. Attys. Gen., for appellees.

ZINN, Justice.

The plaintiff, appellant here, instituted the suit out of which this appeal arises in the district court of Santa Fé county to recover from defendants, appellees here, under the provisions of Laws 1934, Sp. Sess. c. 7, § 314, and Laws 1935, c. 73, § 313, certain taxes paid under protest which had become due under the terms of said acts. The amount of the tax paid under the 1934 act is $29.75 covering sales for the month of June, 1935, and the amount paid under the 1935 act is the sum of $25.54, covering sales for the month of July, 1935. Each payment is set up and recovery sought in a separate cause of action in plaintiff's first amended complaint. The identical questions are presented for decision under each act.

The defendants demurred separately to each cause of action on the ground that it appears from the face of said complaint that plaintiff is subject to the tax sought to be avoided. The trial court sustained the demurrer, and plaintiff electing to stand on his complaint the same was dismissed, from which judgment of dismissal this appeal is prosecuted.

The essential facts as disclosed by the complaint and which stand admitted by the demurrer are as follows: The plaintiff is the wholesale agent at Albuquerque, N. M., for the sale and distribution of petroleum, gasoline, and other products of Phillips Petroleum Company. His compensation is a commission on all products handled by him as such agent. The material allegations of the complaint touching the nature of plaintiff's occupation are the same in both causes of action. As taken from the first cause of action they are:

"That on the 28th day of July, 1933 plaintiff was employed as agent of the Phillips Petroleum Company in Albuquerque, New Mexico, and has continued in such employment as agent of said Phillips Petroleum Company since the 28th day of July, 1933 down to and including the time of the filing of this complaint; that plaintiff is so employed as agent of Phillips Petroleum Company on a commission basis for his services as such agent.

"That plaintiff as such agent is charged with the duties of the sale and distribution of petroleum and other products at wholesale of said Phillips Petroleum Company and is paid a commission on all such products handled by plaintiff as such agent. * * *

"That this plaintiff is employed by Phillips Petroleum Company under a written contract; that said written contract imposes upon plaintiff the duty of devoting all his time and efforts in promoting the sale at wholesale of Phillips Petroleum Company products; that in the discharge of his duties this plaintiff is subject to the instructions of the Phillips Petroleum Company in the matter of all sales of company's products; that this plaintiff is paid for his services on a commission basis and receives a percentage on the wholesale price of all products of the company sold through plaintiff's efforts; *that plaintiff does not in any manner hold himself out to the public as one who is ready or willing to sell the products or commodities of any member of the general public who desires the use of plaintiff's services as a selling agent, but on the contrary this plaintiff acts solely in the name of and in behalf of Phillips Petroleum Company* and is legally obliged at all times to work for the interests of Phillips Petroleum Company exclusively in the same manner and to the same extent as salaried employees of other oil companies are required to do." (Italics ours.)

The tax is imposed by section 201 of article 2, Laws 1934 (Sp.Sess.) c. 7, and by the same section and article of Laws 1935, c. 73, in the following language, to wit:

"There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging, or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: * * *

"K—At an amount equal to two per cent of the gross receipts of the business of every person engaging or continuing in the business of acting as factor, agent or broker selling on a commission basis, and where title to the goods, wares or merchandise sold does not vest in such person at any time during the transaction."

The term "engaging" is given a statutory meaning in article 1 of each act (section 3, par. (g) of 1934, Sp.Sess., and section 103, par. (g) of 1935, as follows:

"The term 'engaging' as ["when" in 1935 act] used in this Act with reference to engaging or continuing in a business or a profession shall also include the exercise of corporate or franchise power, but the term 'engaging' shall not be construed in this Act to include occasional and isolated sales, or *transactions by a person who does not hold himself out as engaged in business.*" (Italics ours.)

The terms "business" and "engaging" are each defined by the act, but still not made definite enough (in view of paragraph K) to make them perfectly clear. But when we consider article 2 as a whole in connection with the definitions mentioned, it becomes at once apparent that the term "engaging in business" has reference to the person who owns the business, not mere employees. Paragraph A has reference to those persons engaged in mining business, etc.; paragraph B has reference to the various kinds of manufacturing business; paragraph C of wholesale merchandise; paragraph D. of retail merchandise; and paragraph E of several different kinds of businesses; and so on to paragraph K. In every instance the tax is levied against *the business of an owner or operator,* and not against the employee acting as manager or agent for the principal who is "engaged in business."

The fact that the general provisions of the act are directed at those engaged in businesses on their own account bears heavily in favor of a construction of paragraph K as being the same character of business, that is, against those engaged in business and not their employees. This would limit the tax in paragraph K to those in the "agency" business and not a person who is employed to operate a business for another. This is indicated further from the fact that this business, and others operated like it, would be subject to a double tax; although one of them would be comparatively small.

It is true, the language literally would indicate an intention to tax the plaintiff, but taking the whole act together, and particularly article 2, we find no intention to tax employees at all and that persons working for ordinary salaries and wages include persons who are working on commission.

It might be stated in passing that chapter 73 of Laws 1935 is not an amendment of the 1934 act, notwithstanding it is the basis of that act. It is a new act entirely, and the fact that certain parts of sections were left out cannot be given as much weight in construing the meaning of the subsequent act as might have been in the case of amendment.

It may be argued that paragraph K of said section 201, as hereinabove quoted, shows that plaintiff's activities as delineated in his complaint come within the literal language thereof unless removed by the statutory definition of the term "engaging" as used in paragraph (g) of section 3, article 1. We believe, however, that he is not "engaged" in the "business" of being an agent, and therefore he is not embraced in the statutory definition heretofore referred to.

The plaintiff confines his agency to the sale of products of Phillips Petroleum Company and does not tender his services as factor, broker, or agent to the public generally as one engaged in the business of being an agent to those who may desire his service as agent. It is specifically admitted by the demurrer that "* * * plaintiff does not in any manner hold himself out to the public as one who is ready or willing to sell the products or commodities of any member of the general public who desires the use of plaintiff's services as a selling agent, but on the contrary this plaintiff acts solely in the name of and in behalf of Phillips Petroleum Company."

Plaintiff admits he is an agent. A clerk in a store who is paid for his services on a commission basis is the same type of agent. A manager of a store or an integrated business belonging to some one else, whose compensation is based on a commission determined either by the profit or the gross sales, is likewise an agent of the owner of the business in the same sense that Comer is agent for Phillips Petroleum Company. Each of those enumerated by way of analogy is engaged as agent for his principal on a commission basis, yet neither holds himself out as engaged in the business of being agent.

We do not believe that it was the intention of the Legislature to tax employees whose compensation is computed on a percentage of the business done. This is clear from a reading of Laws 1934 (Sp. Sess.) c. 7, article 2, § 212 (d); Laws 1935, c. 73, article 2, § 212 (d), wherein we find an exemption from the taxes imposed by the act upon "income received in the form of ordinary wages or salaries." Ordinary wages or salaries need not necessarily be in a fixed, predetermined, or round sum. Ordinary wages or salaries may likewise be based on the amount of labor expended, goods sold, or income received. There is little difference in status between the local agent of an oil company who receives a flat or fixed salary of $5,000 a year, and the agent whose compensation is determined by a percentage of the gross sales. The income of each may amount to the sum of $5,000 per annum. Each has identical duties to perform. Each is agent for his employer. Each conducts the business in the name of his employer. Their compensation is determined in a different manner. Wages or salaries are compensation for services. In the instant case the demurrer admits that the compensation of the plaintiff is a commission on his sales. However, neither agent is *engaged* in the business of acting as agent in the broad sense.

If we adopt the narrower view, then every sales girl or manager whose compensation is determined on a commission basis is subject to the tax imposed simply because their compensation is determined upon a percentage of the business done or goods sold instead of a flat salary or wage.

We look to the statute to find out the kind of agent contemplated. If we accept the literal view, we thereby must include every form of agent whose compensation is on a commission basis rather than a fix-

ed salary as those subject to the tax. We believe the Legislature intended taxing only those who are *engaged in an agency business*, as, for example, real estate agents, fire insurance agents, brokers, factors, etc.

The term "agent" as found in the statute is to be construed in a stricter sense than that commonly given it. "The term is also often used in statutes or constitutional provisions in a more restricted sense than that commonly given it, and, where so used, its significance must generally be determined by a study of the context. The maxim, Noscitur a sociis, will be applied where the word is found in association with others which indicate an intent to give it a limited or particular meaning, but where there is nothing to indicate an intent to employ the term in a limited sense it will be taken in the common and usual sense." 2 C.J.S. p. 1026, Agency, § 1.

The Legislature by associating the word "agent" with "factor" or "broker" indicated the type of agency contemplated to be taxed. The word itself must be determined in the statute by the society it keeps, to wit, brokers and factors.

In finding the words "factor" or "broker" in the same sentence with the word "agent," it is clear that the Legislature intended to limit the meaning of the term "agent" to a particular and circumscribed business, to wit, a general agency business, that is, one not engaged as agent for a single firm or person but one who holds himself out to the public as being engaged in the business of being an agent. "It does not comprehend the broad and general signification of the term, as applied to a person who performs a duty or an act for another. The term agent is understood by its associate terms, captain, owner, master, consignee; it is known by its associates—noscitur a sociis." Childs v. The Brunette, 19 Mo. 518, 522.

The statute contemplates taxing the receipts of one engaged in the agency business as an independent contractor, not as an employee. The plaintiff is the local representative or manager of the Phillips Petroleum Company. The plaintiff acts solely in the name of and in behalf of Phillips Petroleum Company. The record is silent, but we assume that the Phillips Petroleum Company pays all taxes which are due the state under Laws 1935, c. 73, upon the sale of any of its products. As agent or manager of the Phillips Petroleum Company, the plaintiff's acts are considered to be the acts of the principal. Magnolia Petroleum Co. v. Pierce, 132 Okl. 167, 269 P. 1076, 61 A.L.R. 218. He is the servant or employee of his principal.

For the reasons given the cause will be remanded to the district court, with instructions to overrule the demurrer, and proceed in accordance with the views herein expressed.

It is so ordered.

BRICE, J., concurs.

HUDSPETH, C. J., did not participate.

BICKLEY, Justice (concurring).

To hold that the Legislature intended to impose a tax upon one employed as an agent to sell the products of his employer and under contract to devote all his time and efforts in promoting the sale of such products, and who is legally obliged at all times to work for the interests of his employer exclusively in the same manner and to the same extent as salaried employees are required to do, and leave untaxed the salaried employee engaged in identical activities, would be to impute to the Legislature a failure to heed the constitutional provision which affords equal protection of the laws to our citizens, unless there is something in the method of compensation on a commission basis, as distinguished from a specific fixed periodical allowance as a salary, which would afford a reasonable basis of classification for the purposes of taxation. I am unable to comprehend how the nature of the employment is in any wise affected by the method of computing the compensation for the services rendered, whether it be called commission, emoluments, wages, hire, or salary.

Salary is computed by time; recompense on the commission basis is computed on the basis of results. But they are essentially the same. The difference in the method of payment may make it appropriate to use one word or the other, but essentially they are synonymous as being reward or recompense for services performed.

"The word 'commission' has no technical meaning, but is usually employed to mean the compensation to an agent, broker, or person who handles the affairs of others in payment for their services." Words and Phrases, Fourth Series, p. 452.

"Lexicographers and some authorities class 'salary' and 'wages' as synonymous." 4 Words and Phrases, Second Series, p. 1221.

"Commissions paid a traveling salesman for his services are 'wages,' within the meaning of Bankr.Act." 4 Words and Phrases, Second Series, p. 1220.

A contract employing a salesman which stipulates for a commission on sales has been held to be a contract for the payment of "wages." 4 Words and Phrases, Second Series, p. 1220.

In W. H. White & Son v. Ballard County Bank (Ky.) 117 S.W. 294, 296, it was held against an alleged principal, where the issue was agency of one who contracted the debt sued for, that an instruction to find for plaintiff if the alleged agent worked for defendants on a "commission or salary" is not misleading because of use of the word "salary," though no witness used it in his evidence, as the word "salary" was used as a synonym of "commission." The court said: "The word 'salary' seems to have been used synonymous with 'commission,' and to the average man they both convey the idea of compensation, and the jury no doubt thoroughly understood and were in no wise misled by the use of this word in the instruction."

I am not persuaded that the Legislature intended to tax the earnings of a laborer computed on a commission basis and leave untaxed the earnings of a laborer doing the same kind of work and who is recompensed in money computed on the time basis solely. I can see no reasonable basis upon which one could be taxed and another exempted, each doing the same kind of work. In my opinion, if such were the legislative intent it would offend the uniformity clause of the Constitution, and it is to be presumed that no such offense was intended. These considerations are merely reasons additional to those employed by Mr. Justice ZINN, with which I am satisfied. Therefore, I concur.

SADLER, Justice (dissenting).

I disagree with the result reached by the majority. The prevailing opinion written by Mr. Justice ZINN concedes that the language of the two challenged acts, taken literally, indicates an intention to subject plaintiff to the tax imposed. I think it does so with such clearness and certainty as to render improper resort to construction for ascertaining whether the apparent is the real meaning of such language. DeGraftenreid v. Strong, 28 N.M. 91, 206 P. 694.

The tax assailed is levied as a privileges or occupational exaction, graduated in amount by volume of business. Laws 1934 (Sp.Sess.) c. 7, § 201; Laws 1935, c. 73, § 201. The rate of the levy is prescribed in section 201, par. K. of each act, "at an amount equal to two per cent of the gross receipts of the business of every person engaging or continuing in the business of acting as factor, agent or broker selling on a commission basis," etc.

The term "engaging" is given a statutory meaning in article 1 of each act (section 3, paragraph (g) of Laws 1934, Sp. Sess., and section 103, par (g), of 1935) as follows: "The term 'engaging' as (*when* in 1935 act) used in this Act with reference to engaging or continuing in a business or a profession shall also include the exercise of corporate or franchise power, but the term 'engaging' shall not be construed in this Act to include occasional and isolated sales, or transactions by a person who does not hold himself out as engaged in business."

It is to be observed from a reading of paragraph K of said section 201, as hereinabove quoted, that plaintiff's activities as delineated in his complaint fall within the literal language thereof unless removed by the statutory definition of the term "engaging" as used in paragraph (g) of section 3, article 1 and section 103, art. 1. This much may fairly be taken as conceded by the plaintiff. He contends, however, that the statutory definition of the word "engaging" removes him from the literal effect of the language employed in imposing the tax. He does not claim immunity by reason of "occasional and isolated sales," so that in last analysis he claims immunity solely as "a person who does not hold himself out as engaged in business." He thus seeks to place himself in the sta-

tus of a mere employee whose compensation is fixed by a commission on his gross sales, thinking thereby to escape the tax. It is a serious question whether the language, "or transactions by a person who does not hold himself out as engaged in business," is not merely explanatory of what is meant by the phrase, "occasional and isolated sales," immediately preceding its use. Both parties rely wholly upon the construction arising from a reading of the language itself. Neither cites a single authority to support the positions urged upon the court. I am not persuaded that the definition of the word "engaging" found in the act exempts the plaintiff from the terms thereof.

The plaintiff's position is in part summed up in the following quotation from his brief, to wit: "It seems that the Appellees (defendants) seize upon the word, 'commission' as an adequate basis for bringing Appellant within the scope of the Emergency School Tax Acts. Apparently they overlooked the fact that the tax is not on commissions, but is a tax imposed upon persons *engaged in the business* of acting as agent on a commission basis."

As I interpret the allegations of the complaint, ignoring conclusions of the pleader as not being admitted by the demurrer, that is exactly the characterization given plaintiff, viz., as a person "engaged in the business of *acting as agent on a commission basis,*" etc. Section 201, par. K, clearly and specifically points the imposition toward persons doing the very thing which plaintiff alleges he is doing.

But it is said because plaintiff confines his agency to the sale of products of Phillips Petroleum Company and does not tender his services as factor, broker, or agent to members of the public generally who may wish his services in the sale of such products, that there is no holding out of himself as one engaged in the business and he is nothing more than an employee. It is a matter of common knowledge that many, if not most, contracts of agency involving the sale of goods limit the agent to handling the principal's line of goods. I think it is no test of whether a person is "engaging * * * in the business of acting as * * * agent * * * selling on commission," as the terms "business" and "engaging" are defined in these acts, that the subject-matter of his agency is the goods of a particular principal.

Certain statutory definitions other than those already referred to demonstrate that the apparent is the real meaning intended by the Legislature.

"The term 'taxpayer' means any person liable for any tax hereunder." Laws 1934 (Sp.Sess.) c. 7, art. 1, § 3 (c); Laws 1935, c. 73, § 101 (c).

The term "gross receipts" is defined in both acts, as follows: "The term 'gross receipts' means the total receipts of a taxpayer received as compensation for *personal* or professional services for the exercise of which a privilege tax is imposed by this act." (Italics mine.) Laws 1934 (Sp. Sess.) c. 7, art. 1, § 3 (d); Laws 1935, c. 73, art. 1, § 103 (d).

The term "business" as defined in each act reads: "The term 'business' when used in this Act shall include *all* activities or acts engaged in *(personal,* professional, and corporate) or caused to be engaged in *with the object of gain,* benefit or advantage either direct or indirect." (Italics mine.) Laws 1934 (Sp.Sess.) c. 7, art. 1, § 3 (f); Laws 1935, c. 73, art. 1, § 105 (f).

The Legislature, no doubt realizing that within the broad meaning of the language thus employed the ordinary wage earner or salaried employee was included, took pains to eliminate him from subjection to the tax by interposing an express exemption in his behalf, to wit: "There are exempted from the taxes imposed by this act the following: * * * Income received in the *form of ordinary* wages or salaries." (Italics mine). Laws 1934 (Sp.Sess.) c. 7, art. 2, § 212 (d); Laws 1935, c. 73, art. 2, § 212 (d).

It is also important to note the change made in section 201 par. K, of the 1934 act in the enactment of the 1935 act. I already have quoted the portion thereof fixing the amount of the tax. For convenience I now quote all of paragraph K of section 201 as the same appears in the 1934 act, which is its exact language in the 1935 act except for the italicized portion which is omitted in the later act, to wit: "K—At an amount equal to two per cent of the gross receipts of the business of every person engaging or continuing in the business of acting as factor, agent or broker selling on a commission basis, and where title to the goods, wares or merchandise sold does not vest in such person at any time during the transaction. *The gross receipts of any person taxed by this subdivision shall include only the total amount of his commissions; provided, that where merchandise is sold by a factor acting as a manufacturer's representative, or intermediary, working on a commission basis in lieu of salary, and who at no time has possession of the merchandise sold, the commission of such factor shall be exempt from taxation hereunder*; provided *further* that a merchandise broker who buys and sells merchandise for his own account, shall so far as all such transactions are concerned, be considered a wholesaler or retailer, as the case may be, and be subject to tax as such wholesaler or retailer."

In the 1934 act, as will be observed, an exemption was created in favor of a factor acting as manufacturer's representative, or intermediary, working on a *commission basis in lieu of salary,* "who at no time has possession of the merchandise sold." Even if plaintiff should be considered "a factor acting as a manufacturer's representative," that fact alone would not entitle him to the exemption. In addition he must be one "who at no time has possession of the merchandise sold." It abundantly appears from the complaint that plaintiff does have possession of same, for he alleges that he is charged with the "sale and distribution" thereof.

Thus, a limited exemption in the 1934 act in favor of certain factors "working on a

commission basis in lieu of salary," within which appellant cannot bring himself by reason of its conditions, is entirely eliminated by omission from the 1935 act. That omission is significant. It is solely upon the theory that he is "working on a commission basis in lieu of salary," and thus claims status as an employee not engaged in business, that plaintiff rests his argument that he is not a "taxpayer" as defined in the respective acts. Laws 1934 (Sp. Sess.) c. 7, art. 1, § 3 (c); Laws 1935, c. 73, § 103 (c). In view of this change in the statute and of the language in section 212 (d) limiting the exemption there created to income received in the "*form of ordinary* wages or salaries," it would scarcely aid plaintiff if his claim of status as a person "working on a commission basis in lieu of salary" should be conceded. Cf. Winne v. Hammond, 37 Ill. 99; State v. Thompson, 120 Mo. 12, 25 S.W. 346; Couturie v. Roensch (Tex.Civ.App.) 134 S.W. 413; Planters' Warehouse Co. v. McMekin, 36 Ga.App. 219, 136 S.E. 104; Evans v. Bulley, 1 Newfoundl. 330; Marrinan Medical Supply, Inc., v. Ft. Dodge Serum Co. (C.C.A.8th Ct.) 47 F.(2d) 458. The plaintiff would seem to be a "factor" within these authorities.

The prevailing opinion seeks to minimize the obvious significance of the omission from the 1935 act of the language italicized in the last quotation supra of said subparagraph K by suggesting that the later act is not an amendment of the former but an entirely new act. The implication is that, if an amendment, the significance of the omission might be deemed controlling. A mere comparison of the two acts is all that is required to show that the 1935 act is a substantial re-enactment of the 1934 act, transferring its administration from State Tax Commission to Bureau of Revenue, when created, authorizing the issuance of tokens for reimbursing to "taxpayers" amount of the tax applicable to any sale, and effecting other minor changes. The 1935 act contains no express repeal of the 1934 act, merely repealing all acts or parts of acts in conflict with the later act.

That the 1935 act is not to be deemed "a new act entirely," as stated in the prevailing opinion, or at all, is plain. A contrary view is clearly based upon a misapprehension of the effect of the re-enactment. The later act is nothing more than a continuation of the earlier one with such changes either by omission or addition, by way of amendment, as the Legislature saw fit to adopt. Cf. State v. Thompson, 37 N.M. 229, 20 P.(2d) 1030.

"The re-enactment of a statute, or of a provision of a statute, is not a repeal of such statute or provision; it is to be construed as simply the continuance of the old rule. However, there may be a repeal of parts or provisions of the old statute or section which are omitted from the re-enactment." (Italics mine). 59 C. J. 926, § 528. See, also, 25 R.C.L. p. 934, § 106, under "Statutes."

There can be no doubt that plaintiff's occupation as described in his complaint is

literally within the definition of "business" as found in the two acts. The majority seem to concede as much. "The term 'business' when used in this act shall include *all* activities or acts engaged in (personal, professional or corporate) * * * with the object of gain, benefit or advantage either direct or indirect." Could language be broader? I do not think so. Certainly, this language puts plaintiff within the act.

But this is not all. In specifying the rate applicable to certain taxpayers, it is fixed "at an amount equal to two per cent. of the gross receipts of the business of every person engaging or continuing in the business of acting as factor, *agent* or broker selling on a commission basis, and where title to the goods * * * sold does not vest in such person at any time during the transaction." This is exactly what plaintiff describes himself as doing. The previous definition of "business" makes the doing of such things a "business" within the meaning of the act. Being placed thus within the very language of the act by two separate provisions thereof, in order to escape the tax, the plaintiff must point to language taking him out. This he fails to do.

In both what I have referred to as the prevailing opinion by Mr. Justice ZINN and the specially concurring opinion by Mr. Justice BICKLEY, the majority seem to rest mainly their conclusion that plaintiff is not liable upon the exemption from the tax of "income received in the form of ordinary wages or salaries," appearing as section 212 (d) of c. 7, art. 2, Laws 1934, Sp.Sess., and as the same section in c. 73, Laws 1935. Unquestionably, as heretofore stated, this exemption was intended to excuse from payment of the tax the army of salaried employees and wage earners. That it has such effect there can be no doubt. But unwarranted fear that it may not fully accomplish its purpose has brought the majority to a false conclusion.

They express fear that to give effect to the literal language of the act might subject the sales girl, the clerk in a store, or the wage earner, working on a commission basis, to payment of the tax. The exemption, it is true, is limited to income received in the "form of ordinary wages or salaries." The clerk or wage earner working on a commission basis obviously is not receiving income in the *form of ordinary* wages or salaries. The ordinary wage or salary is a fixed sum per day, per week, or per month. The fact that it is on a commission basis does not necessarily deny it status as a wage or salary. But, certainly, it is not the form in which wages and salaries ordinarily are paid.

The obvious answer to this suggestion is that not one in a thousand clerks, laborers, or wage earners works on a commission basis. It is common knowledge that they are paid fixed sums on a daily, weekly, or monthly basis. So that in exempting the income of those so paid, the Legislature lifted from operation of the act this large body of wage earners and salaried employees. Legislative bodies necessarily view things in the large. They legislate

to meet conditions thus seen. We must attribute familiarity by our Legislature with the form taken in the payment of ordinary wages or salaries. Even if the tax were applicable to a clerk or wage earner working on a commission basis, it would be no test of the law's validity that it thus works a hardship in extreme cases. State v. Mirabal, 33 N.M. 553, 273 P. 928. Neither does this consideration warrant departure from the literal meaning of language employed in a statute to avoid such a contingency.

In his specially concurring opinion, Mr. Justice BICKLEY suggests that to tax the agent working on a commission basis in lieu of salary and leave untaxed the agent performing the same services for a fixed salary would be to impute to the Legislature a failure to heed the constitutional guaranty of equal protection. Unequal protection of the law is not claimed in the respect indicated. And while this suggestion is employed only arguendo, it is not at all certain that a difference in the method of paying compensation, whether as a flat salary or wage, or on commission basis, does not afford reasonable basis of classification for purposes of taxation. Cases can be supposed where exactly the same duties would be performed under either method. They are exceptional. In the vast majority of cases, it is generally recognized that the agent on commission basis is more of a free lance, has greater freedom of action and wider discretion, more control over his time, with earnings limited only by his own energy and abilities. Ordinarily and to a much greater extent than the strictly salaried agent or employee, he is the architect of his own fortune. These considerations, though it is unnecessary to decide the point, would tend to warrant classification.

This argument is applied by Mr. Justice BICKLEY, of course, only as an aid in arriving at true legislative intent. And so, he apparently concludes with the majority, that the act as written applies only to such agents as, "for example, real estate agents, fire insurance agents, brokers, factors, etc.," who offer their services to the public at large, and do not confine their activities to the service of a single principal.

This holding is in part, at least, to escape the feared consequence of unequal protection. But where does it bring us? May not agents of the type to which the majority agree the act does apply, with as much reason invoke the equal protection clause upon the ground that they are taxed for the privilege of doing identically the same thing for different principals as others who are excused upon the mere ground that they perform it many times for the same principal only? Cf. Stewart Dry Goods Co. v. Lewis, 294 U.S. 550, 55 S.Ct. 525, 79 L.Ed. 1054. Is it not better, therefore, since unequal protection in this respect is not asserted, to declare the statute means exactly what it says, and await the time, if ever it comes, when its invalidity is challenged in such behalf, to consider the constitutional question? It seems so to me, particularly, in view of the fact that the construction to which this argument brings

the majority exposes it to the same attack and with equal, if not greater force, from the class of agents left subject to the tax.

Wholly aside from the considerations just discussed, although the majority find themselves unable to do so, I see a vast difference in the status of a *sales girl* or *wage earner,* working on a commission basis, instances of which are so rare as to be negligible, and that of the *wholesale agent* of an oil company with duties as outlined in the complaint before us. The latter is truly engaged in business within the meaning of the act and subject to the tax.

Complaint is made by plaintiff that his status is entirely different from that of others paying the tax; that the price of his products is fixed by his principal and cannot be changed by him; that he neither can shift the tax to his principal, nor pass it on to the consumer, because bound by terms of a written contract. (This contract was not pleaded for scrutiny of the court.) These considerations strongly challenge the justice of the tax in its application to plaintiff and other agents so circumstanced. But the appeal should be directed to the Legislature. It is not the function of the courts to pass upon the wisdom or policy of legislation, so long as it is within constitutional bounds.

The action of the district court in sustaining the demurrer to plaintiff's complaint was proper and should be sustained. Because of a contrary conclusion by the majority and for the reasons given, I dissent.

70 P.(2d) 147

STATE v. BROWN.

No. 4268.

Supreme Court of New Mexico.

June 28, 1937.

Rehearing Denied Aug. 9, 1937.

Joseph Gill, of Albuquerque, for appellant.

Frank H. Patton, Atty. Gen., and Richard E. Manson, Asst. Atty. Gen., for the State.

BICKLEY, Justice.

The appellant was convicted of cattle stealing. The first point relied upon for reversal is that the evidence does not sustain the verdict. The evidence was conflicting, but after a careful review thereof we find appellant's contention without merit.

He next urges that the jury should have been permitted to take the branded hide and the marked ears to the jury room for closer scrutiny. The most that appellant contends is that the trial judge may in his discretion, and in the absence of prohibiting statute, permit the jury to take with them to the jury room such exhibits as in his opinion will aid the jury in their deliberations. Citing 1 Hyatt on Trials, 988, par. 961. From this he argues that the facts present an abuse of discretion in the present instance. We think otherwise.

Appellant filed a motion for new trial in which he claimed, among other things, the production of newly discovered evidence. The tender fell short in several particulars of meeting the requirements held in State v. Luttrell, 28 N.M. 393, 212 P. 739, to be necessary to obtain a new trial upon such ground. The trial judge in denying the motion expressed the opinion that such evidence tendered as newly discovered would be merely cumulative. It cannot be soundly contended that it was discovered since the trial or that it could not have been produced thereat. It would have been merely further contradictory of the evidence produced by the State at the trial vigorously assailed by the able counsel for the defendant, the late Joseph Gill, through argument and production of testimony. With characteristic earnestness that able advocate whose passing was a loss to the bench and bar presented this and other arguments in behalf of the accused upon the attention of the trial court and here. The remarks of the trial judge in denying the motion evinces a careful consideration of the matters presented by the motion, but he was unable to feel his discretion moved to grant a new trial. Judge Hay expressed satisfaction with the manner in which the jury had been selected, and stated that there was nothing in the conduct of the jury which would indicate that the jury was prejudiced, and remarked, "This is not a case where the evidence is all one sided." The trial court did not abuse its discretion in denying the motion for new trial.

Finally appellant contends that the trial court erred in admitting the testimony of expert witnesses to the effect that the brands had been burned or otherwise changed. It is vigorously argued that the jury were as well circumstanced as the

[redacted]

witnesses to determine from an examination of the hide whether or not the brands had been mutilated. It is well settled that expert testimony is admissible when the subject matter of the inquiry is of such a character that only persons having skill and experience in it are capable of forming correct judgment as to any facts connected therewith, and expert testimony is not confined to specified professions, but is applicable where particular skill applied to a practical problem is necessary to explain results. See People v. Jennings, 252 Ill. 534, 96 N.E. 1077, 43 L.R.A.(N.S.) 1206. A consideration of the record convinces us that the evidence challenged by appellant falls within the rules.

This view is supported by precedent in cases where the precise question was presented. In Gatlin v. State, 72 Tex.Cr.R. 516, 163 S.W. 428, it was held that expert testimony to the effect that certain brands on cattle had been burned, altered, or defaced was admissible. In Simonds v. State, 76 Tex.Cr.R. 487, 175 S.W. 1064, an expert witness was allowed to testify that brands on goats had been burned. See, also, 22 C.J. 537.

Finding no error in the record, the judgment is affirmed and the cause remanded for such further proceedings as may be proper. And it is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

70 P.(2d) 149

STATE v. WALDEN et al.

No. 4290.

Supreme Court of New Mexico.

July 6, 1937.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

E. M. Grantham, of Clovis, for appellants.

Frank H. Patton, Atty. Gen., and Fred J. Federici, Asst. Atty. Gen., for the State.

BICKLEY, Justice.

Appellants were convicted of robbery. After a careful consideration of the error assigned in admission of testimony introduced by the state in rebuttal, we conclude that there was no reversible error because the trial judge correctly regarded the testimony as rebuttal, and, secondly, if such evidence was not strictly in rebuttal and might have been offered in chief, it was within the discretion of the court to admit it in rebuttal and there was no abuse of discretion.

There was no error in permitting the district attorney to inquire of a character witness brought forward by the appellants whether he had married a sister of one of the defendants, and upon an affirmative answer being given, whether they were divorced. The court's ruling was controlled by its discretion which was not abused.

Appellants complain that they were prevented from laying a predicate for impeachment of the state's witness Mullis. The record shows that the predicate was laid and that the appellants were untrammeled in their impeachment efforts.

The trial court did not err in admitting the testimony of the witness Gunnels to the effect that appellants had tried to sell him two steers on the day of the robbery. The prosecuting witness Raybourn testified that the appellants came to him at his cattle pens and interested him in the purchase of some steers; that appellants took him in their automobile to the country, ostensibly to look at said steers, and while on the way hit him with what looked like a gun, although it being night and the

only light present being from the car lights he could not be sure what it was they hit him with. The defendants told the interesting story that they met Raybourn in a drinking place and that Raybourn proposed to shoot some dice, and that in order to advance said enterprise they drove around a while in search of another dice shooter, but being unable to find him, went to Raybourn's cattle pens and spun a yarn to Raybourn's wife about going to look at steers because Raybourn told them this deception was necessary to allay the suspicions of Mrs. Raybourn, who frowned darkly on dice shooting and similar pastimes. Appellants said they and Raybourn got out into the country and shot dice in the light of the car lamps, and that they won all of Raybourn's money, about $50, and that he got sore and started a fight, and it became necessary to knock him out, which they proceeded to do, but with nothing more lethal than bare fists. The testimony of Gunnels was corroborative of Raybourn's testimony that defendants first approached him to sell steers and tends to refute the defendants' assertion that the contacts were made with dice-shooting intent. Considering these and other circumstances disclosed by the record, we would be reluctant to conclude that the testimony of witness Gunnels was not material as objected by appellants. Appellants concede that in doubtful cases of materiality the admission of testimony is largely in the discretion of the trial court, and we do not agree with appellants that the court went beyond the limits of sound discretion in admitting this testimony.

Appellants' fifth point is that the court erred in denying appellants' motion to dismiss the case on the ground that the information failed to charge an offense under the laws of this state, and in giving an instruction that the jury should find the defendants used a deadly weapon, or were armed with a deadly weapon, before it could convict them. It is claimed that the prosecution is under the provisions of section 35-701, N.M.Comp.St.Ann.1929, which inveighs against robbery when the robber is "armed with a dangerous weapon." It is said that because the information charged that the accused were armed with a "deadly weapon," no offense is charged under this statute. A deadly weapon is surely a dangerous weapon. It seems that this court in State v. Powers, 37 N.M. 595, 26 P.(2d) 230, considered it permissible to use the phrases "deadly weapon" and "dangerous weapon" interchangeably. See, also, State v. Penton, 157 La. 68, 102 So. 14.

At section 320 of Bishop on Statutory Crimes (3d Ed.), the author in discussing deadly and dangerous weapons uses the following language:

"Deadly Weapon.—The term 'deadly weapon' occurs in the common law of homicide and in various statutes. It is a weapon likely to produce death or great bodily injury. * * *

"Dangerous weapon.—Some of the statutes employ the term 'dangerous weapon.' It is a milder term than the other, yet otherwise of the same meaning. A weapon may be dangerous without being deadly."

And we think a weapon that is deadly is dangerous. If there is a technical difference, the appellants benefited by the use of the technically erroneous phrase, and therefore were not prejudiced.

We are unable to agree with appellants' contention that there is no substantial evidence to show that the appellants robbed Raybourn with a dangerous weapon.

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

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

70 P.(2d) 150

NORVELL v. BARNSDALL OIL CO. et al.

No. 4289.

Supreme Court of New Mexico.

July 10, 1937.

W. H. Patten, of Hobbs, for appellants.

John R. Brand, of Hobbs, for appellee.

BICKLEY, Justice.

The appeal seeks a review of a judgment of the district court rendered pursuant to provisions of the Workmen's Compensation Law (Comp.St.1929, § 156-101 et seq.). The judgment awarded recovery by appellee of compensation at the rate of $15 per week from January 13, 1936, on account of total disability suffered by him in the course of his employment, such sum per week to be so paid appellee during the continuance of his total disability, but for a period of not to exceed 550 weeks. By the judgment the defendants are permitted to require the plaintiff to submit to a physical examination at any reasonable time or times as provided by law in order to determine whether or not his disability has decreased or ceased, and being also permitted to apply to the court at any time for an order that they be relieved of liability for further payments of compensation or for the reduction in the amount of compensation payable.

Appellants have filed a motion asking this court to instruct and direct and empower the district court to take further testimony in the cause and to make findings and conclusions of law therefrom, touching the complete or partial recovery of appellee, and that all of the testimony so taken, together with the findings of fact and conclusions of law made by the district court, may be certified "so that it may become a part of the records and proceedings had in the above entitled cause, in order that all the matters may be fully determined by one hearing in this cause."

We are not favored with a brief in support of the motion nor one in resistance thereof, yet it appears that the matter is of sufficient interest to engage our consideration.

The power reserved by the district court in his judgment is in accordance with the continuing jurisdiction residing in the court making the award to hear applications for diminution or termination of payment of compensation as the facts may warrant, as provided in section 156-124, N.M.S.A.1929. This continuing jurisdiction is commonly provided in workman's compensation acts, and the

exercise thereof is treated in 71 C.J. § 1381 et seq., of the article on Workman's Compensation Acts. At section 1396, it is said: "Except where a particular provision of the act authorizes, in the furtherance of justice between the parties, the correction of mistakes after the tribunal determining the compensation, if any, due an injured workman has once acted, it may not undo that which has been finally determined, nor deny the right of a party as established on appeal, even though based upon an incorrect view of the law." It appears that ordinarily the exercise of the continuing jurisdiction alluded to depends upon a change in condition, and it is stated in the notes that change in condition of claimant since the award is the only question for determination, and such change in condition refers to conditions different from those existent when the award was made. Since it appears from the decisions that generally application to decrease or terminate compensation under a prior award not being an original proceeding is not affected by the provision of the act fixing the time within which original proceedings for compensation must be instituted and is not affected by the Code provision applicable to modification of judgments generally, and in the absence of controlling statute or rule may be presented at any time within the period for which compensation is allowable (71 C.J. p. 1446 et seq.), it would appear that it is contemplated by our statute that such applications may be made to the district court after an appeal has been taken for the purpose of reviewing the original award. It is true that it is stated broadly that upon an appeal being granted or a writ of error being sued out to review a judgment of a district court jurisdiction has been transferred from the district court to the Supreme Court. But there are exceptions, and the provisions of the Workman's Compensation Act cited provide one of them. When the application for modification or termination has been made and the issues made up on appropriate pleadings, apparently there will be a case within a case, and we assume without deciding that a review here may be had of the district court's decision upon such hearing. That would be a new appeal—whether a short appeal as from final orders affecting a substantial right made after entry of final judgment, or an ordinary appeal as from a final judgment, is a matter upon which we do not express an opinion.

We hold that the trial court has the power to exercise the continuing jurisdiction provided in the statute and which the trial judge in the instant case so carefully reserved in its judgment, notwithstanding that subsequent to the original award an appeal has been granted to this court and such appeal is pending.

We see no place in the present appeal for the proceedings on the application for diminution or termination of the compensation upon the ground of changed conditions arising since the original award was made. Such a practice

might easily result in delay of a review of the original award and might tend to confuse rather than to enlighten us as to the merits of the errors assigned and directed to the original judgment.

Therefore, that part of the motion praying that such proceedings be certified to this court to become a part of the record in the pending appeal is denied. And it is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

70 P.(2d) 152

STATE v. INMAN.

No. 4253.

Supreme Court of New Mexico.

June 21, 1937.

W. A. Sutherland, of Las Cruces, C. C. Royall, of Silver City, and J. C. Gilbert, of Roswell, for appellant.

Frank H. Patton, Atty. Gen., for the State.

HUDSPETH, Chief Justice.

Aron L. Inman was charged with first-degree murder for the killing of Robert Ake. Upon the trial he was convicted of voluntary manslaughter and sentenced to serve from nine to ten years in the penitentiary. From the judgment and sentence of the court this appeal is prosecuted. The court, over the objection of the defendant, instructed the jury on voluntary manslaughter. This is assigned as error.

The material facts are: The deceased and defendant were cattlemen occupying adjoining ranges in Catron county. Ill feeling had existed for years, and on July 16, 1935, the defendant ordered the deceased off the ranch of which he was manager, whereupon the deceased challenged the defendant to "fight it out" with rifles, saying: "Inman, the next time I see you I am going to have my thirty and By God, you had better have yours." There was evidence that the deceased had been lying in wait alongside a trail which the defendant frequently traveled and of threats made by the deceased and communicated to defendant. On August 6th, three weeks after

the threat or challenge of July 16th, the defendant drove into Beaverhead, a small village which had a weekly mail service and at which many of the residents of the sparsely settled mountain region tributary to Beaverhead assembled on Tuesday of each week, the day of the arrival of the mail. He stopped his truck some 40 to 50 feet from the point in the street at which the deceased was standing. The defendant testified: "When I stepped out of my car, Bob Ake was kind of facing me. He gave me a hard look and turned toward the car parked in front of the Post Office gate. I then grabbed my gun out of the seat of my car and fired as quick as I could. I fired the shot because I thought that Mr. Ake had started to that car to get a gun. When I fired, he fell over backwards. Then he threw his right hand across his body (Indicating) and looked at me and said 'God damn you' and attempted to get up, and I fired again as soon as possible. * * *" The defendant had previously testified as follows: "The disclosure to me of these facts and threats affected me as to my feeling of safety and peace of mind. I can't explain it, it was a feeling I never had before. I don't believe I can explain it. It caused me to take all precautions I knew how to take, and tend to my business. I taken someone with me wherever I went, and I did not ride alone anymore in that country. When I did ride I looked behind everything I passed, brush, rocks. I did not run any risks. I would not have been surprised to have seen Mr. Ake anywhere up that river. I had no reason not to know Mr. Ake was not well acquainted with that river and its places of exposure. He knew as well as I did. I persisted in my feeling of anxiety very much. After the 16th of July I next saw Ake on August 6th, that was Tuesday. On that day I went to Beaverhead Post Office. * * *" And on cross-examination the defendant testified as follows: "After I shot Ake I went into the house to tell Bud Sheff to call the Sheriff and to get a drink of water. I probably was a little thirsty. I don't know whether I was excited or not, I suppose I was. I had been expecting this so long, I expect I was not. I had been expecting this a long time before it happened. I didn't shake hands with my friends that I remember of. I wouldn't say positively, but I don't remember. That is my rifle. (Shown by District Attorney). That is the one that shot Bob Ake. State's Exhibit A I believe is the one. That is a 30-30. I have no other explanation of why I shot that second shot. I fired the first shot to save my own life and I fired the second one to save my own life."

The question to be determined is whether or not the facts bring the case within the rule to the effect that the defendant was in such "terror" that it constituted "heat of passion" as defined in State v. Kidd, 24 N.M. 572, 175 P. 772 and followed in other cases, the last being State v. Simpson, 39 N.M. 271, 46 P.(2d) 49, 50. The defendant relies upon State v. Hunt, 30 N.M.

273, 231 P. 703, maintaining that the facts in the case at bar are similar to those in the Hunt Case, where we held that "It is error, requiring reversal, to submit * * * a degree of unlawful homicide not within the proofs, and over the objection of the defendant."

It is also pointed out that under all the authorities three weeks is a sufficient "cooling time" and that the evidence supports the theory that the defendant at the time of the homicide displayed the utmost coolness and deliberation. It is true that no time was wasted after the defendant arrived at the scene of the homicide, but he testified that he shot to save his own life. "I fired because I thought that Mr. Ake had started to that car to get a gun." This plea of self-defense was based upon the immediate danger.

Defendant's brief states: "The jury did not believe the self defense story as shown by their verdict. If they did not believe this defense clearly there was no other verdict for them than murder." The facts in the case at bar are quite similar to those in State v. Simpson, supra, where we said: "The verdict thus represents the conclusion that the provocation for terror was not sufficient to justify the killing, but was sufficient to raise a reasonable doubt that appellant slew in malice." This language is applicable here, and the rule in the Simpson Case is controlling in the case at bar. The defendant's able counsel strenuously argue that the Hunt Case, as well as the weight of authority in other jurisdictions, is contrary to this rule. The rule was adopted after thorough consideration and we see no reason to depart from it now. A discussion of the question as to whether the Simpson decision overruled State v. Hunt, supra, would serve no useful purpose in view of the promulgation of Trial Court Rule 35—4453 and the enactment of chapter 199, Laws 1937, now effective. A careful reading of the record and thorough consideration of the arguments of defendant's counsel leave us with the conviction that the defendant had a fair trial and that the verdict should stand.

Finding no error in the record, the judgment and sentence of the district court will be affirmed, and it is so ordered.

SADLER, BICKLEY, BRICE, and ZINN, JJ., concur.

70 P.(2d) 757

STATE v. HARRIS.

No. 4286.

Supreme Court of New Mexico.

July 29, 1937.

Hervey, Dow, Hill & Hinkle, of Roswell, for appellant.

Frank H. Patton, Atty. Gen., and Richard E. Manson, Asst. Atty. Gen., for the State.

ZINN, Justice.

Appellant was tried and convicted of the offense of involuntary manslaughter and sentenced to serve a term in the penitentiary of not less than two nor more than three years. From this judgment and sentence this appeal is prosecuted.

There were no objections taken at the trial to any of the testimony adduced by the prosecution, and no objections were made to any of the instructions given by the trial court, and no instructions were requested by the appellant either contrary to or differing from those instructions given to the jury by the trial court.

Counsel for appellant now ask this court to review the entire record to ascertain whether or not the trial court erred in giving instructions to the jury defining the crime of manslaughter as applied to the facts in this case. The appellant claims the court committed fundamental error in that the court's instructions were not in accord with the appellant's conception of the degree of negligence necessary to constitute the basis of the crime of involuntary manslaughter.

It was the duty of the appellant to point out to the trial court any claimed errors in the administration of justice as they occurred. This would have enabled the judge of the district court to avoid such errors. The failure of the appellant to point out the errors which he now claims were committed by the trial court, and his failure to invoke a ruling by the trial court at the time, is fatal. The purpose of the law is to give an accused a fair trial, not repeated chances for an acquittal. Errors, if any, not in some manner brought to the attention of the trial court, may not be relied on here for reversal. State v. Diaz, 36 N. M. 284, 13 P.(2d) 883, and cases therein cited.

Appellant contends that the trial court committed fundamental error. This contention is based on the claim that the court did not properly instruct the jury on the law of the case, and that the evidence does not show that the appellant was

driving his truck in a reckless, wanton manner in utter disregard for the safety of others. If the record showed that the killing had been caused by mere negligence, not amounting to a reckless, willful and wanton disregard of consequences to others, then there would be no basis for a criminal action.

We agree with the rule enunciated by the Supreme Court of Illinois, that in the case of an accidental death of a pedestrian struck by an automobile, where the proof is sufficient to establish, beyond a reasonable doubt, that under the circumstances of the injury the conduct of the driver of the machine was so reckless, wanton, and willful as to show an utter disregard for the safety of pedestrians, a conviction for manslaughter will be warranted; but an injury caused by mere negligence, not amounting to a reckless, willful, and wanton disregard of consequences, cannot be made the basis of a criminal action. The Illinois court said: "This court has, in reviewing judgments for manslaughter where death was caused by alleged reckless driving of automobiles, laid down the rule that where the proof is sufficient to establish, beyond a reasonable doubt, that under the circumstances of the injuries the conduct of the drivers of the machines was so reckless, wanton, and willful as to show an utter disregard for the safety of pedestrians, convictions for manslaughter will be warranted. These cases also recognize the rule that an injury caused by mere negligence, not amounting to a reckless, willful, and wanton disregard of consequences to others, cannot be made the basis of a criminal action." People v. Allen, 321 Ill. 11, 20, 151 N.E. 676, 679.

We have read the record and find that there is ample evidence to establish, beyond a reasonable doubt, that under the circumstances of the killing, the conduct of the appellant in driving his truck was so reckless, wanton, and willful as to show an utter disregard for the safety of others. A conviction for manslaughter was warranted. The evidence shows that the actions of the appellant were not mere negligence. The conviction must stand, inasmuch as we find no fundamental error to justify a reversal.

For the reasons given, the judgment and sentence of the district court will stand affirmed.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

70 P.(2d) 758

STATE v. McCABE.

No. 4280.

Supreme Court of New Mexico.

July 24, 1937.

Rehearing Denied Aug. 23, 1937.

G. L. Reese, Sr., of Roswell, and T. E. Mears, Jr., of Portales, for appellant.

Frank H. Patton, Atty. Gen., and A. M. Fernandez, Ass't Atty. Gen., for the State.

ZINN, Justice.

The defendant (appellant here) killed J. J. Rose.

J. J. Rose had showered intimate attentions upon Lucille McCabe, the daughter of the defendant, for many years. Rose had sought her company at socials and other occasions to such an extent that it was noticeable in the neighborhood. These amorous gestures by Rose towards the girl had commenced when she was an immature child and had continued until the time of the tragedy. The defendant had accused Rose of having taken Lucille McCabe to Texas for immoral purposes and had Rose arrested, charged with having a female minor in his possession for immoral purposes. Rose was arrested, placed under bond, and his case came on for hearing. Upon discovery that Lucille McCabe at that time was not a female minor, Rose was not prosecuted. When defendant was informed of this fact by the prosecuting attorney, he took a gun from his car and started toward the courthouse in Portales, N. M. He came upon Rose at the front door of the courthouse, in broad daylight,

and in the presence of a number of witnesses. The defendant killed Rose while Rose was sitting on the concrete bannister at the front door of the court, and while Rose was totally unarmed. Not a word was spoken at the time of the homicide either by the defendant or the deceased.

The defendant was informed against by the State, brought to trial before a jury, and convicted of murder in the second degree. The defendant was sentenced to the penitentiary for a term of not less than fifteen nor more than twenty-five years. From such verdict and sentence this appeal is prosecuted.

The defendant's defense was predicated upon temporary insanity and self-defense. Three points are claimed as error on appeal.

The defendant claims that:

1. The trial court erred in permitting witness Carl Case to testify as to the good reputation of the deceased and in denying the motion of the defendant to strike the testimony of said witness. It is the claim of the defendant that the witness was not qualified to testify as to the reputation of the deceased, and that no proper predicate therefor had been laid by the state.

2. The court erred in overruling the motion of the defendant to strike the testimony of witness J. Irving Nunn as to the reputation of the deceased and in permitting said witness to testify as to the good reputation of Rose because no proper predicate for such testimony was laid by the state. It is the claim of the defendant that witness Nunn by his own testimony shows that he was not qualified to testify that such reputation was good.

3. The court erred in sustaining the motion of the district attorney to strike out the answer of witness Price Crume wherein such witness in response to a question by attorney for defendant answered that he had been arrested at Kenna and tried in the justice court for stealing crossties, and paid the costs of the suit.

The court did not commit error in admitting the testimony referred to in defendant's first and second assignments of error.

The first objection made to the testimony of Carl Case, the manager of a canning factory, was to the qualifying question whether the witness knew what the reputation of J. J. Rose was for peace and quietude. This was objected to by counsel for defendant, which objection was overruled. Thereupon the witness answered: "Yes." The next question propounded to the witness was whether that reputation was good or bad. This question was not objected to. Upon further examination, both cross and redirect, it was clearly shown that the witness based his conclusion as reflected in his response to the question propounded to him upon the absence of derogatory remarks of Rose's conduct by Rose's neighbors. The testimony of Case as to the reputation of Rose for peace and quietude was in effect that in so far as the witness was concerned he knew nothing against deceased's reputation in the respect

inquired about. We cannot see wherein the defendant was in any way prejudiced by this form of testimony.

No objection was made to the State laying its predicate for the reputation evidence offered by the State through witness Nunn, about which complaint is now made by the defendant in the second assignment of error. It was after cross-examination that a motion was made to strike the testimony. Witness Nunn testified in effect that the deceased, Rose, had been "straight" with him and that it was upon this record of personal dealing that witness Nunn had based his response to the question as to Rose's general reputation. It is clear that general reputation cannot be deduced from such facts. However, the defendant was not prejudiced.

Witness Nunn may have been disqualified from expressing his opinion as to the reputation of deceased based solely on his own judgment arising out of his personal relations with Rose. Nevertheless it cannot be said that the court abused its discretion in permitting the testimony to stay in for what it was worth and to be weighed by the jury in the light of the very proper and very thorough cross-examination of witness Nunn by counsel for defendant. Evidence of character is founded on opinion, and in the admission or rejection of opinion evidence, the court has a certain discretion which will not be interfered with on appeal unless clearly erroneous. 3 Am. Jur. 593, § 1036.

In the case of State v. Douthitt, 26 N.M. 532, 194 P. 879, 881, we said: "A witness may know that the reputation of a party for truth and veracity or good moral character is good in a given community, although he has never heard any one discuss it. The mere fact that it has not been discussed is sufficient to justify the witness in saying that it is good."

The testimony of witnesses Case and Nunn that they knew the reputation of the deceased for peace and quietude were weakened by their ambiguous and contradictory assertions on cross-examination. However, the court, who had the advantage of observing the character and demeanor of those witnesses on the stand, did not err in refusing to take their testimony from the jury. The denial of the motions to strike the testimony could have done no harm, because the jury had the benefit of the cross-examination to aid it in weighing the truth of the witnesses' declaration of knowledge. No substantial right of the defendant was affected.

The third assignment of error is predicated upon the court's striking certain testimony of witness Crume elicited upon cross-examination by the defense. This witness upon cross-examination had testified that he had been arrested for stealing crossties and paid the costs of the suit. Upon motion by the State this testimony was stricken. It is the defendant's contention that the question was properly asked for the purpose of impeaching witness Crume and for the purpose of affecting his credibility, pursuant to 1929 Comp.

St., § 45-606, and should not have been taken from the jury.

Section 45-606 permits the questioning of a witness to determine whether such witness had ever been convicted of any felony or misdemeanor. In the instant case the impeaching testimony was not properly offered and no error was committed by the court when the same was stricken. The witness responded in the affirmative to a question asked as to whether or not he had "been tried in the justice of the peace court for stealing crossties," and had "paid the costs of the suit." Counsel for defendant urge that the testimony is admissible under the statute because "it is equivalent to a conviction, where a man pays the costs."

We have held that it is the conviction, that is, a plea or verdict of guilty and judgment or sentence passed on such plea or verdict, which must be inquired into, and not proof of the equivalent of a conviction. State v. Roybal, 33 N.M. 540, 273 P. 919.

The trial court by its ruling did not foreclose any further investigation or inquiry into the matter inquired about. The witness could have been asked whether he had been convicted of stealing crossties and sentenced. This was not done and there was no offer of proof that there had been a conviction and no claim was made or is now made that there was any. The question as asked and the answer as given did not prove any conviction.

Finding no error, the verdict and judgment must stand.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

70 P.(2d) 760

MERCHANTS BANK (BURKE, Intervener) v. DUNN et al.

No. 4223.

Supreme Court of New Mexico.

July 14, 1937.

W. A. Keleher and Theo. E. Jones, both of Albuquerque, for appellants.

Marron & Wood, of Albuquerque, and H. C. Denny and H. S. Glascock, both of Gallup, for appellees.

SADLER, Justice.

This is a suit by the Merchants Bank, a banking corporation, of Gallup, N. M., as plaintiff, to set aside a conveyance of certain real estate located in the town of Gallup, as a voluntary conveyance made in fraud of creditors. The grantors in the deed of conveyance, John J. Dunn and Mabelle A. Dunn, his wife, of Gallup, and the grantee therein, A. E. Thiffault, of Chicago, Ill., were made defendants to the suit. While the suit was pending and before trial, John J. Dunn in the meantime having been adjudicated a bankrupt, his trustee in bankruptcy, Frank J. Burke, intervened in the suit, adopted the allegations of the complaint, and prayed that said deed be set aside and the property adjudged in ownership of the bankrupt for the benefit of all his creditors.

The case was tried at Gallup on December 5, 1935. Within a week prior thereto, on November 27th, the defendant Thiffault, by consent of all parties, had been orally examined out of order as a witness in his own behalf at Santa Fé and a transcript of his testimony preserved. Upon the trial, when plaintiff had rested its case, the defendants moved for a dismissal, themselves tendering no testimony or evidence. This motion the court properly treated as a demurrer to the evidence. However, in their argument upon the motion, so treated, counsel for plaintiff dealt with the testimony of defendant Thiffault, not theretofore introduced, and consented that the court might take same into consideration in ruling on the demurrer. Ac-

cordingly, if the testimony of Thiffault is to be considered, the most that can be said of it, and counsel for defendants do not seriously contend otherwise, is that the transcript thereof came in as a part of plaintiff's case in chief, to which defendants' demurrer was directed along with all other evidence adduced by plaintiff. We shall so treat it.

The trial court sustained defendants' demurrer to the evidence and dismissed the complaint. From the judgment so rendered the plaintiff and the intervener join in this appeal, praying a revision and correction thereof. A statement of the facts is necessary to test correctness of the trial court's ruling on the demurrer.

On December 28, 1933, the defendants Dunn and wife signed two notes in plaintiff's favor in the total principal amount of $9,800, renewing an indebtedness of the Dunns which originated some five years previously in the sum of $11,500. As security for the debt and on the same date the notes for $9,800 were signed, the Dunns executed a mortgage in plaintiff's favor on some improved real estate in Gallup.

On January 19, 1934, less than three weeks later, the Dunns joined in a conveyance to defendant Thiffault of certain other real estate in Gallup, consisting of improved town lots, by a deed reciting as the consideration "the sum of ten ($10.00) * * * and other good and valuable considerations." There were attached to the deed canceled documentary revenue stamps in the amount of three and one-half dollars. This deed was promptly recorded. At the time of this conveyance, the property mortgaged to plaintiff only three weeks prior thereto had a value not to exceed $7,750. There was no evidence that the Dunns owned any other property, real or personal, than that mortgaged to plaintiff and that conveyed to defendant Thiffault. The propperty conveyed to Thiffault had a net value of $3,500 at the time of its conveyance.

Mrs. Thiffault and Mrs. Dunn were first cousins. Mrs. Dunn had been reared in the home of Mrs. Thiffault's mother from the time she was a child five or six years of age and was looked upon as a member of the family.

Actual consideration for the conveyance from the Dunns to Thiffault as testified by Mr. Dunn and Mr. Thiffault, each being placed on the stand at plaintiff's compulsory call, was a loan from Thiffault to the Dunns made in the year 1931. Each related the same story touching this loan.

So related, it happened in this wise: In June, 1931, Mr. Dunn visited Chicago, asked and received of Thiffault a loan of $1,500. Proceeds of the loan were paid over in currency. Later, in August, 1931, Mrs. Dunn went to Chicago and asked and received an additional loan of $2,000, also paid in currency. The currency was removed by Thiffault from his safety deposit box in a named bank and delivered to Mr. and Mrs. Dunn, respectively, at the times mentioned, in Thiffault's home with no witness present in either instance. No receipt, note, or other

evidence of the loan was asked or given at that time.

Subsequently, a note on a form printed by Valient Printing Company of Albuquerque, N. M., was signed by the Dunns and mailed to Thiffault in Chicago. The note was dated August 4, 1931. Its maturity was one year from date. It provided for 10 per cent. interest from date, 10 per cent. attorney's fees, if placed with an attorney for collection, and was in the principal sum of $3,500, aggregate of the two loans testified to. According to Mr. Thiffault, this note was received by him in the mails "shortly after August 4th," 1931, its date; according to Mr. Dunn he sent it to Thiffault at Chicago with reference to the note's date, "sometime afterward * * * maybe a month or two * * * maybe three months." Whereas, according to the witness John C. Blaine of Valient Printing Company of Albuquerque, the note was one of an invoice of five thousand promissory note forms on Hammermill Bond paper not printed by his company until February 15, 1932.

Interest remained unpaid on the note from its date until settlement by transfer of the property to Thiffault, or from August 4, 1931, to January 18, 1934. During this period of approximately two and one-half years, although the note reached maturity at the end of one year, Thiffault made no demand upon the Dunns for payment either of principal or interest. No communication of any kind ever passed between them with reference to the note. Then, shortly before the conveyance in January, 1934, Thiffault, feeling some concern regarding the indebtedness, notwithstanding two and one-half years' silence on the subject, suddenly and of his own notion left Chicago for Gallup for the purpose of securing a settlement. The note he left behind in his safety deposit box, where it had remained unexamined and untouched since its receipt from the Dunns.

Arriving in Gallup he finally got around to the matter of the note. In Thiffault's own words the settlement came about thusly: "I asked if he was in a position to take care of this obligation. He said he didn't have any ready cash and spoke about the mortgage he had on those three buildings with the bank, *and the only thing he had to offer in settlement was this property on Coal Avenue.* After considering the matter we took it up with Mr. Denny and closed the deal." (Italics ours.)

Thus, according to the stories of Dunn and Thiffault, and under the circumstances related by them, was the loan made and settled.

Default having resulted on the $9,800 indebtedness due plaintiff, in due course it instituted foreclosure proceedings. On March 5, 1935, a deficiency judgment was entered against the Dunns for $3,323.50 as the amount remaining due plaintiff after applying proceeds of the sale of the mortgaged real estate. On April 27, 1935, the defendant John J. Dunn was adjudicated a bankrupt by the United States District Court for the District of New Mexico. Frank J. Burke was appointed his trustee

in bankruptcy, duly qualified as such, and intervened in this suit, aligning himself with the plaintiff for the benefit of all creditors, as aforesaid.

The sole question before us is: Did the court err in sustaining defendants' demurrer to the evidence? Or, to put it differently, did the evidence make out a prima facie case of fraudulent conveyance in favor of the plaintiff and the trustee in bankruptcy of defendant John J. Dunn? We think it may be taken as agreed by the parties that the conveyance to Thiffault was fraudulent as to existing creditors if it was voluntary and rendered John J. Dunn insolvent. If the evidence supports an inference of insolvency and that the deed was voluntary, the demurrer should have been overruled; otherwise, not. A statement of the rule applicable is necessary.

Upon demurrer to the evidence the demurrant admits as true all portions of the evidence and reasonable inferences flowing therefrom which tend to prove the allegations of the petition. The court cannot weigh conflicting evidence nor consider the case as submitted by defendant on plaintiff's showing. Union Bank v. Mandeville, 25 N.M. 387, 183 P. 394; Mansfield v. Reserve Oil Co., 38 N.M. 187, 29 P.(2d) 491. Applying this test, we have no hesitancy in declaring plaintiff's evidence made out a prima facie case and that the trial court erred in sustaining the demurrer thereto.

We may pass decision of the first point argued. It is that the recited consideration for the deed prima facie showed it to be voluntary under the authority of Rogers v. Balduini, 28 N.M. 102, 206 P. 514. It was there held that a conveyance by a woman largely indebted of all her property, worth $6,000, for a recited consideration of $1, was prima facie fraudulent against her creditors. The deed before us recites as consideration, "ten ($10.00) * * * and other good and valuable considerations." Defendants contend this makes a difference. Cf. Zuniga v. Evans, 87 Utah, 198, 48 P. (2d) 513, 101 A.L.R. 532. But why consider this argument when we know from the evidence the consideration was either satisfaction of a loan of $3,500 from grantee to grantors or nothing? The real inquiry becomes, then, whether the circumstances surrounding the purported loan, unexplained, or not further explained, support an inference that no such loan in fact was made. We hold they do support such an inference.

Much of the argument of defendants' counsel would be pertinent to a question of our right to disturb findings of the trial court made upon the submission of a cause on the merits but wholly inapplicable where the evidence is being tested on a demurrer. In the latter case the court does not weigh conflicting evidence. On the contrary, it disregards the conflict and such portions of the evidence as tend to weaken or disprove the issue plaintiff must sustain, and considers as true only such evidence, with its accompanying favorable inferences, as supports the material allegations of the petition. Such is the price the demurrant must pay for having the evidence tested on demurrer. If it seems too great, let him

meet the issue. He hazards nothing on the result of his test. If sustained, he has thus far prevailed. If he loses, either before the trial court or here, he takes up right where he left off, opens his case, and puts on his evidence. In view of these considerations, this price seems not too great.

Accordingly, notwithstanding the fact that Dunn and Thiffault were on the stand as plaintiff's witnesses, though hostile, to accept as true their story of the loan would be to destroy rather than support the material allegations of the petition. The door to inferences, under the rule, may not so quickly be closed. The court must hear their story through before permitting inferences to arise. Thus considered, the unusual nature of the transaction; the close relationship of the parties; the passing from lender to borrower of $3,500 in currency outside the presence of witnesses; the taking of no receipt therefor at the time; presentation of a note as evidence of the debt claimed to have been executed shortly after August 4, 1931, or at most within two or three months thereafter, on a form testified by the printer not to have been printed until February 15, 1932; silence of the parties concerning the transaction as between themselves for two and one-half years with no demand for payment either of interest or principal; and, finally, a trip from Chicago to Gallup by the lender to secure a settlement without taking with him the note which was to be the basis of any settlement arrived at—these circumstances, viewed in the light of the financial condition of the Dunns, certainly cast such suspicion on the whole transaction, if not further explained, to support an inference that the loan never in fact took place.

But, it is said by defendants' counsel, there is nothing in the evidence to support an inference of insolvency. Plaintiff's counsel counters with the suggestion that no such defect in the proof was raised at the trial as a ground of the demurrer. Cf. Blacklock v. Fox, 25 N.M. 391, 183 P. 402; Schaefer v. Whitson, 32 N.M. 481, 259 P. 618; Jackson v. Gallegos, 38 N.M. 211, 30 P.(2d) 719.

We find it unnecessary to consider this contention, since in our view the evidence warrants an inference of insolvency. On December 28, 1933, the Dunns admittedly were indebted in the principal sum of $9,800, secured by a mortgage on certain real estate. This eventuated into a deficiency judgment of $3,323.50 in March, 1935. John J. Dunn was adjudicated a bankrupt in April following. Cf. Rogers v. Balduini, supra. On January 18, 1934, less than three weeks following execution of the $9,800 in notes and the mortgage, the deed in question was delivered. The cashier of plaintiff bank knew of no other real estate owned by John J. Dunn than that covered by the plaintiff's mortgage and Thiffault's deed, nor of any cash.

Thiffault testified that when he got Dunn's agreement to pass the deed, Dunn said he had no ready cash, mentioned plaintiff's mortgage on other property owned, and further that "the only thing he (Dunn) had to offer in settlement was this property on Coal Avenue." If it was, its conveyance

in the light of other facts shown gives rise to an inference of insolvency.

It seems apparent to us from comment of the trial judge at the time of sustaining defendants' demurrer that, although considering the evidence before him as on demurrer, he erroneously resolved conflicts therein as though deciding on the merits. The defendants should have been compelled to proceed with their case. In so doing they may entirely overcome the unfavorable inferences arising from the evidence as it now stands.

The judgment of the lower court will be reversed. The trial court is directed to overrule defendants' motion to dismiss, treated as a demurrer to the evidence, and proceed further in the trial of the cause conformably to the views herein expressed.

It is so ordered.

HUDSPETH, C. J., and BICKLEY and BRICE, JJ., concur.

ZINN, J., did not participate.

70 P.(2d) 764

In re HOGUE.

CROOK et ux. v. WALKER.

No. 4176.

Supreme Court of New Mexico.

July 24, 1937.

Hatch, Grantham & Manson, of Clovis, for appellants.

James A. Hall, of Clovis, for appellee.

MABRY, District Judge.

Appellants, Clarence Crook and Bessie Crook, his wife, petition for the adoption of Billy Dee Hogue, a two year old minor. Upon hearing and objection of natural mother, Geraldine Walker, appellee, the petition was denied, and petitioners appealed.

Appellants filed their petition for adoption, alleging in substance that the child, Billy Dee Hogue, was an illegitimate and abandoned child; that they then had the care and custody of said child and were able to provide a suitable home for it; and that it was for the best interest of said child that the petition for adoption be granted. There had been no prior adjudication that the child was neglected or abandoned, nor was any consent to adoption obtained from the natural mother. Appellee, the natural mother of said child, filed her answer denying that the child was abandoned, and alleging that she was able and willing to furnish proper care and support, and prayed the petition be denied and that she be awarded the custody of the child who for some three or four weeks had been in the custody of petitioners with her consent. The cause was referred to the Bureau of Child Welfare in due course, and the Bureau submitted its report to the court recommending that petitioners be allowed to adopt. It does not appear that the bureau investigated the conditions surrounding the natural mother, but their report only went to the suitableness of the home of petitioners, and in support of petitioners' claim that they were fit and proper persons to have the child through adoption. The case was tried by the court, and the court made findings of fact, some of which appellants contend were hard to reconcile with the decree of the court in denying petitioners' prayer. It appears from the testimony that appellee had been employed by the appellants at a small weekly wage; that they gave her room and board for herself and child for a month or more; that shortly after the employment began appellee left appellants' home, leaving the child there, and she was not heard from by appellants for approximately three weeks, and that appellants during that time had the care and custody of the child, appellee contributing nothing to its support; that appellants were fond of the child and gave it every care and attention during the

time that the mother was absent, and the child, as they claim, thus abandoned. That shortly after appellee left the home of appellants she received a letter from the attorney for appellants suggesting that she sign a document giving her consent to the adoption of the child by appellants. There is a conflict of testimony as to whether the petitioners were good to the child, but the court found for them in this respect, but, in addition, found that appellants at one time said that if the mother would pay a board bill of $16 and show that she was able to support the child it would be returned to her. Appellants concede that the discretion of the trial court in awarding custody cannot be disturbed if supported by substantial evidence, but seem to take the position that, although there may be substantial evidence to support the judgment, yet, in view of the court's findings, the judgment should not stand; that is to say, appellants contend that the court cannot find that the best interest and welfare of the child will be served by granting the petition and permitting adoption, and at the same time arbitrarily permit the natural tie of kindred and mother love to determine its judgment. It seems to us that appellants are in error here, and this error is predicated upon a wrong interpretation of the trial court's use and understanding of the "welfare" and "interest" phrases found in its opinion.

It is well settled that this court will not disturb findings of fact of the trial court which are supported by substantial evidence. Crosby et ux. v. Harral et ux., 35 N.M. 575, 4 P.(2d) 655; Pra v. Gherardini, 34 N.M. 587, 286 P. 828.

We think appellants misinterpret the trial court's findings of fact. Appellants interpret the findings as requiring judgment allowing adoption. We do not believe that the court's findings, when taken as a whole and read together in connection with the testimony, justify such construction. Appellants point out that the trial court must have decided the issues here against appellants and in favor of appellee, the mother of the child, because of the ties of blood and relationship rather than under the rule that the paramount issue should be and is the best interest and welfare of the child.

Appellants call our attention to the case of Crosby et ux. v. Harral et ux., 35 N.M. 575, 4 P.(2d) 655, 656, where Mr. Justice Hudspeth said in sustaining the lower court's judgment in an adoption matter: "The trial court properly made the welfare of the child the loadstar of his decision." But we find there no inconsistency with our holding here. The welfare of the child is not to be determined by and does not rest altogether upon economic and financial considerations and factors.

Isolated excerpts from the court's findings, which were informal and dictated into the record during and at the close of the case, would in a measure support appellants' contention, but a careful reading of all the findings and statements of the court in explanation of the judgment it gave nullifies such interpretation. The

evidence supports the findings of the court that the natural mother of the child, though she might temporarily have abandoned it for a few weeks in December, 1934, immediately got in touch with petitioners who then had its custody, and endeavored to regain possession; and, that at the time of the trial, and at all times thereafter, the mother was living with relatives and was able to take care of the child, although perhaps "not as well as" petitioners. The court further found that although there was an abandonment for "three or four weeks or about a month * * * but since then the status has changed," and the court further states in its findings and in explanation of its decision that had the temporary abandonment continued for any length of time the explanation offered by the mother of the child might not have applied. The court also took notice of the fact that the mother came immediately to claim her child when she was advised that the Crooks desired to adopt it, and that she was then a fit and proper person to have its custody.

Appellants rely upon the case of Pra v. Gherardini, supra. In that case the natural mother of the child voluntarily delivered and gave her child to her sister and brother-in-law when it was about one month old. The mother contributed nothing by way of food, clothing, or money toward the support of the child. She always treated it as though it were the son of her sister; it was some nine years later that the mother decided she wanted the child and made her first claim to it. The foster parents had become greatly attached to the child in these years. The trial court held, and was by this court sustained, that even a natural mother, though otherwise a fit and proper person, under the circumstances of that case, could not get back her child, saying, "The best interests of the child requires that he be left with respondents." We there disapproved of the rule sought to be invoked, viz., that if the mother be a fit and proper person she would have the paramount right to the child, notwithstanding the best interests of the child demand otherwise. And this doctrine still stands undisturbed. But in the case at bar we have a different situation, and a case that carries none of the compelling reasons that supported the opinion in the Pra Case. We have here no voluntary parting with possession or gift of the child; there are no long years of custody in appellants who, by the conduct of the natural mother, had been led to believe that the child they had nourished, fed, clothed, and loved from its very infancy would never be snatched from the cradle of their affections. Three weeks is scarcely time enough for a stranger's love and attachment to become so great that the rights of the natural mother, though poor and jobless, but otherwise a fit and proper person, should be denied.

This court has heretofore said a parent has no property right in their children, and the paramount issue is the welfare of the child. Ex parte Wallace, 26 N.M. 181, 190 P. 1020; Crosby et ux. v. Harral et ux., 35 N.M. 575, 4 P.(2d) 655;

Pra v. Gherardini, 34 N.M. 587, 286 P. 828. And yet all courts recognize that in determining the right to the custody of a child under adoption proceedings that the welfare and best interest of the child is not measured altogether by material and economic factors—parental love and affection must find some place in the scheme and we all know this item covers a multitude of weaknesses. The trial court by its findings recognized the mother to be, notwithstanding her temporary abandonment of the child prior to the proceedings being filed, a fit and proper person and one who was attached to and wanted her child. The trial court probably made an unhappy choice of words when it said in one of the findings that "the appellants were more nearly qualified under the rule that the welfare of the child is paramount," but it is clear, by following the court's entire statement, that by "welfare" it meant financial and economic only, as distinguished, for example, from spiritual, filial, or social. And the court makes it clear that this, its interpretation, is the measure that it understands is applied by the courts when they use the term "welfare of the child." For example, the court in explaining its feeling and finding that this child should go to its natural mother, under the circumstances in this case, pointed out that:

"Very few of us but that somebody could come along and say, 'I am in a whole lot better position to give that child educational advantages and training than the mother or father. * * *' They might take some of your children. * * * They might have taken mine, because I know of men with better facilities who might be superior intellectually, morally, etc., to raise a child, but the ties are not the same."

The court's finding therefore that the natural mother, appellee, at the time of the trial has a home for the child with her sister and brother-in-law, and that they are amply able to assist the mother in caring for the child, and there being findings as to her general and moral fitness, leads us to the conclusion that the court in using the term "welfare of the child" used it in the sense and had in mind the economic and financial aspect or definition only.

Finding no merit in appellants' contention, the judgment will be affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

70 P.(2d) 896

MERRIFIELD v. BUCKNER et al.

No. 4129.

Supreme Court of New Mexico.

July 26, 1937.

John F. Simms, of Albuquerque, for appellant.

Bradley M. Thomas, Harry S. Bowman, and E. C. Warfel, all of Santa Fé, for appellees.

BRICE, Justice.

This is an action to quiet title to 126 acres of land within the boundaries of the Chilili Land Grant. A statutory answer was filed by the board of trustees of the Chilili Land Grant, as such trustees, and as individuals in behalf of themselves, two hundred residents of the Chilili Land Grant who reside on lands within it, and in behalf of the Town of Chilili; together with a cross-complaint to quiet title in the Town of Chilili; and to cancel certain deeds.

The following are the essential facts, taken from the findings of the court made after the trial:

The Chilili Land Grant, called "The Town of Chilili Grant," was made by Mexico, confirmed by Congress in 1858,

and patented in 1909. It lies in part in what is now Torrance county (formerly Bernalillo) and is a community grant, having certain tracts set apart to residents, and common lands managed by a board of trustees. In 1909, the trustees sold to Samuel Eblen and Joseph Eblen the 126 acres, for $2 an acre; collected the $252 in cash, executed a trustee's deed on November 5, 1909, delivered it to the purchasers, and made a copy of the deed in the minute record of the board itself. The Eblens recorded their deed promptly, assessed the land to themselves for 1910 and up to 1916, and in the latter year sold it by warranty deed to George C. Merrifield for $504 ($4 per acre). Merrifield recorded his deed, assessed the land in his name until his death, and his widow, the plaintiff, through inheritance from him and by deeds from his children of a former marriage, acquired his rights. All taxes from 1910 to 1933, inclusive, have been paid by the Eblens and their successors, and the trustees of the grant never returned this land for taxes or paid any taxes on it. Mrs. Merrifield contracted to sell this land to another, and her contract is outstanding, made in good faith before this litigation started. The land is uncultivated and was a part of the common land of the grant. After buying it in 1916 from Eblen, Merrifield started a fence on one side of the land, cut firewood and posts on it from time to time, and on one occasion, when residents of the grant cut mine props on it, he had the props confiscated as his property. The trustees made no move to question his title, never brought any suit or action, paid no taxes for 25 years, and retained the purchase price received in 1909.

The decree of the district court denied appellant's prayer for relief, canceled a deed executed by the board of trustees of the Chilili Land Grant to Samuel and Joseph Eblen to the 126 acres of land in suit; also a deed to the same lands from the Eblens to George C. Merrifield under whom appellant claims, because invalid; and held that neither appellant nor those under whom she claims ever had any title to the land.

The land grant known as "The Town of Chilili Grant" was made by the republic of Mexico, and title confirmed in "The Town of Chilili" by act of Congress of December 22, 1858 (11 Stat. 374), and patented to the Town of Chilili in 1909.

There is nothing in evidence to indicate the nature of the original Mexican title papers, but it may be taken as a fact that the title is identical with that of the Town of Tomé Grant, confirmed by the same act of the Congress (December 22, 1858), in regard to which the Territorial Supreme Court, in Bond et al. v. Unknown Heirs of Juan Barela, 16 N.M. 660, 120 P. 707, 715, stated: "In other words, the only title which passed from the crown was to the allotments, and these to each of the allottees respectively, and not to the community to be held in common as the property of all. The outlying land remained in the crown sub-

ject, however, to use for pasturage and other purposes by the members of the community. That this last, however, constituted a title in no sense, but simply a permissive use at the pleasure of the crown, is pointed out in the Sandoval Rio Arriba Company and Pena Cases above referred to. The similarity between the present title papers and those in the Pena Case impresses us as particularly noticeable. This being the nature of the Tome title papers, we hold, with the contention of the appellees, that, when Congress came to act upon this claim in 1858, it passed as the property of the United States to the town of Tome all of the land not previously allotted to settlers. This thus partook of the nature of an original grant to that town and to its successors the present defendant corporation. The grant was burdened with no trust in favor of plaintiffs as the successors in title to certain of the original allottees, and the court below was therefore right in declining to impress upon the confirmation any such declaration of a trust."

Upon appeal to the Supreme Court of the United States the Tomé Case was affirmed (229 U.S. 488, 33 S.Ct. 809, 811, 57 L.Ed. 1292). The Supreme Court closed its opinion as follows: "* * * no title to any of the land, passed to any of the petitioners save those to whom allotments were made, and only to the allotted tracts, no further discussion is necessary. When patent to the entire grant issued to the town of Tomé, title to all the unallotted land passed from the United States to the town, unburdened with any trust for heirs or grantees of persons named in the original petition and decree."

These cases follow that of the United States Supreme Court in U. S. v. Santa Fé, 165 U.S. 675, 17 S.Ct. 472, 41 L.Ed. 874; U. S. v. Sandoval, 167 U.S. 278, 17 S.Ct. 868, 42 L.Ed. 168; Rio Arriba Land & Cattle Co. v. U. S., 167 U.S. 298, 17 S.Ct. 875, 42 L.Ed. 175; U. S. v. Pena, 175 U.S. 500, 20 S.Ct. 165, 44 L.Ed. 251.

The confirming act of Congress (December 22, 1858) covered numerous pueblos and town claims, and provided in substance that the pueblo land claims in the territory of New Mexico, designated in the corrected lists as "Number eleven, of the town of Chilili in the county of Bernalillo, * * * are hereby, confirmed; and the Commissioner of the Land-Office shall issue the necessary instructions for the survey of all of said claims as recommended for confirmation by the said surveyor-general, and shall cause a patent to issue therefor as in ordinary cases to private individuals: Provided, That this confirmation shall only be construed as a relinquishment of all title and claim of the United States to any of said lands, and shall not affect any adverse valid rights, should such exist."

As to the nature of pueblo grants, see above-cited cases and Townsend et al. v. Greeley, 5 Wall. 326, 18 L.Ed. 547; Hart v. Burnett, 15 Cal. 530, 550; Grisar v. McDowell, 6 Wall. 363, 18 L.Ed. 863; Palmer v. Low, 98 U.S. 1, 25 L.Ed. 60;

State v. Board of Trustees of Las Vegas Grant, 28 N.M. 237, 210 P. 101; Kavanaugh et al. v. Delgado et al., 35 N.M. 141, 290 P. 798, 800. We stated in the Kavanaugh Case: "The community land grant with which we now deal [Town of Tecolote Grant] is an anomaly among corporations. While we have termed it a quasi municipal corporation, it is in some respects more like a private corporation. Its principal, if not its only, function is to hold title to and manage its common lands; * * *"

The general statutes enacted in 1907 for management of community land grants which provide for the sale of common lands (article 1 of Chapter 29 N.M. Sts.1929) does not apply to the Chilili Grant because of the following provision: "but [this article] shall not apply to any land grant which is now managed or controlled in any manner, other than herein provided, by virtue of any general or special act." (Comp.St.1929, § 29-102.) This act was intended to apply to grants for which no legislative provision had been theretofore made for their management.

The Territorial Legislature of 1876 (Laws 1875–76, c. 51) provided, among other things, for a governing board of the Chilili Grant, consisting of five trustees "Whose duties shall be to pass such ordinance as they may deem necessary for the protection of the common property of the grant, subject to the approval of a majority of the bona fide residents of said grant." and with no other powers, duties, or authority except such as may be implied from that stated. This act has not been changed since 1899. The board of trustees of this grant is a creature of the Legislature, and has only such powers as were conferred by the act creating it. As no authority was granted the board of trustees to sell the common land, nor is such authority implied from that granted, its deed to the Eblens was void, as was the deed from the Eblens to Merrifield under whom appellant claims as a purchaser and his heir at law (as his grantor had no title); unless these deeds, together with the necessary possession, required by section 83-119, N.M.St.1929, have vested title in appellant and her predecessors by limitation. This statute provides in substance that, where a person has been in possession for ten years of lands granted by Spain, Mexico, or the United States, holding or claiming the same under a deed, etc., purporting to convey an estate in fee simple, and no claim to the land by suit is effectually prosecuted within such ten years by another, then such person shall be entitled to "keep and hold possession" against all, etc.

The facts with regard to possession, as set out in appellant's brief, under the heading "Statement of Facts," is as follows: "The land is uncultivated and is a part of the common land of the grant. After buying it in 1916 from Eblen, Merrifield started a fence on one side of the land, cut fire wood and posts on it from time to time, and on one occasion when residents of the grant cut mine props on

it, he had the mine props confiscated as his property."

It should be added that appellant and her predecessors in title have paid all taxes from 1910 until the filing of this suit, and the trustees of the Chilili Grant never returned the land for taxation or paid taxes thereon during that time, about twenty-three years.

The rule laid down by this court in Jenkins v. Maxwell Land Grant Co., 15 N.M. 281, 107 P. 739, 741, and approved in Montoya v. Catron, 22 N.M. 570, 166 P. 909, 910, is: "That to constitute adverse possession the occupancy of one so claiming must be (1) actual; (2) visible; (3) exclusive; (4) hostile; and (5) continuous. If any one of these elements is lacking, no title by adverse possession can ripen."

There was quoted with approval in the Montoya Case the following text: "'It is very generally held that to prove title by adverse possession, or any single element thereof, the evidence should be clear and convincing. It is also a rule of general application that such possession or element cannot be established by loose, uncertain testimony which necessitates resort to mere conjecture. Title by adverse possession cannot be established by inference or implication.' 2 C.J. 276."

We stated in the recent case of G O S Cattle Co. v. Bragaw's Heirs, 38 N.M. 105, 28 P.(2d) 529, 532: "The law controlling and applicable here is as was stated by this court in the case of Baker v. Trujillo De Armijo, 17 N.M. 383, 128 P. 73, 75, where we said: 'It has been settled that to constitute an adverse possession there need not be a fence, building, or other improvement made; it sufficing, for this purpose, that visible and notorious acts of ownership be exercised, for the statutory period, after an entry under claim and color of title. Ewing v. Burnet, 11 Pet.[41] 49, 9 L.Ed.[624] 628. The uses to which the property can be applied, or to which the owner, or claimant, may choose to apply it, the nature of the property, and its situation are largely controlling factors in determining what acts of ownership might be considered requisite to the assertion of an adverse claim.'"

It was there held that a rancher who used a piece of land in the middle of his ranch for watering cattle, a salt ground and range, need not fence it or put other improvements on it, "It being sufficient that visible and notorious acts of ownership be exercised after an entry under claim of right and color of title." See, also, Baker v. Trujillo De Armijo, 17 N.M. 383, 128 P. 73, and Johnston v. City of Albuquerque, 12 N.M. 20, 72 P. 9.

The court made no finding as to what uses the land was adapted or susceptible, and we are not advised in that regard. But the payment of taxes and occasional cutting of timber is not adverse possession. Talbot v. Cook, 57 Or. 535, 112 P. 709; Stern v. Fountain, 112 Iowa, 96, 83 N.W. 826; Stone v. Perkins et al., 217 Mo. 586, 117 S.W. 717.

True, appellant's predecessors had paid taxes on the land for over twenty years, which indicated that they claimed title to it, as the failure to pay taxes on it by the Town of Chilili indicated that it did not claim the title; and would have an important bearing on the question of adverse possession if the facts had been in dispute. Fletcher et al. v. Fuller et al., 120 U.S. 534, 7 S.Ct. 667, 30 L.Ed. 759; Holtzman v. Douglas et al., 168 U.S. 278, 18 S.Ct. 65, 42 L.Ed. 466. But we do not understand that these cases hold the payment of taxes alone is proof of adverse possession, but that it is evidence that may be considered on the question. This court and the Territorial Supreme Court have consistently held that continuous possession for ten years is necessary to perfect a limitation title; though the character of possession depends upon the uses to which the land can be applied. G O S Cattle Co. v. Bragaw's Heirs, supra.

The findings of the court are not questioned; indeed, they are appellant's requested findings. The conclusions of the court cannot be disturbed unless we hold that under the facts found it necessarily must follow that the court erred in its conclusion that the appellant had no title by limitation.

Aside from paying the taxes, there is no evidence of a limitation title. The fact that appellant's predecessors cut firewood and posts "from time to time" is not sufficient. From what time to what time? There must be some proof of entry and possession. Even though we should hold that this was a proof of entry, there is no proof of any particular ten years of continuous cutting of firewood and posts established. Now and then, or "from time to time," is too indefinite. 2 C.J. p. 276, supra. The court also found as facts that during the twenty-five years immediately prior to filing of the suit that residents of the Chilili Grant had likewise cut firewood and posts from the land in suit; from which it would appear that the land was used as much by the Grant residents as by appellant and her predecessors, and that even this exercise of ownership was not exclusive.

We cannot say that the court erred in his conclusion that appellant had no title to the land.

The district court found that appellant and her predecessors in title paid all taxes assessed against the land over a period of twenty-four years, beginning with the year of 1910.

The answer states: "These defendants herein agree to do any equity, or pay any money by refund that the law may direct and this court may require that they do or perform or pay."

After the court had announced the ruling on the question of title the appellant made the following statement: "That inasmuch as the Plaintiff and her predecessors in title have expended in the year 1909, $252.00, paid to the Trustees of the Grant, at the rate of $2.00 per acre, and have paid $174.36 in taxes, beginning

with the year 1910, and continuing up to and including the year 1933, upon the tract of land in the Town of Chilili Grant, that as a condition precedent to awarding relief to the Town of Chilili, as against the plaintiff, that the Town of Chilili should refund to the Plaintiff the sum of $252.00, plus six per cent interest for twenty-five years, plus $174.56 taxes."

The court denied this request and the appellant duly excepted.

The court found that the appellant, Merrifield, and her predecessors in title since the 5th of November, 1909, have claimed to own the land in fee simple as against the Town of Chilili Land Grant and all the world, and this claim has not been questioned or disputed by the Town of Chilili until the filing of this suit. From this finding of the court, it may be inferred that such claim of title was made in good faith, and that the payment of the taxes was for the protection of what appellant believed a good title to the property. Had she not paid the taxes, the appellees necessarily would have had them to pay or lose the property. They not only acquiesced in the payment of the taxes by appellant, but never rendered the property for taxation, as the court found. Under these facts the appellant is entitled to recover for the taxes so paid in good faith, together with 6 per cent. interest thereon from the dates of payment. Langhorst v. Rogers, 88 Ark. 318, 114 S.W. 915; Murphy v. Missouri, etc., Co. 28 N.D. 519, 149 N.W. 957; Bacot v. Holloway, 140 Miss. 120, 104 So. 696, 105 So. 739; Steers v. Kinsey, 68 Ark. 360, 58 S.W. 1050; Sorensen v. Larue, 47 Idaho, 772, 278 P. 1016; Cook v. Berlin Woolen Mill Co., 56 Wis. 643, 14 N.W. 808; Hudson v. Tilly, 154 La. 839, 98 So. 265; Linton v. Allen, 154 Mass. 432, 28 N.E. 780; White v. Harvey, 175 Iowa, 213, 157 N.W. 152; 51 C.J., title, Quieting Title, § 265. Nor does it matter that appellant is a successor to, and not, the person who paid the taxes. She stands in his place as the one entitled to be reimbursed. Zintheo v. Goodrich Rubber Co., 136 Wash. 196, 239 P. 391.

The fact that appellant did not claim the return of the taxes in her pleading we think is immaterial under the circumstances. She has a right to rely upon the tender made by appellees. Miller v. Cook, 135 Ill. 190, 25 N.E. 756, 10 L.R.A. 292. Evidence was taken on the question, an issue made thereof in the trial of the cause, acted upon by the court and no objections made. Under numerous rulings of this court the pleadings will be treated as amended in that respect.

The appellees asked for equitable relief by cross-action; and in response the court canceled all deeds evidencing a title in appellant. They should do equity and pay the taxes with interest, as they offered to do.

A more serious question is whether appellees should be required to return the purchase money. The taxes paid by appellant were debts the owner of the prop-

erty owed to the state and its municipalities. They were secured by a lien on the property, and must have been paid under penalty of its sale for taxes. But the board of trustees had no more authority to sell the land and receive the money than any other five members of the community, or even a stranger to the grant. They could not make regulations for the management of the grant without the approval of the members of the community.

That shadowy corporation known as "The Town of Chilili" is the owner of the land in fee simple by grant from the United States. Its existence and that of like corporations are recognized by the governments of the United States and this state. The state has treated them as municipal corporations with powers lying dormant, or nonexistent, until conferred by a legislative act. The difficulties involved in their administration were recognized by us in Kavanaugh et al. v. Delgado et al., supra, in which through Mr. Justice Watson we stated:

"Many difficult problems have arisen from the slow and gradual implanting of a common-law jurisprudence upon a civil law territory and population. The courts could not reject rights or institutions as nonexistent, because they had not as yet been translated into terms of the common law. With common-law machinery, under the direction of a bar and bench bred to the common law, it has been necessary to enforce rights and recognize institutions unknown to that system. Where technical interpretation and reasoning must have failed, practical administration has found the way.

"The 'town' of Tecolote was here when the United States troops took possession. It was recognized by the Congress more than thirty years before the common law was here adopted as the rule of practice and decision. Its transformation from a Mexican quasi municipal corporation (U. S. v. Sandoval, 167 U.S. 278, 17 S.Ct. 868, 42 L.Ed. 168) to a New Mexico corporation, is difficult to trace either historically or legally. We do not attempt the task."

We recognize the existence of the corporation and its title to the land, and shut our eyes to the "how" or "why" of it. As a practical matter the Legislature has assumed the function of exercising control over them through statutes providing for their administration by boards of trustees. But, as heretofore stated, the power conferred on the board of trustees of the Chilili Grant is limited to passing "such ordinances as it may deem necessary for the protection of the common property of the Grant, subject to the approval of a majority of the bona fide residents of said grant," and such other powers as are necessarily implied from those granted. As the land is subject to taxation and taxes must be paid or the land ultimately lost (State v. Board of Trustees of Las Vegas, 28 N.M. 237, 210 P. 101), there is implied authority to secure funds for the purpose of paying such taxes and for any other legiti-

mate purpose that could be denominated "for protection of common property." No doubt grazing fees may be charged and other like means used to obtain funds with which to pay taxes, but not by a sale of the land, the title to which is not vested in the board of trustees, but in the "Town of Chilili."

It is the legislative policy that these lands are not to be sold, except in proceedings to enforce the payment of taxes. The members of the board of trustees received the purchase money for the land, as individuals and not as representatives of the Town of Chilili. If the funds were now in the treasury of the board, they could be recovered as personal property owned by appellant; or if the money could be traced into property held by the board of trustees for the Town of Chilili a different question would be presented.

The cases of Hobbs Townsite Co. v. Hobbs et al., 38 N.M. 331, 32 P.(2d) 818; Central Transportation Co. v. Pullman's Palace Car Co., 139 U.S. 24, 11 S.Ct. 478, 35 L.Ed. 55; Louisiana v. Wood, 102 U.S. 294, 26 L.Ed. 153; Parkersburg v. Brown, 106 U.S. 487, 1 S.Ct. 442, 27 L.Ed. 238; Brown et al. v. Atchison, 39 Kan. 37, 17 P. 465, 7 Am.St.Rep. 524, and Board of Trustees, etc., v. Postel, etc., 121 Ky. 67, 88 S.W. 1065, 1066, 123 Am.St.Rep. 184, are not authority in this case.

Generally speaking, they were suits brought to recover money paid for bonds illegally issued. In some cases the property bought with the funds was still in possession of the defendant, while in others there were actual benefits received by the municipality which the courts held should be paid for; but in every case the municipality had acted through its duly constituted agents, and the action was brought to recover the fruits of the illegal contract.

But this is not such a suit. The appellant invoked the jurisdiction of the court by filing her suit to quiet title, with the result that it is determined that she has no title, neither did any of those under whom she claims, including the board of trustees of the Chilili Grant.

If it may be presumed that the money was deposited in the treasury of the board and spent legitimately for the benefit of the corporation (though without authority), still it cannot help appellant's case. She has no title to the property, neither had the board of trustees; and, though we ordered the return of the purchase money as a condition of canceling the void deeds, the refusal to comply would not validate them.

The declaration which we have made that the deeds in question are null and void in passing upon appellant's title is in effect a cancellation of the deed. Kittle v. Bellegarde, 86 Cal. 556, 25 P. 55; Gibbons v. Peralta, 21 Cal. 629.

The cause will be reversed and remanded, with instructions to permit appellant to amend her complaint in regard to her claim for refund of taxes with interest, determine the amount thereof, impress an

equitable lien against the land to secure the payment thereof, foreclose such lien, and sell said property under the direction of the court to satisfy such debt and interest, unless paid within such time as the Court shall direct.

The decree of the district court is otherwise affirmed. It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

70 P.(2d) 902

STATE v. GENNIS.

No. 4272.

Supreme Court of New Mexico.

July 22, 1937.

Nathaniel Lloyd, of Las Vegas, for appellant.

Frank H. Patton, Atty. Gen., and Fred J. Federici, Asst. Atty. Gen., for the State.

HUDSPETH, Chief Justice.

This is an appeal from a judgment and sentence of the district court after a jury had found appellant guilty of violating 1929 Comp.Stat. § 35-3201. The information states that appellant and 100 other persons did assemble together with intent then and there to do an unlawful act with force and violence against the property of the American Metal Company "by intimidation and threats to the employees of said Company to prevent the operation of the pumping system of the mine of said Company, thus and thereby causing or threatening to cause the destruction of the property of said American Metal Company." The property involved is situate on the upper reaches of the Pecos river and the underground workings of the mine extend under the river. In the early part of February, 1936, there were some 700 men employed in and about the mine and on the 12th day of that month in the early morning the appellant appeared at the collar of the shaft, with numerous other persons, and under his leadership it was resolved to prevent workmen from entering the mine and to bring the pump men out of the mine. The mine produced much water. It was testified by the foreman as follows:

"* * * In a little less than one hour the water would get so deep that the electric motors which drive the pumps would get wet and they would not work.

"Q. And what effect would that have on the mining operations there? A. It would stop.

"Q. And what effect would it have on the mine itself? A. It would eventually fill up with water and be lost. * * *"

Other witnesses testified that the appellant said "that they would go down and get the pump men that were at work, and let the mine flood, * * * that he would send a committee down to talk to Mr. Matson, and that it was his time to act, and if he didn't put the men back to work, I believe at that time, he had mentioned Andres Cruz and himself, that if they didn't come to their demands, why they would let it flood. * * *" and that they had formed a picket line to keep the men from going down in the shaft. When two of the pump men appeared at the collar of the shaft to go down to work, according to the testimony of Herbert

[redacted]

Hamilton, one of the pump men, the following occurred: "The Greek took me by the right arm and asked us where we were going, we told him we were going down, and he says, 'You are not going down, and nobody else is going down today.' * * *" The foreman of the mine testified: "I asked Gennis and Cruz once what would happen if we would put the pump men down anyway, and they said there would be trouble." Another witness testified: "Well, one time, Ole, the master mechanic, went and asked Cruz and Gennis to permit him to send lunches to his pump men who were left on duty. They refused and said that they would bring them out shortly anyway. I butted into the conversation and said that if the Mine drowned we would all be out of a job. Cruz said if we didn't get what we wanted, that is what we want to happen, and Gennis agreed, I believe he said, 'That's right.' * * *" A committee was appointed to get the men out of the mine. They phoned to the pump men in the mine and ordered them to shut down the pumps and come out. The foreman had the master mechanic cut off the power so that the appellant and his associates could not use the hoist in carrying out their threats to bring the pump men out of the mine. After the defendant and his associates had shut down the 12 mile aerial tramway between the mine and mill, the sheriff and other officers arrived and had to resort to the use of gas bombs in order to disperse the crowd of 150 or more about the shaft.

[redacted] The evidence is sufficient to warrant conviction under the statute which is set out in State v. Hawks et al., 28 N.M. 486, 214 P. 753. See, also, 66 C.J. 39; *People v. Most*, 128 N.Y. 108, 27 N.E. 970, 972, 26 Am.St.Rep. 458; Annotation, 58 A.L.R. 744, 751. The Court of Appeals in the Most Case, speaking through Mr. Justice Andrews, said: "The main question relates to the sufficiency of the evidence to support the charge in the indictment. In order to ascertain in what the offense of an unlawful assembly consists, reference must be had primarily to the statute which defines it. It was an offense well know at common law, and common-law definitions are a material aid in many cases in the interpretation of statute definitions of common-law offenses. But as it is competent for the law-making power to create new offenses not before known, so it may extend to common-law definitions of particular offenses so as to include acts not punishable under the common law and not embraced within the common-law definition of the offense. In other words, identity in the name of offenses at common law and under a statute does not necessarily imply that the same precise constituents, and no others, enter into each. * * * Unless, therefore, the jury were authorized to find that the threat charged in the indictment was made not only by the defendant, Most, but also by at least two other persons, on the occasion in question, the offense was not made out. In determining whether others par-

ticipated with Most in the threat alleged, it was not necessary that it should affirmatively appear that other persons present uttered or repeated the same words used by Most. Their participation could be shown by their adoption of his language, exhibited by their conduct. If the jury were authorized to find that the persons present were under the influence of similar sentiments, and that they (to the number of two or more) adopted his language as their own, then the threats, although only uttered by him in words, were also those of the persons who by their conduct united in and assented to them. 'If any person,' said Mansfield, C.J. in Clifford v. Brandon, 2 Camp. 370, 'encourages, promotes, or takes part in riots, whether by words, signs, or gestures, or by wearing the badge or ensign of the rioters, he is himself to be considered a rioter.' Within this principle the requisite concurrence of the statutory number in the threats uttered by Most was shown or at least there was sufficient evidence of that fact to go to the jury."

Appellant maintains that the names of other persons, if they be necessary to the consummation of the offense, should, if known, be inserted, and if unknown the information should so state—that the information is fatally defective in that the only description of other persons is "together with one hundred (100) other persons," and cites State v. O'Donald, 1 McCord (S.C.) 532, 10 Am.Dec. 691. Trial Court Rule 35-4421 provides: "(4) In no case is it necessary to aver or prove that the true name of any person, group or association of persons, or any corporation is unknown to the grand jury or district attorney." See, also, Martin v. State, 115 Ga. 255, 41 S.E. 576.

The appellant also questions the soundness of an instruction given, but no objection was made in the lower court and the point cannot be raised for the first time in this court. State v. Sullinger, 36 N.M. 148, 9 P.(2d) 689; State v. Loveless, 39 N.M. 142, 42 P.(2d) 211.

The main point relied on for reversal is that the trial court denied appellant 24 hours after the delivery of a copy of the information before requiring him to plead, in violation of Trial Court Rule 35-4451; which reads as follows: *"Copy of indictment or information to be furnished defendant.* Every person who has been indicted or informed against for an offense shall be furnished with a copy of the indictment or information together with the indorsements thereon at least twenty-four hours before he is required to plead thereto, and he shall not be required to plead to such indictment or information if it has not been so furnished to him. A failure to furnish such copy shall not affect the validity of any subsequent proceeding against the defendant if he pleads to the indictment or information."

A complaint based upon the same offense had been filed months before and a copy of the complaint furnished another attorney who at that time represented the appellant. Trial of appellant was com-

menced after he announced ready on that complaint in cause No. 7023 on the criminal docket and a jury was impaneled, after which the case was dismissed, and the information in the case at bar, No. 7068, was filed. The record discloses the following:

"Thomas v. Truder (District Attorney): If the Court please, we now file an Information in this case.

"The Court: All right, let me have the Information. H. M. Genis, stand up.

"Clarence Lynch (Attorney for the Defendant): Your honor, please, we would like to have twenty-four hours time within which to plead in this case after the filing of the Information.

"The Court: The request will be denied. Mr. District Attorney, does this Information charge a different crime as in the Criminal Complaint?

"District Attorney: (Mr. Truder) No, sir.

"The Court: That being the case, I see no reason of any delay in this case of twenty-four hours.

"Mr. Lynch: In the former case, we did not have the time to present preliminary motions. We may have Motions we would like time in which to file, preliminary motions and pleas. * *

"The Court: Mr. Gennis, stand up. Mr. Gennis, there is an Information here against you, which reads as follows: (reads information) What do you say, guilty or not guilty?

"Mr. H. M. Gennis: Not guilty.

"The Court: All right. If you wish to file any plea, how long a time do you wish within which to file it?

"Mr. Lynch: We wish twenty-four hours. We would have to do some studying, and we—if this plea is in a form of former jeopardy, we may want to file a demurrer or some other pleading. * * *

"The Court: The record will show that the charge set out in No. 7023, and that set out in No. 7068 is the same only that in No. 7023, it is set out in the form of a Criminal Complaint, and in No. 7068 it is set out as an Information. * * * And the names of the same witnesses Mr. Truder endorsed in No. 7023, were endorsed on the Information in 7068.

"Mr. Truder: The other Complaint, being a Criminal Complaint, all of the same witnesses are not endorsed, part of them are the same."

The Attorney General, in an able brief, argues that under our liberal rules the information should be considered as an amendment or the stating of the same charge in a different form as that made in the complaint in cause No. 7023, and cites 16 C.J. 389; State v. Speyer, 194 Mo. 459, 91 S.W. 1075; State v. Sovern, 225 Mo. 580, 125 S.W. 769; People v. Kidd, 357 Ill. 133, 191 N.E. 244; Price v. People, 78 Colo. 223, 240 P. 688; White v. People, 79 Colo. 261, 245 P. 349; Potter v. State, 47 Okl.Cr. 254, 288 P. 362; State v. Bugg, 66 Kan. 668, 72 P. 236.

The criminal complaint filed in No. 7023 does not appear in this record, but we assume that the same charge under the same statute was attempted to be set out in both the complaint and information. The names of the witnesses indorsed upon the information were not the same as those on the complaint and the information was given a different number on the criminal docket.

By the adoption of trial court rules we eliminated many technicalities of procedure. However, in adopting these rules, most of which were taken from the Code proposed by the American Law Institute, the matter of first consideration was that nothing should be taken away from the defendant essential to the effective presentation of his defense. In this spirit rule 35-4451 was adopted. It may at times be used by defendants to obtain unnecessary delay, but it was thought better to give defendants' counsel ample opportunity to prepare for trial and to take such steps preliminary to the plea as counsel may believe his client entitled to, than to permit a defendant to be hurried into a trial without preparation. The offense with which appellant is charged is closely akin to mob rule. One difference between the procedure of the mob and that of the courts is that the mob gives its victim no time to prepare for his defense, while courts endeavor by an investigation conducted with deliberation and impartiality to ascertain the truth.

The impatience of the learned trial judge with defendant's demand for 24 hours' delay can easily be understood. He had been engaged for a week in the trial of other cases growing out of the same labor disturbances and had heard the State's witnesses give the same testimony repeatedly. Appellant's attorneys had represented other defendants. All concerned seemed familiar with the facts. However, this was a new cause, bearing a different number on the docket, and the information was a new pleading bearing the names of new witnesses. The appellant was entitled to the 24 hours demanded. 16 C.J. 389, 390; Bohannan v. State, 11 Okl.Cr. 69, 142 P. 1092; Dunkin v. State, 45 Okl.Cr. 203, 282 P. 692; State v. Jensen, 83 Utah, 452, 30 P.(2d) 203; State v. DeWolfe, 29 Mont. 415, 74 P. 1084.

The Attorney General argues that since the appellant entered a plea he is estopped from further objecting under the last clause of rule 35-4451, which says: "A failure to furnish such copy shall not affect the validity of any subsequent proceeding against the defendant if he pleads to the indictment or information." We are unable to concur in this view. Of course a defendant may waive his right to be furnished with a copy of the information, and if he fails to demand the 24 hours' delay the validity of subsequent proceedings could not be questioned on that ground. But appellant made his demand repeatedly and invoked the ruling of the court thereon. The court denied him a right guaranteed him by the rule.

For the reason stated, the judgment should be reversed and the cause remanded

to the district court with directions to grant appellant a new trial.

It is so ordered.

SADLER, BICKLEY, BRICE, and ZINN, JJ., concur.

70 P.(2d) 906

CITY OF RATON v. SEABERG.

No. 4183.

Supreme Court of New Mexico.

July 15, 1937.

Robert A. Morrow, of Raton, for appellant.

Hugo Seaberg, of Raton, in pro. per.

ZINN, Justice.

The appellant, a municipal corporation, brought suit in two counts against appellee, who is engaged in the operation of a hotel in the City of Raton, known as the "Seaberg Hotel," to recover a license tax pursuant to an ordinance adopted by the municipality on May 23, 1927. This tax was imposed under the authority granted municipal corporations by 1929 Comp.St. § 90-502. Said section 90-502 was partially repealed by Laws 1933, c. 73 (see section 16 of said act), which chapter 73 was like-

wise repealed (Special Session Laws 1934, c. 33), but said Special Session Laws 1934, c. 33, was declared invalid. See Safeway Stores, Inc., v. Vigil, 40 N.M. 190, 57 P. (2d) 287.

The first count of the suit was to recover a license fee for the year ending January 15, 1933, and the second count was to recover the license fee which was due for the year ending January 15, 1934. The total amount claimed by appellant was $234.20 for the two years. The license fee under the ordinance is based on a flat sum of $125 per annum.

The appellee defended as to the first count of the suit, denying the authority of the municipality to enact the ordinance imposing the license or tax, and affirmatively claimed that the appellant had received and retained the full amount due it for the year ending January 15, 1933.

As to the second count the appellee tendered the amount he claimed due the municipality under his theory of the law to the clerk of the district court. He claimed he owed the municipality the sum of $40 based on the rate of $1 per annum for each $1,000 gross volume per annum of business done as provided by 1929 Comp.St. § 90-505.

Appellee also set forth in his separate defense other legal objections. These objections to the tax were set up by appellee as to both counts.

The municipality failed to reply. Thereupon the appellee filed a motion for judgment by default, setting up the defendant's failure to reply or demur to the affirmative matters pleaded in defense of the first or second count of the action as required by 1929 Comp.St. § 105-420, and moved for judgment under 1929 Comp.St. § 105-421. The legal objections to the first count were waived by appellee for the purpose of testing appellee's right to judgment by default. He rested as to this count on the allegation of payment. The appellant resisted the motion for judgment by default without avail. The court entered its judgment in favor of appellee.

The answer was filed June 15, 1933, and served on appellant's attorney June 29, 1933. The motion for judgment by default was filed January 18, 1934.

The record is in a most deplorable condition. The city sued appellee for occupation tax for the years 1932 and 1933, in separate causes of action. As to 1932, after general denials which questioned authority of the city to levy the tax, the defendant pleaded payment of the sum of $47 as the full amount due it for occupation tax for 1932.

As to 1933, defendant denied generally allegations of the second cause of action and tendered and offered to pay into court the sum of $40 per year as the amount due under the ordinance which he contended was applicable to his business. However, although motion for judgment by default was filed January 18, 1934, the tender was not actually made good by deposit of the sum of $40 with the clerk until January 30, 1934, the day upon which, or the day after, the court must have granted the default

recited in the judgment. The motion therefor, as indicated, had been filed on January 18, 1934. Plaintiff's first pleading resisted default and prayed for leave to file reply on January 27, 1934. Whether between that date and January 29th an argument on motion for default had occurred, the record does not show. But on January 29th the plaintiff filed a separate "Motion for Permission to Further Argue Defendant's Motion for Default," etc. It was noticed for hearing on February 3, 1934. On February 10, 1934, the court entered its final judgment in the cause.

In said so-called "Motion for Permission to Further Argue Defendant's Motion for Default and for Permission of the Court to file reply," we find the following: "That said motion should be denied for the reason that issues of fact have been joined by the answer to both the first and second cause of action and require evidence in order for the court to decide said issues between the parties."

This clearly shows that the appellant did point out to the court that issues of fact had been joined upon which the court must first hear testimony before deciding against appellant on the question of "tender and payment" as raised by the appellant's answer to the first cause of action. The court had held that this issue, standing alone, after all other defenses had been waived by appellee, required no reply. The court should have heard testimony before rendering judgment.

In his motion for default the appellee expressly waived all legal objections set forth in his answer except payment and tender. Certainly this is true as to the first cause of action seeking a recovery for $47, for in his motion for judgment by default as to this item he says: "The defendant in and by this motion hereby waives all other defenses set forth in his said answers to the first cause of action, including the defenses demanding and providing for the nonsuit and dismissal of the complaint, which waiver is applicable only to the purpose of this motion and not otherwise."

As to the second cause of action, the waiver reads: "Defendant further moves that all supporting allegations in the answers to the said second cause of action supporting the judgment above prayed for may be judged to have been confessed by the plaintiff. But the defendant waives all other defenses, which are in excess and additional to the adjustment moved in the above paragraphs, applicable to the said second cause of action; such waiver, however, to be applicable only to the purpose of this motion, including the defenses demanding and providing for the nonsuit and dismissal of the complaint."

We are unable to gather from a reading of this waiver just what is intended thereby. All separate defenses pleaded, if good and sustained, naturally would support a judgment by default. The appellee moves that all "supporting allegations" be taken as confessed. And yet in concluding he says, "such waiver, however, to be applicable only to the purpose of this motion, including the defenses demanding and providing

for the nonsuit and dismissal of the complaint"; thus strongly intimating that the special defenses other than tender were embraced in the waiver, for if sustained they were of the very kind to demand a dismissal of the complaint and the defeat of appellant's action.

Appellee's motion for default judgment is predicated on appellant's failure to deny "new matter" pleaded in defense. The judgment expressly recites that the pleas of tender and payment are not "new matter." Previously the court states in the judgment that the appellee has set up in his answer "certain allegations" which in the court's opinion constitute "a plea or pleas in bar" and that said pleas in bar, in so far as this hearing is concerned, "stand confessed, inasmuch as no demurrer was ever filed to said plea or pleas, and no reply filed."

If the "certain allegations" referred to in the judgment are the so-called pleas in bar, or if they be anything other than the pleas of payment and tender, the court had no right even to consider them as to the first cause of action because they had been expressly waived for purposes of the motion for default. On the other hand, if the court referred to the pleas of payment and tender, it had no right to enter judgment by default, having ruled that such plea was not new matter. If not, it required no reply and the cause should have stood for trial as to the first cause of action on the complaint and answer.

What has just been said with reference to the first cause of action applies to the second cause of action if we should interpret the waiver similarly, with this exception: In the first cause of action the defendant pleaded that the $47 had been paid and received by the city in full payment of the license for 1932. If so, that settled the matter and the issue stood for proof. As to the second cause of action, the answer merely offered to pay $40 into court in settlement of the 1933 occupation tax. Appellee did not even make that tender good until January 30, 1934, the day on which, or the day after, the court must have granted the motion for default.

Apparently after entry of default the appellee moved for judgment on the pleadings. The case being at issue on the first count on the question of payment and acceptance, and the court having ruled the plea of payment not new matter, and appellee having eliminated from consideration on the motion all questions other than payment, we are unable to see how the court could render a judgment on the pleadings as to that count.

As to the second cause of action, the so-called waiver is so confused and uncertain in meaning and application that we think no judgment entered under it should stand. The issue as to the second count differs from the first in this, viz., that as to the first, tender and payment of a given sum in full of the claim was alleged and became issuable under the trial court's holding that it was not new matter demanding a reply. As to the second cause of action tender alone of a given sum as the amount claimed to be due composed

the issue. Even if the waiver as to the second cause of action were declared identical with that relating to the first, and the court should find the tender made as alleged, that would not settle the matter unless the court further found that the sum tendered was the correct amount.

But because we are unable to say what the waiver means as to the second cause of action and because the trial court improperly rendered judgment on the pleadings as to the first cause of action with issue joined, as the court held, on the plea of tender and payment, the judgment should be reversed as to both causes of action and the cause remanded. The parties will be permitted to reframe their pleadings as they may be advised.

It is so ordered.

HUDSPETH, C. J., and SADLER and BRICE, JJ., concur.

BICKLEY, J., did not participate.

71 P.(2d) 56

GILBERT v. INTER-OCEAN CASUALTY CO. OF CINCINNATI, OHIO.

No. 4193.

Supreme Court of New Mexico.

July 10, 1937.

Rehearing Denied Sept. 1, 1937.

Rodey & Dickason, of Albuquerque, and Jones, Hardie, Grambling & Howell, of El Paso, Tex., for appellants.

Marron & Rogers, of Albuquerque, for appellee.

BICKLEY, Justice.

Appellee held policies of the Mutual Life Insurance Company of New York which included disability benefits due to *total and permanent disability to follow a gainful occupation.* For convenience, we will hereafter refer to these as the Mutual policy. She thereafter applied for and received from appellant a policy which indemnified against the effects resulting in bodily injury or death. This policy provided for payment of specific sums in case of loss by accident of one or both hands,

feet, or eyes. It provided indemnity for loss from partial disability, and from loss of time due to sickness and also for loss due to total disability to perform "any and every duty pertaining to the insured's business, or occupation" for twelve months and for a longer period if "the insured shall be *wholly and continuously disabled by bodily injuries from engaging in any occupation or employment for wage or profit.*" The definite overlapping of coverage arises from the language of the two policies quoted and italicized. The insured became totally disabled from following any gainful occupation and made claim for and received under the Mutual policy $50 per month. She asked $100 per month of appellant, which was paid for a while and then refused because it is claimed that in her application for the insurance she made a false statement material to the acceptance of the risk or the hazard assumed by the company; that this false statement amounts to a warranty and voids the policy. The application contained the following question:

"Are you now carrying or have you applied for any other accident or health insurance? If so, state fully. (Name of Company, Association or Society, and amounts carried in each must be stated.)"

The answer was, "No." Appellant further defends that in any event it is not liable for the full amount of $100 per month because of the provisions of section 17 of the policy commonly referred to as the standard proration clause, as follows:

"If the insured shall carry with another Company, corporation, association or society other insurance covering the same loss without giving written notice to the Company, then in that case the Company shall be liable only for such portion of the indemnity as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined."

Appellant also claimed that it had paid to appellee more than she was entitled to and sought recovery thereof. Plaintiff sued appellant and obtained the verdict of a jury in her favor. Afterwards, motion by defendant for judgment notwithstanding the verdict was denied and judgment was entered against appellant.

In addition to the proposition heretofore mentioned, appellant asks us to review the errors assigned as follows:

"Appellant's Third Assignment of Error. * * * The court erred in refusing appellant permission to introduce three policies issued by the Mutual Life Insurance Company of New York to appellee in evidence for the purpose of showing that appellant would not have issued to appellee the policy sued on had it known of the existence of the three policies issued by the Mutual Life Insurance Company of New York, as under the evidence in this case the jury was entitled to pass upon such issue.

"Appellant's Fourth Assignment of Error. * * * The court erred in re-

fusing to allow the witness, G. A. M. Willson, who was State Manager of appellant for New Mexico at the time the policy sued on in this case was issued to appellee to testify that if he had known of the existence of the three policies issued by the Mutual Life Insurance Company of New York he would not have allowed appellant to issue the policy sued upon in this case in the amount for which it was issued, as the undisputed evidence in this case showed that appellant did not know of the existence of the said three policies which appellee held with the Mutual Life Insurance Company of New York at the time she obtained the policy from appellant, sued upon in this case."

The case is of first impression here and the decisions cited from other jurisdictions are of little help. First we take up section 17 of the standard provisions of the policy heretofore quoted. It does not say that if the insured shall carry other policies designated or named accident or health policies proration shall be allowed. The names of the policies are not determinative of the character of the coverage. We must disregard form and seek an understanding of the substance. The language is clear and unambiguous. If insured carries "other insurance covering the same loss" without notice to appellant, the proration clause is operative. It makes no difference whether the "other insurance" existed at the time appellant's policy was issued or subsequently. Unquestionably the policies of the Mutual Life Insurance Company involved and that issued by appellant are characterized by marked differentiating features, yet they are alike in some particulars. They overlap in two places at least. Both cover death resulting from accident; in case of total permanent disability resulting in inability of insured to engage in any gainful occupation or employment for wage or profit, disability benefits may be recovered under each. Under the policy issued by appellant there are coverages not in the mutual policy. It takes death by accident or the existence of a certain condition of total permanent disability to bring into operation both policies. Viewed prospectively from the standpoint of the policies above, if the provisions of each conceivably, nevertheless remotely, could cover loss due to total permanent disability as therein defined, then they each covered the same loss and absent notice to appellant the appellee would be required to accept proration. The matter may also be viewed retrospectively after the event. Under the facts crystallized by the event, it appears that insured claims that both policies do cover the same loss. There can be no vitality to the proration clause and the insurance company is not concerned unless and until insured asserts a right to recover under both policies for the same loss. It seems inconsistent for insured to claim indemnity under each policy for the same loss and in the same breath say that they do not cover the same loss. We think clause 17 was designed as a dragnet thrown out whereby regardless of existing insurance and regardless of the cor-

rectness of answers in application relative thereto, and even though such answers under the facts do not void the policy if it is disclosed that the insured had existing insurance or afterwards acquired same which in fact does cover the loss, indemnity for which insured asserts, and no notice has been given, the insurer may avail itself of the limitation of liability which it has reserved in the contract of insurance. We hold that the trial court was right in viewing this point as a law question only, but that he reached an erroneous conclusion.

Appellant's proposition that appellee's negative answer to the question contained in the application "Are you carrying or have you applied for any other accident or health insurance?" bars her recovery must be decided upon considerations of both law and fact. It is so presented.

Here the good faith of insured in making the answer is a factor and the materiality of the statement implied is also an element. The trial judge having concluded that the policies did not cover the same loss quite naturally concluded that the insured had answered correctly that she did not carry any other accident and health insurance. In so concluding, the trial judge was doubtless influenced by the so-called "dominant feature test." That is, in making a comparison of policies of insurance to determine whether applicant correctly appraised the form of insurance provided in the different policies the dominant features of each may be considered as characterizing them as one sort or the other. This test is a fair one when testing the intention and good faith of the applicant in making her answer and applied would doubtless absolve her from a charge of fraud or intent to deceive by her answer. But appellant did not in the lower court and does not here urge the falsity of the statement in the willful sense. But as we said in our discussion of the first point, we are not to make our decision upon consideration of name and label alone. The question is not "Do you own any accident or health policies?" It is: "Are you carrying * * * any other accident or health insurance?" Section 71-152, N.M.Stat.Anno.Comp.1929, defines various forms of insurance. Subsections (1) and (2) are as follows:

"(1) *Life insurance:* Upon the lives of persons, including disability benefits, and every insurance appertaining thereto, and to grant, purchase, or dispose of annuities and endowments.

"(2) *Disability:* Against disability resulting from bodily injury or sickness, or death resulting from bodily injury in any form, and every insurance appertaining thereto, including quarantine and identification."

These definitions are in part for the purpose of aiding in application of the regulatory provisions contained in the same chapter. Apparently under the provisions of said section a licensed company may transact the form of insurance mentioned

in (2) or the forms specified in both subsections (1) and (2). But we apprehend that because the disability insurance may be included in as a part of, or supplemental to a contract of life insurance, its nature, form, or characteristic has not thereby been changed. The very loss suffered by appellee and for which she claims indemnity under the Mutual policy results from bodily injury or sickness. The statutory definition of disability insurance is a good definition of accident insurance. Cooley's Briefs on Insurance defines accident insurance: "Insuring against loss or damage due to accidental injury to the person insured and resulting in disability or death." Under the Mutual policy, if insured is totally and permanently disabled as a result of accidental injury or ill health, she is entitled to recover disability benefits. How can it be soundly argued that this is not accident or health insurance?

Having concluded that appellee made a false answer to the question as the word "false" is understood as meaning "erroneous," this is by no means to say that because thereof she is barred of recovery on the policy sued on. Whether she is barred involves considerations of law and fact. Our Legislature has indicated a public policy that insurance policies of this nature shall contain substantially a provision that all statements made by the insured shall in the absence of fraud be deemed representations and not warranties. Section 71-161, N.M.S.Anno.Comp.1929. Whether this provision is strictly applicable to the form of insurance transacted in the policy issued by appellant we do not decide, but in any event appellant has complied with the spirit of it because section 12 of the application is in part as follows: "Do you agree * * * that the falsity of any statement herein shall bar the right to recovery *if* such statement is made with intent to deceive *or* is material either to the acceptance of the risk or the hazard assumed by the Company." (Italics ours.) This language does not import a warranty that the statement if merely erroneous as an appraisal of the extent of coverage contained in other existing insurance is material. Without declaring any rule on the subject, it seems that to constitute the statement implied in the erroneous answer a false statement made with intent to deceive or a false statement material to the acceptance of the risk, etc., some proof is required. At least that is the way the matter was presented in the trial court and here. From the transcript before us, it does not appear that applicant answered the question last quoted. See Krisberg v. Inter-Ocean Casualty Co., 39 N.M. 107, 41 P.(2d) 519. However, the absence of an answer to the question if in fact it was not answered becomes unimportant because as we read the pleadings it seems that defendant assumed that it was answered and plaintiff's reply acquiesced therein. No evidence was offered by appellant to show that the statement was made fraudulently or with intent to deceive. The burden rested on appellant to show that the statement was material. This burden the appellant sought to dis-

charge by the offer of the evidence referred to in assignments of error 3 and 4 heretofore quoted. The tenders were refused. Herein the trial court committed errors.

In the course of our argument it has developed that the likelihood of a situation arising when the coverage of the Mutual policy would overlap that of the policy sued on would appear to be remote, nevertheless we could not say as a matter of law that such remote possibility would not have been regarded by appellant as material to the acceptance of the risk by the company.

The judgment is reversed with instructions for a new trial upon an issue framed involving the effect of the questions and answers presented in paragraphs 8 and 12 of the application upon the question of liability of the appellant, and after such determination the rendition of judgment in accordance therewith and with regard to the principles herein expressed, and it is so ordered.

HUDSPETH, C. J., and SADLER, J., concur.

BRICE, Justice (specially concurring).

The terms of an insurance policy should be so plain that "a wayfaring man, though a fool, need not err therein"; yet paragraph 17 of the policy sued on has been the subject of construction in numerous courts, and no two have ever agreed upon its meaning. Dustin v. Interstate Business Men's Accident Ass'n, 37 S.D. 635, 159 N.W. 395; L.R.A.1917B, 319; Aaberg v. Minnesota Commercial Men's Ass'n, 161 Minn. 384, 201 N.W. 626; Wahl et al. v. Inter-State Business Men's Accident Ass'n, 201 Iowa, 1355, 207 N.W. 395, 50 A.L.R. 1374; Provident Life & Accident Insurance Co. v. Rimmer, 157 Tenn. 597, 12 S. W.(2d) 365; Massachusetts Bonding & Insurance Co. v. Santee (C.C.A.) 62 F.(2d) 724; Graham v. Business Men's Assurance Co. of America (C.C.A.) 43 F.(2d) 673; Oglesby v. Massachusetts Accident Co., 230 App.Div. 361, 244 N.Y.S. 576; International Travelers' Ass'n v. Gunther (Tex. Com.App.) 280 S.W. 172; Id. (Tex.Civ. App.) 269 S.W. 507; Arneberg v. Continental Casualty Co., 178 Wis. 428, 190 N.W. 97, 29 A.L.R. 93.

The insurance company inserted this provision in its policies and the appellee had to accept it as written or not at all. Her premiums were paid and accepted by the appellant; and her right to indemnity became a question only after the eventuality insured against had occurred, which in this case would not happen to one in a thousand holding such policies. She is charged with knowing the existence and meaning of paragraph 17, though she may not have read the policy; or having read it (like courts who have construed it), failed to grasp its meaning, whatever it may be. It should be construed liberally in behalf of the insured; a cardinal rule of construction regarding insurance contracts, if susceptible of more than one meaning.

But with these considerations operating in favor of the appellee, and with a sympathetic attitude toward her claims, I am unable to find in the language of paragraph 17 of the policy in suit any support for them.

We all agree that the meaning of "other insurance covering the same loss" as used in paragraph 17 is the key to the solution of the principal question to be answered.

There are but two possible meanings: "Other insurance" either includes *any* overlapping insurance, whether accident, health, or life; or else it has reference to insurance indemnifying against all of the eventualities insured against by appellant. There is no middle ground.

At the time the policy was issued there was no "loss," and "other insurance covering the same loss" could have no reference to a loss that does not occur. It required death, accident, or sickness to bring "loss" into the transaction. It looks to the future; applies prospectively; that is, if and when a liability arises under the policy sued on the appellee is carrying with another company, etc., other insurance covering the same loss (that is, the loss for which indemnity is claimed); written notice of which had not been given appellant, then the proration provision would apply. This is the only meaning I am able to find in the language used.

If the words "without giving written notice" had been "without *having* given written notice," there could not be a shadow of a doubt. But the subsequent words "indemnity promised" could only have reference to an indemnity promised in case of a presupposed eventuality (loss) that would call for such indemnity; and the words "amount of *like* indemnity" could only have reference to indemnity promised in case of a like eventuality. Only if we can hold that the word "loss" means the whole of the eventualities, the happening of any one of which would entitle the holder to indemnity (and no such meaning can be conjured out of it by me, though I strongly wish for it), could there be found support for appellee's claim. This would mean that the Mutual policies must have been effectively identical in the health and accident features with the policy in suit for the proration provision to apply, and by no stretch of the will can such result be reached by me with any support of reason. Such provisions are traps for the unwary and should be eliminated from policies of insurance by statute as in Missouri. State ex rel. Business Men's Assurance Co. v. Allen et al., 302 Mo. 525, 259 S.W. 77. I reluctantly concur in the majority opinion.

ZINN, Justice (dissenting).

I cannot agree with the majority. The case before us is one of first impression in this jurisdiction. However, pro-ration provisions similar to section 17 found in the health and accident policy of the appellant have been construed in other cases. The term of the Mutual Life Insurance policies held by appellee and the policy involved in this litigation are different in

many respects as an examination of such policies clearly discloses. The Mutual Life policies are the usual life insurance policies containing a "total disability" provision paying benefits for such casualty, and the policy involved in this litigation is a health and accident policy which likewise contains a clause paying for total disability. The two types of policies must be construed in their entirety to determine what was intended by section 17 of the policy here sued on. The dominant feature of each of the Mutual policies is life insurance. Incidental thereto, though a part of it, is the total disability clause contained in the Mutual Life policies. The policy of appellant is a health and accident contract of insurance. Incidental thereto, though a part of it, is the "total disability" provision. The Mutual policies are life insurance policies and not accident and health insurance policies. The Mutual policies did not insure against disease or accidents unless death or total disability ensued. On the contrary, the appellant's policy insured against sickness and accident irrespective of the ultimate result.

In a separate provision of each of the Mutual policies as well as the policy of the appellant, we find a provision to the effect that, in case of total and presumably permanent disability of the insured, she was to receive certain benefits. Herein is the only similarity between the two types of policies. From all this it seems clear that the primary feature of the Mutual policies was insurance against death irrespective of the cause. The life insurance feature of the appellant's policy paid only if the insured died as the result of an accident. Its primary and dominating feature was insurance against any sickness or accident, whether partial or total disability resulted, and against accidental death. As said by the Missouri court in Jones v. Prudential Insurance Co., 208 Mo.App. 679, 236 S.W. 429, 432: "In deciding the character of this contract between the parties, it may be well to bear in mind the difference between an ordinary life policy and an accident policy."

When this difference is borne in mind, it is clear that the insurance carried in the Mutual Life Insurance Company is not "other insurance covering the same loss." The dominant feature of the policy is the test by which we determine the kind of insurance intended. As was said by the Supreme Court of Missouri: "The mere addition of one or more features or elements in a contract of insurance on life, that may serve to give the contract or policy a particular designation in the business or insurance world, will not in the least devest the contract or policy of its chief character of insurance on life, or make the contract other than life insurance." Logan v. Fidelity & Casualty Co., 146 Mo. 114, 47 S.W. 948, 950.

The Missouri Court of Appeals in Jones v. Prudential Ins. Co., supra, said: "In deciding the character of this contract between the parties, it may be well to bear in mind the difference between an ordinary

life policy and an accident policy. In an ordinary life policy the insurer contracts to pay a certain sum of money when satisfactory proof is made that the insured has died. Death is the contingency which must happen that will create liability under the contract. Liability attaches under such a policy when death occurs, and the policy is in good standing irrespective of the cause of the death, whether it be brought about by natural causes, by intention, or by accident; and, in the broad sense, any life insurance policy is accident insurance, if perchance the death is occasioned by reason of an accident. On the other hand, the primary contingency insured against in an accident insurance policy is that no accident will befall the insured under the terms of the policy and in such time as the policy is kept alive. * * * It may be said that in an ordinary life policy death is the contingency insured against, and if it be the result of an accident such accident is but incidental, while in the accident policy the accident is the thing insured against, and death is but one of the incidents or classes of injuries insured against."

Neither appellant or the Mutual Life Insurance Company conceive of their policies as being total disability insurance policies. One is a life insurance policy. The other is an accident and health insurance policy. The construction contended for by appellant, I am convinced, is one never contemplated by the parties, and not justified by the facts.

The first object of construction is to ascertain the intention or meaning of the parties, and to interpret the contract by that intention or meaning. The purposes of the two policies throw light on the intention or meaning, and it could not have been the intention of the parties to the accident policy to contract against life insurance which contained an additional proviso against total disability as "covering the same loss," as that not insuring against parties or total loss by injuries or sickness. Had the appellant intended otherwise, it could have so provided in section 17 in more specific terms.

It has been so held in the case of Arneberg v. Continental Casualty Co., 178 Wis. 428, 190 N.W. 97, 100, 29 A.L.R. 93, by the Supreme Court of Wisconsin. That court had under consideration a clause of an accident policy identical with the one now under consideration and it was held: "The contention of appellant is that the policy issued by the Northwestern Mutual Life Insurance Company was for the same loss covered by the accident insurance policy sued upon, and that defendant is liable only for such portion of the indemnity promised in its policy as the said indemnity bears to the total amount of like indemnity in all policies covering such loss. While both policies furnished indemnity in case of accidental death, they were not alike in any other provision. The Northwestern Mutual life insurance policy provided indemnity in case of death from whatever cause. This

of course included death by accident. It is well understood that death benefits are not the dominant feature of an accident insurance policy. The dominant feature of that kind of a policy is indemnity for loss of time resulting from accident. These two policies overlap only in the one contingency—accidental death. In no other respect are they alike and in no other respect did they cover the same loss."

Though the question in the Arneberg Case was not related to the total disability provisions of the policies in question but predicated on the so-called "double indemnity" provisions in the event of accidental death, yet the legal principles involved the construction of a provision in the accident policy identical with section 17 herein, and are the same.

The contents of the policy which appellee purchased are dictated by the appellant, and the appellee could not before accepting it add one word to or subtract one word from that contract. This condition of affairs has caused courts everywhere to hold that the contract must be strictly construed against the insurer, and if there be any doubt as to the construction of the contract, the doubt must be resolved in favor of the insured. We have so held. Collier v. Union Indemnity Co., 38 N.M. 271, 31 P.(2d) 697; Nikolich v. Slovenska Nardona Podporna Jednota, 33 N.M. 64, 260 P. 849. Section 17 was prescribed by the appellant and its terms could have been made much clearer had appellant desired to specifically intend a life insurance policy containing a provision paying for total disability as a policy of insurance covering the same loss as its own policy. Liberal intendment and enlarged construction are used to favor the insured and not the insurer.

The majority opinion is predicated upon the theory that "other insurance" does not mean "other insurance policy." Technically that may be correct. Appellant contends that the appellee's application for insurance with appellant is a part of the policy. It is therein provided that the falsity of any statement made in the application bars the insured from any right of recovery, and appellee's answer to question 8 of such application was to the effect that she did not carry any other health and accident insurance. According to appellant's theory, this was untrue, was unknown to appellant, was material to the acceptance of the risk assumed by appellant, and that this constituted a breach of warranty barring the right of appellee to recover from appellant. Let us place the appellant and appellee in the exact positions they were in at the time of the creation of the contract and in doing so we have a better understanding of the resultant obligations under the contract.

The appellant by its own formulated and prepared application, through its own agent, G. A. M. Wilson, asked the appellee the following question:

"Are you carrying or have you applied for any other accident or health insurance? If so, state fully the name of the company, association or society, and amounts carried in each must be stated."

To this appellee replied that she had not applied for any other accident or health insurance. She answered truthfully. To her mind, the Mutual Life Insurance Company policies were "life insurance" policies and not accident or health insurance policies. She was not carrying "any other accident or health insurance" policy as generally understood. The record is silent as to whether or not the agent of the appellant explained to appellee that such life insurance policies carrying total disability provisions were (according to the present claim of appellant) health and accident policies. The appellee answered that she had no accident and health insurance. Such answer was truthful in fact and in law.

Only one conclusion can be reached. To the mind of the appellee at the time she applied for insurance the question propounded related to health and accident insurance policies and not to life insurance policies. The question propounded by appellant to the appellee indicates the appellant's own conception of its insurance contracts, namely, health and accident insurance and not life insurance. The question propounded by appellant indicated a desire upon the part of appellant to determine whether appellee carried other health or accident insurance policies, not life insurance policies which may have a clause insuring against total disability.

As I construe the two types of policies, and in light of statutory recognition of their distinctive features, the life insurance policies of the Mutual Life Insurance Company with their total disability provisions are not "other insurance covering the same loss" as contemplated either in answer to question 8 or which required notice of appellant under the provisions of section 17 of its policy. What appellant meant in asking question 8 was other accident and health insurance and that is exactly what appellee meant when she answered "no" to question No. 8. This meaning and understanding of the contract is what the parties to the insurance contract are bound by. This is the same meaning to be given section 17 of the insurance contract. To adopt a strict view in favor of a partial forfeiture of the insurance bought and paid for the appellee is a view of the law in which I cannot concur.

71 P.(2d) 140

HUTCHESON v. GONZALES, Secretary of State.

No. 4316.

Supreme Court of New Mexico.

July 31, 1937.

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J. O. Seth, of Santa Fe, and A. T. Hannett, John F. Simms, W. A. Keleher, Fred E. Wilson, and Joseph L. Dailey, all of Albuquerque, for plaintiff.

Frank H. Patton, Atty. Gen., Fred J. Federici and A. M. Fernandez, Asst. Attys. Gen., and H. A. Kiker and David W. Carmody, both of Santa Fe, and Stanley W. Miller, of Albuquerque, for defendant.

BICKLEY, Justice.

The applicant asked leave to file in this court application for an alternative writ of mandamus against defendant and for this court to take original jurisdiction of this cause. Such leave was granted. It appears from the application, and from fact sources of which we take judicial notice, that by chapter 117 of the Laws of 1937, the Legislature by unanimous vote of each house thereof, 22 Senators voting in the affirmative, nays none, 2 Senators being absent, and 34 members of the House voting in the affirmative, none in the negative, the others being absent, called a special election to be held throughout the state on September 21, 1937, for the purpose of approving or rejecting any and all amendments to the Constitution of the state of New Mexico proposed at the current session, and provided in said enactment that such special election shall be proclaimed, held, conducted, and counted in the same manner and be subject to the same regulations as are now prescribed by law for general elections, not inconsistent with said act; that said Legislature proposed 4 amendments to the Constitution of the state of New Mexico by 4 duly adopted joint resolutions known as Senate Joint Resolution No. 3, Senate Joint Resolution No. 14, House Joint Resolution No. 24, and House Joint Resolution No. 25. It is averred in the application that by article 19, section 1, of the Constitution it is made the public duty of the Secretary of State to cause each and all of said amendments to be published in the manner provided by law; that the defendant claims and asserts that by reason of the filing with her, in her office, as Secretary of State, of referendum petitions alleged to contain the names of more than 25 per cent. of the qualified electors in more than three-fourths of the counties of the state of New Mexico, directed against said chapter 117 of the Laws

of 1937, that said act is suspended and automatically referred to the general election in November, 1938, for approval or disapproval; and that she will not publish notice of said special election of September 21, 1937, unless required so to do by a court of competent jurisdiction. Said application also contains the following:

"That chapter 117 of the Laws of 1937, is not subject to being suspended by referendum petitions or otherwise, and cannot be by said petitions, or otherwise, referred to the electors of this state at the next general election in November, 1938, for the following reasons, to-wit:

"A. Because article 19, section 1, of the Constitution of the State of New Mexico, affirmatively requires that the said four proposed Constitutional Amendments shall be submitted to the said special election called for September 21, 1937, by Chapter 117 of the Laws of 1937, and does not permit a referendum thereon; and

"B. Because chapter 117 of the Laws of 1937, is a special law, not subject to referendum, under the provisions of article 4, section 1, of the Constitution of the State of New Mexico; and

"C. Because the referendum cannot be lawfully or legally employed by twenty-five per cent. of the electors in three-fourths of the counties of the state to prevent all of the electors of the State from voting on said four proposed Constitutional Amendments at the special election called for September 21, 1937; and

"D. Because the referendum provided by article 4, of the Constitution of the State of New Mexico cannot lawfully be used for the purpose of referring to the general election of 1938, chapter 117 of the Laws of 1937, calling the special election for September 21, 1937, for the reason that so to employ said referendum would be, in effect, to repeal chapter 117 of the Laws of 1937, because to postpone a vote upon the matter of approving or rejecting chapter 117 of the Laws of 1937, until more than a year after the only date on which it could be effective, to-wit: September 21, 1937, would be, in effect, permitting twenty-five per cent. of the voters in three-fourths of the counties of the State of New Mexico to nullify chapter 117 of the Laws of 1937, even though the same might receive a majority of the votes of all of the electors in the general election of 1938.

"That applicant is a citizen and resident of the State of New Mexico and County of Bernalillo, and is a qualified elector of said state and county, and is entitled to vote at all elections, and that he, in common with all other electors of said state, is interested in the matter of having said special election lawfully called and held on September 21, 1937, and is entitled to vote therein, and that as such qualified elector, his rights are affected, in common with those of all other citizens and electors of the state, by the alleged failure and refusal of the defendant, as Secretary of State of New Mexico, to discharge a public duty, to-wit: the causing of said proposed amendments to be published as required

by article 19 of the Constitution of the State of New Mexico, and that the State of New Mexico, as a state, is not concerned with the question of the calling and holding of said special election.

"That circumstances, which, in the opinion of the applicant render it necessary and proper that the Alternative Writ of Mandamus issue originally from this court and not from any other court in the State of New Mexico, are as follows:

"That owing to the short length of time that now remains before the time when the Secretary of State is required to commence publication of said proposed Constitutional Amendments as required by article 19, of section 1 of the Constitution of New Mexico, it would be impossible for the applicant to proceed in the District Court and have the cause reviewed by the Supreme Court of New Mexico before said publications should be commenced and started, in order to comply with the constitutional requirements pertaining thereto;

"And inasmuch as the Secretary of State has been advised by the office of the Attorney General of New Mexico that she is under no duty to publish said proposed amendments, but that the filing of the referendum petitions in her office has relieved the Secretary of State of the duty to so publish said proposed amendments, and pursuant to said advice the Secretary of State has asserted that she will not publish said proposed amendments, unless and until so required by a court of competent jurisdiction, it would be futile for your applicant to attempt, by mandamus to compel the Secretary of State to do what your applicant alleges to be her public duty, in other forum or court than the Supreme Court of the State of New Mexico."

An alternative writ of mandamus was issued. All the pertinent facts are admitted either by the writ and answer of defendant or subsequently by her counsel at the hearing, coupled with a challenge of the legal conclusions drawn therefrom by the plaintiff. Defendant by her answer raises certain specific defenses in support of her refusal to proclaim and call the special election.

It seems appropriate to consider first the claim of plaintiff that the enactment calling the special election is not legislation as contemplated by article 4 of the New Mexico Constitution, because if this point should be ruled in favor of defendant, her other defenses would be of no further interest to her.

Article 4 of the New Mexico Constitution is entitled: "Legislative Power—Where Vested—Senate and House—Referendum." A portion of section 1 of said article 4 is as follows:

"The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except * * * laws providing for the preservation of the public peace, health or safety."

It was asserted on July 4, 1776, by the framers of the Declaration of Independence that all men "are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of

Happiness. That to secure these rights, *Governments are instituted among Men,* deriving their just powers from the consent of the governed." They further declared that when certain popular rights were infringed upon, it was "the Right of the People to alter or to abolish it, and to institute new Government."

After vindicating these principles by discharging their pledge of their lives, fortunes, and honor, a government was instituted which went through changes until it was charted in the Constitution of the United States. The preamble of that Constitution, besides being one of the finest sentences ever written, is one of the most comprehensive:

"We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this CONSTITUTION for the United States of America."

There it all is, our chart and our creed. It is the fruition of the hopes of those who framed the Declaration of Independence.

The men who sat in the convention of 1787 were not sanguine enough to suppose their work could stand unaltered for all time to come. They provided a process of amendment. "The Right of the People to alter or abolish" their form of government and institute another in its stead was taken care of by peaceable and orderly means in order to preserve "the public peace, health or safety," without the privations, suffering, and sacrifice incident to revolution of the character they had just gone through.

Mr. Bryce in "The American Commonwealth" in a chapter on "Direct Legislation by the People" through amendments to State Constitutions, vol. 1, p. 456, says:

"It has been well observed by Dr. von Holst (Constitutional Law of the United States, § 90) that the completeness and consistency with which the principle of the direct sovereignty of the whole people is carried out in America has checked revolutionary tendencies, by pointing out a peaceful and legal method for the effecting of political or economical changes, and has fostered that disposition to respect the decision of the majority which is essential to the success of popular governments."

The spirit and objects of our State Constitution, which was approved by Congress, submitted by referendum to the voters, and adopted by our people, are of like character. The history of article 19 of the New Mexico Constitution serves to further emphasize the importance as relating to the public peace and safety of having at hand a liberal means of amending the Constitution. Appellant attaches to his brief a copy of a complete report of the Flood Committee in Congress regarding the approving of the New Mexico Constitution. Interesting as it is, it is too long to quote in full, and we employ instead a portion of the observations of appellant thereon, as follows:

"In this respect we call to the court's attention the fact that when the constitution was originally drawn article 19, providing for the amendments thereof, provided a very difficult manner for the adoption of amendments to the state constitution. A proposed amendment could only be submitted upon a two-third vote of each house and, except in extraordinary circumstances, could only be submitted to a vote of the people at a regular election once each eight years. Taking these provisions, in connection with the legislative distribution provided for in the constitution, the Flood Committee points out that possibly four counties in the state could block an amendment to the state constitution and the Committee commented upon the unfairness of said article 19. In view of the Committee's report, another Article was drawn and adopted by the people as our present article 19. This new section 1 of article 19 is much more liberal than the original. It provided for proposed amendments to be adopted by a mere majority of both houses of the legislature and for a submission of the proposed amendments at a special election as well as at a general election. The sequence of events in the connection of the drawing of this new article is interesting. When the constitution was originally drawn as a whole, as pointed out before, amendments could be submitted only at a general election. The legislature had no discretion whatever in the matter. The new section 1 of article 19 was prepared after the balance of the constitution, including article 4, had already been prepared and agreed upon. It seems to us rather unreasonable, therefore, to contend that the persons preparing the constitution could have had, by the referendum power contained in section 1 of article 4, reference to any of the acts of the legislature performed by virtue of the power given in section 1 of article 19, which was prepared and its provisions made afterwards."

Can any one doubt that "governments are instituted among Men, deriving their just powers from the consent of the governed" for the broad general purpose of "the preservation of the public peace, health or safety"? To this end, did the members of our constitutional convention frame and promulgate and the electors at a referendum thereof ordain and establish our State Constitution?

How then can "any law enacted by the Legislature" which is enacted pursuant to article 19 of our Constitution providing for amendment thereof, and without which article 19 there would have been no warrant or occasion for such enactment, the sole purpose of which is to effectuate such process of amendment or referendum upon the advisability thereof, be said to be other than a law "providing for the preservation of the public peace, health or safety"? These considerations emphasize the argument of counsel for plaintiff that the law sought to be referred is not legislation as contemplated by article 4 of our Constitution, if indeed they do not prove that such law is expressly excepted from the operation of section 1 of said article 4, viewed as an enactment emanating from the Legis-

lature by virtue of its strictly legislative power, as contended by defendant. We are much intrigued with the thought, but since the argument of plaintiff did not take that form, we now consider his, which in effect amounts to the same thing, or at least, if found to be sound, accomplishes a like result.

Plaintiff's proposition is thus stated in his brief:

"Chapter 117, New Mexico Session Laws of 1937, is not referable for the reason that it is not legislation as contemplated by article 4 of the New Mexico Constitution.

"(A) The authority given to the Legislature to initiate constitutional amendments by article 19 of the New Mexico Constitution is entirely separate from the ordinary legislative power of the legislature and is not subject to the provisions affecting general legislation under article 4 of the Constitution.

"(B) Every provision which it is necessary for the Legislature to make for the purpose of exercising the power given it to propose and submit constitutional amendments falls in the same category as proposed amendments themselves."

The article 19 referred to is as follows:

"Proposing amendments. Section 1. Any amendment or amendments to this constitution may be proposed in either house of the legislature at any regular session thereof; and if a majority of all members elected to each of the two houses voting separately shall vote in favor thereof, such proposed amendment or amendments shall be entered on their respective journals with the yeas and nays thereon.

"The secretary of state shall cause any such amendment or amendments to be published in at least one newspaper in every county of the state, where a newspaper is published once each week, for four consecutive weeks, in English and Spanish when newspapers in both of said languages are published in such counties, the last publication to be not more than two weeks prior to the election at which time said amendment or amendments shall be submitted to the electors of the state for their approval or rejection; and the said amendment or amendments shall be voted upon at the next regular election held in said state after the adjournment of the legislature proposing such amendment or amendments, or at such special election to be held not less than six months after the adjournment of said legislature, at such time as said legislature may by law provide."

This article is entitled "Amendment." It deals solely with the method of amending the Constitution.

What then is the nature of the authority reposed in the Legislature to initiate constitutional amendments?

As heretofore stated, in earlier times the necessity of means of affecting changes in written Constitutions was felt. Thus we had constitutional conventions with referendum upon the entire Constitution. When Constitutions so adopted were thought to require change, there developed another referendum on the subject of assembling a new convention to revise the Constitution.

"The people were to vote 'convention' or 'no convention,' as they might prefer, and such changes as the body might make in the organic law, should the people authorize it to meet, would have then to be submitted 'to the decision of the citizens of this state * * * together or in distinct propositions as to them (the members of the convention) shall seem expedient.' "

The foregoing is an illustration given by Oberholtzer, "The Referendum in America" at page 131. Dr. Oberholtzer then at chapter 6 discusses "The Amendment of Constitutions by the Legislative Method." He says at page 144:

"The need was soon felt, and it had been prophetically anticipated in Maryland and Delaware in 1776, for some easier mode of amendment than by assembling a new convention. The legislature was holding sessions frequently. While it was engaged in its own specific line of work, it might too act in the capacity of a convention in adopting, or at any rate in proposing for adoption, such amendments to the constitution as might seem to be required from time to time for the good of the state. From the beginning it was understood that in enacting constitutional law, even to this extent, the legislature was stepping outside of its own rightful province."

Again at page 150, the author speaks of the citizens "amending their constitutions by legislature ad referendum." At page 155 he speaks of Legislatures so proceeding as "acting in their capacity as makers of the fundamental law."

The same thought is expressed by Hoar in his work on "Constitutional Conventions." He devotes an interesting chapter to "Legislatures as Conventions." A portion thereof delineates the capacity in which a Legislature acts in instituting constitutional amendments. At page 82 he says:

"The legislature, in taking any steps toward the framing of a constitution, does not act in its legislative capacity. * * * Many decisions bearing more or less on this point, but relating more particularly to the extra-legislative nature of the proposal of constitutional amendments are collected in the Indiana decision. (Ellingham v. Dye, 178 Ind. 336, 99 N.E. 1, Ann.Cas.1915C, 200, which we referred to in Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573, as 'a case of surpassing interest as regards the principal questions decided.')

"Furthermore, the Indiana decision says that in the ordinary legislative method of constitutional amendment, the legislature is quoad hoc empowered to act as a convention.

"By express constitutional provision, they act in conventional capacity, in the way of recommending specific amendments to their constitution.

"The Indiana court quotes with approval the following from the Supreme Court of Arkansas [State v. Cox, 8 Ark. 436, 443]: 'The General Assembly, in amending the constitution, does not act in the exercise of its ordinary legislative authority, of its general powers; but it possesses and acts in the character and capacity of a conven-

tion and is quoad hoc, a convention expressing the supreme will of the sovereign people.'

"And Jameson's following comment thereon: 'It expresses with admirable brevity, force, and clearness, the true doctrine in regard to the power of our General Assemblies under similar clauses of our Constitutions.'"

As bearing upon this question, the author says at page 81:

"The two houses and the governor constitute the entirety of the body which considers and finally determines all matters of legislation. But it is the two houses and the great mass of the electors of the commonwealth combined which constitute the body which considers and determines the questions of constitutional amendment. With all matters of legislation the people in their capacity of electors have nothing to do. But with constitutional amendments they have everything to do, for the ultimate fate of all proposed amendments depends absolutely upon their approval. If they approve, the proposed amendment at once becomes a part of the constitution; if they disapprove, it fails utterly and never comes into existence. The fundamental distinction which thus becomes most manifest, between the mere legislative machinery of the government, and that machinery which alone possesses the power to ordain amendments to the constitution of the commonwealth is most radical and extreme."

Citing Commonwealth v. Griest, 196 Pa. 396, 46 A. 505, 506, 50 L.R.A. 568, an extremely well-reasoned case from which we quote briefly:

"It will be observed that the method of creating amendments to the constitution is fully provided for by this article of the existing constitution. It is a separate and independent article, standing alone and entirely unconnected with any other subject. Nor does it contain any reference to any other provision of the constitution as being needed or to be used in carrying out the particular work to which the eighteenth article is devoted. It is a system entirely complete in itself; requiring no extraneous aid, either in matters of detail or of general scope, to its effectual execution. It is also necessary to bear in mind the character of the work for which it provides. It is constitution-making,—it is a concentration of all the power of the people in establishing organic law for the commonwealth; for it is provided by the article that, 'if such amendment or amendments shall be approved by a majority of those voting thereon, such amendment or amendments shall become a part of the constitution.' It is not lawmaking, which is a distinct and separate function, but it is a specific exercise of the power of a people to make its constitution. * * *

"The subsequent provisions of the article are equally devoid of any right or authority to intervene, derived from any source whatever. * * *

"It remains only to consider the reasons which are urged against the validity of such a conclusion. They are all concentrated and find their only life in the provisions of

another article of the constitution, to wit, the third, in the twenty-sixth section of which, it is contended, there is a provision which makes it necessary to the validity of a proposed amendment that it must be submitted to the governor for his action thereon, and that, if he disapproves of it, it fails at once, and no further proceedings can take place, in the way of its establishment, unless his disapproval shall be overcome by a vote of two-thirds of the members of both houses. The seriousness and gravity of this proposition will be at once conceived, when it is considered that it confers upon the governor, alone, the power to prevent the adoption of an amendment to the organic law of the state, by a mere exercise of his veto power, unless the amendment is passed over his veto by a two-thirds vote of the members."

After discussing in detail the provisions of the Pennsylvania Constitution corresponding to article 4 of our Constitution, the court makes observations equally applicable to our article 4:

"*Nowhere* in the article is there the *slightest reference* to or provision for the subject of *amendments* to the constitution. It is not even alluded to in the remotest manner. On the contrary, the entire article is confined *exclusively* to the subject of legislation; that is, the actual exercise of the lawmaking power of the commonwealth, in its usual and ordinary acceptation. It is too plain for argument that, unless there were somewhere else in the constitution a provision for creating amendments thereto, that power could not be exercised under any provision of the third article. It follows that a direction to submit 'every order, resolution or vote' of the two houses to the governor for his approval does not carry with it any other matter than such as is authorized by the article. As constitutional amendments are not authorized by the third article, they cannot be within the purview of those orders, resolutions, or votes which must be submitted for the action of the governor. * * *

"But the great and overshadowing distinction between this and the ordinary legislation lies in the fact that the organism which *decides questions of constitutional amendment* is an entirely different and distinct organism from that which decides questions of legislation, even in its broadest sense. The two houses and the governor constitute the entirety of the body which considers and finally determines all matters of legislation. *But it is the two houses and the great mass of the electors of the commonwealth, combined, which constitute the body which considers and determines questions of constitutional amendment.* With all matters of legislation the people, in their capacity of electors, have nothing to do. But with constitutional amendments they have everything to do, for the ultimate fate of all proposed amendments depends absolutely upon their approval. If they approve, the proposed amendment at once becomes a part of the constitution. If they disapprove, it fails utterly and never comes into existence. *The fundamental distinction* which thus becomes most manifest between the mere legislative machinery of

the government and that machinery which alone possesses the *power to ordain amendments* to the constitution of the commonwealth is most radical and extreme. Hence it follows, by an inevitable conclusion, that when the twenty-sixth section of the third article of the constitution says that 'every order, resolution, or vote' of the two houses shall be submitted to the governor for his approval or disapproval, it does not and cannot have any reference to the action which the two houses take in performing their part of the work of creating amendments. After them comes the governor, in matters of legislation, but after them come the electors of the commonwealth, in matters of constitutional amendment. In the latter the power and will of the people are final and conclusive. In the former the power and the will of the governor are supplemental only. His action may be final, or it may not; depending on an ultimate vote of the two houses by a two-thirds, instead of a majority, vote. If it is two-thirds, he is not an element, even in matters of legislation, but he is never an element in matters of constitutional amendment. Before passing to the question of authority, only one more thought needs expression. *It is that these two articles of the constitution are not inconsistent with each other, and both may stand and be fully executed without any conflict.* One relates to legislation only, and the other relates to the establishment of constitutional amendments. *Each one contains all the essentials for its complete enforcement without impinging at all upon any function of the other.* And it follows, further, that, because each of these articles is of *equal dignity and obligatory force* with the other, *neither* can be used to change, alter, or overturn the other. It is not a tenable proposition, therefore, that because the twenty-sixth section of the third article requires that all orders, resolutions, and votes of the two houses shall be submitted to the governor, the same provision shall be thrust into the eighteenth article, where it is not found and does not belong." (Italics ours.)

Vol. 6 Ruling Case Law, at page 28, states the matter in this way:

"In submitting propositions for the amendment of the constitution, the legislature is not in the exercise of its legislative power, or of any sovereignty of the people that has been intrusted to it, but is merely acting under a limited power, conferred upon it by the people, and which might with equal propriety have been conferred upon either house, or upon the governor, or upon a special commission, or any other body or tribunal."

In the case of Warfield v. Vandiver, 101 Md. 78, 60 A. 538, 541, 4 Ann.Cas. 692, the Maryland court recognized the distinction of the powers given the Legislature under an article of the Constitution dealing with amendments in the following language:

"Article 14 is a separate and distinct subdivision of the Constitution. It deals, in its first section, exclusively with the process of amending the Constitution, and

has no relation whatever to legislation. The other provisions in other articles to which allusion has been made are confined to lawmaking. This article is restricted to Constitution making; and the two subjects are widely disconnected in location and in substance."

Other cases which may be cited to sustain our views: Nesbit v. People (1894) 19 Colo. 441, 36 P. 221; State ex rel. Donnelly v. Myers, 127 Ohio St. 104, 186 N.E. 918; Hawke v. Smith, Sec. of State, 253 U.S. 221, 40 S.Ct. 495, 64 L.Ed. 871, 10 A.L.R. 1504; State of Missouri ex rel. Tate v. Sevier, 333 Mo. 662, 62 S.W.(2d) 895, 87 A.L.R. 1315; State ex rel. Morris v. Mason, 43 La.Ann. 590, 9 So. 776; McAlister v. State ex rel. Walton, 96 Okl. 143, 221 P. 779; Johnson v. Craft et al. (1921) 205 Ala. 386, 87 So. 375, 388. We quote with approval the following passages from the majority opinion on rehearing in the case of Johnson v. Craft, as applicable to instant case:

"The present review and reconsideration is thus reduced in scope and subject-matter to the point of an 'irreducible minimum.' The proposition earnestly urged is that the function and service of the Legislature in performance of its duty under article 18 of the Constitution, in proposing and submitting amendments to the Constitution, is divisible into two distinctive processes or actions, in the order to be stated, viz. formulating, upon constitutionally attained agreement of the two houses, a proposed amendment to the Constitution, and, this being done (permissibly concurrently) as the necessary, natural precursor of and predicate for the other process, to wit, that of ordering the election, including a valid provision for the time it shall be held. * * *

"Recurring to the particular contention for the divisibility of the function of proposing and of submitting amendments to our Constitution: The analysis proposed in the arguments is a striking illustration of the well-known ability of counsel. More; it is pleasing to contemplate as the performance of lawyers of highest skill. Nevertheless, it is not sound. Viewed as the work of a surgeon, it would separate the heart from the body, leaving the body without the impulse of life. The heart of the simple, complete, separately provided, distinct system for amending the Constitution (Jones v. McDade, supra [200 Ala. 230, 75 So. 988]; Commonwealth v. Griest, 196 Pa. 396, 46 A. 505, 50 L.R.A. 568, 572, among others) is that which alone can infuse life into that which is lifeless, viz. a favorable election by the people on the amendment proposed. The body to become thereupon vital is the proposed amendment. The electoral function is not the body, but the heart that vitalizes the body. The argument proceeds in the reverse order of the factors to which it must refer. It unjustifiably exalts the mere order in which these two acts may be performed over the constitutional design and composite effect to which that action can alone relate. The design of article 18 is an entire scheme. To propose an amendment without providing for the election would be as much

a folly as providing for an election on an amendment not proposed. * * *

"If the Legislature as an entity, not in its law-making capacity, is the only agency that can formulate an amendment, how can it for a moment be thought, much less contended, that 'Legislature' was intended to have any different effect or design when the ordering of the election and fixing the time it should be held was the purpose of the makers of the Constitution? If 'Legislature' means the entity in one instance, it has the same meaning in the other."

We will find it convenient to apply the appellation "convention" to the Legislature when sitting with respect to the extra-legislative business of amending the Constitution ad referendum.

The plaintiff and defendant seem to be in agreement on one thing, and that is that article 19 provides for "such special election * * * as said legislature may by law provide."

Defendant says that this understanding of the clause should impel us to decide that in calling an election and setting the time thereof and providing the means therefor the Legislature acted in a legislative capacity and the calling of the election is *by law*. It follows, says the defendant, that since the election is called *by law* and since the people have reserved power under article 4 to direct a referendum against *any law* (not within express exceptions) chapter 117, Laws 1937, is suspended under the facts here presented.

We do not doubt that the procedure provided by the Legislature in session as a convention to amend the Constitution, which directs submission to the voters in order to effectuate the proposals for amendment is a law. The question is whether it is the kind of a law against which referendum may be directed under article 4.

Our Constitution, article 9, § 8, declares:

"No debt * * * shall be contracted by or on behalf of this state, unless" (in the manner stated).

Surely taken literally, "no debt" is as comprehensive a term as the term "any law" employed in section 1 of article 4. But we held in State ex rel. Capitol Addition Bldg. Commission v. Connelly, 39 N.M. 312, 46 P.(2d) 1097, 100 A.L.R. 878, that reading all of the article 9, sections 8, 10, 12 and section 11, as amended, it was apparent that the term "debt" referred to obligations pledging for repayment general faith and credit of state or municipality, and contemplates levy of general property tax as source of funds with which to retire obligation. So our problem is not solved by concluding that the special election to submit the amendments was provided "by law."

The defendant says that the question here presented was decided in Clements v. Hall, 23 Ariz. 2, 201 P. 87, 89. We do not so understand that decision. At one place the court said:

"Whether the Legislature, in calling a special election acts in its capacity as a lawmaking body, or whether it is in the exercise of a delegated power that it makes

the call, we think it unnecessary to decide in this particular case, for the reason that it seems to us that the Legislature has done very much more than to call a special election. *If it has done anything it has provided the machinery for holding the election and authorized the incurring of the expenses necessary therefor.* Section 4, against which the referendum is filed, not only calls the special election, but adopts by reference a system of general laws, to wit, the general election laws, whether applicable or not. In other words, the procedure provided in the general election laws is required to be followed in holding the special election on November 9, 1921, in every respect except as to date." (Italics ours.)

The defendant says in her brief:

"A legislature in proposing amendments is not acting in legislative capacity, but in calling an election and setting the time it does act in legislative capacity and calling of election is by law."

Since from all of the foregoing we find no difficulty in reaching the conclusion that both in proposing the amendments and in providing for or calling the election the Legislature acts in the capacity of constitution-makers, and since defendant places great reliance on the decision in Clements v. Hall, supra, we follow it further to see whether her claim that chapter 117 appropriating money to pay the expenses of the election proves that it is a law passed by the Legislature as a convention pursuant to power vested in it by article 4, and even if so, whether such law is subject to the referendum provisions of section 1 of article 4. Defendant also relies on the case of Hatch v. Stoneman, 66 Cal. 632, 6 P. 734. Entertaining great respect, as we do, for the decisions of the courts of our neighboring states, we feel that the reasoning set forth in other decisions above cited is more persuasive. To some extent the Arizona decision is distinguishable.

That constitutional conventions may incur expense for legitimate needs is not doubted. Hoar, "Constitutional Conventions," p. 177. The same author, quoting Jameson, says that the convention may pledge the faith of the state for the necessary expenses. but warns that that is a different thing from pledging the credit of the state. He refers to the fact that the attempts of the earlier state constitutional conventions to appropriate money were successful, but that such attempts had been unsuccessful in later years, and that the opinions of the Attorney General of 3 of the states had ruled against the legality of such proceedings.

No case deciding the point has come to our attention. We think it would not be an unreasonable holding that a constitutional convention has incidental enacting capacity within the narrow range implied as necessary for the business of proposing questions of revision and submitting them to the people. See Opinion of the Justices, 76 N.H. 612, 85 A. 781. The New Mexico Constitutional Convention enacted provisions submitting the Constitution to the people, fixing the date of the election,

and declaring that "except as to the manner of making returns of said election and canvassing and certifying the result thereof, said election shall be held and conducted in the manner prescribed by the laws of New Mexico now in force," and provided the form of ballots, the method of making returns, and other details of the submission. See article 22, entitled "Schedule." The power to do so has never been questioned so far as we know.

And it would seem that when the Legislature acts as a convention to formulate and submit constitutional amendments, there would be a stronger case for saying that within the narrow range of measures necessary to effectuate the main business of amending the Constitution they would have implied capacity to appropriate money to defray the expenses they had the power to incur and to do all things necessary thereto. It would seem extremely technical to hold that the identical Senators and Representatives sitting as a constitutional convention under article 19 could by a majority of each House propose amendments, provide for submission of them to the people, and incur the expense thereof, and yet be compelled to dissolve as a convention and reconvene under article 4 to make an appropriation of money to pay the expense. In the case of constitutional conventions as commonly understood, the personnel of the delegates therein is usually different from that of the coexistent Legislature, but under the system whereby the Legislature is sitting as a convention to formulate and submit constitutional amendments, the personnel is the same. It may be that the acts of the Legislature-convention body partake of both Constitution making and law making in the narrow sense. But it is apparent that the body, whatever it may be called, could not even propose constitutional amendments under article 4, and that it could not pass laws which are outside the narrow range of Constitution making under the provisions of article 19. But it seems that the 2 capacities may converge within that narrow field.

A somewhat pertinent illustration is the passing of the complete separation of functions of law courts from equity courts. Law and equity principles persist, but they are administered by the same judge. He no longer is required to rise as a court of law and walk around his chair and sit down again as a chancellor. We think it is not unlikely that the acts of the Legislature, acting as a convention to frame and submit constitutional amendments, may partake of both Constitution making and legislation. But the answer to defendant's contention is that the acts of the Legislature against which a referendum may be directed for the purpose of approving, disapproving, suspending, or annulling the same are only such laws ("any laws") as may be enacted by the Legislature alone without the interposition of an approving vote of the people. In other words, the required number of electors may by petition under section 1 of article 4 suspend the operation of a law and refer its fate to the electors, but there

is nothing in said article which supports the view that such petitioners have the *right to refer* "the right to refer" a proposed constitutional amendment for their approval or disapproval.

The defendant relies further on Clements v. Hall, quoted supra, because of the statement there made that the Arizona enactment "adopts by reference a system of general laws, to wit, the general election laws, whether applicable or not." Defendant says in her brief:

"The bill in question not only adopts by section 2 the general law, as in the Arizona case (Clements v. Hall, supra) but it goes further and provides in section 3 for the method of appointment of election officials, and their pay. It goes into details as to the manner of purging registration lists."

It is an interesting speculation as to whether most all of the provisions of chapter 117 so referred to are not surplusage or in the main mere reaffirmance of a portion of the general election code enacted 10 years earlier specifically made applicable to elections on constitutional amendments.

Section 41-401, N.M.S.A.1929, is as follows:

"At all elections at which any proposed constitutional amendment or question other than the election of officers shall be submitted to a vote of the electors, such election shall be held and conducted in conformity with this act insofar as the same is applicable."

A further illustration will show how unfortunate it might be if defendant's views should prevail. Suppose the Legislature, pursuing its extra-legislative function of Constitution making, should submit constitutional amendments after the general appropriation bill had been passed by the Legislature and provide in the submission of such amendments that they shall be voted on at the next regular election, and make an appropriation to defray that part of the expenses of the election which will be incurred solely for the purpose of procuring election supplies such as ballots submitting the proposals, etc., not otherwise necessary for the holding of the general election, and suppose such appropriation enactment could be traced solely to the powers derived by the Legislature from article 4. Can it reasonably be claimed that the right to amend the Constitution so carefully preserved by a majority of the electors who adopted the Constitution could be thwarted by 25 per cent. of the electors under the legislative power reserved in the people by article 4? We think such was not the intention.

Plaintiff in his brief offers the following good illustration as to how defendant's theory would work on the power contained in section 2 of article 19, providing for constitutional conventions:

"If we adopt a homely test of the soundness of the respondent's theory that provisions *'by law'* for constitutional conventions, or for voting on proposed amendments at special elections, we believe we

could demonstrate the absurdity to which it leads. If the legislature of New Mexico in 1937 had submitted to the people, at the general election of 1938, the question of whether a constitutional convention should be called, it would become the duty of the *next* legislature, meeting in January, 1939, to give effect to the favorable vote of the people if they approved at the ballot box. Pursuant to Section 2 of Article 19, being the next legislature after the people had spoken at the ballot box, the legislature of 1939 would, of necessity, by bill provide the date, place and conditions under which the constitutional convention should be held and would, also, include the necessary directions as to how the special election should be conducted; what laws should govern it, and how the expenses thereof should be paid. According to the respondent, this would be an ordinary statute or law, subject to referendum. If the date set for the constitutional convention should be fixed by the legislature prior to the general election in 1940, a petition by twenty-five per cent of the voters would be sufficient to suspend the holding of the election for delegates to the constitutional convention, and then, if a majority of the people approved the law at the general election of 1940, the matter would reach a stalemate. The date for the election for delegates to the constitutional convention, as fixed by the legislature of 1939 in its bill calling the election, having passed there would be nothing to do but wait until the legislature of 1941 could meet and then to see what that legislature might be able to do. Manifestly it could do nothing, because it would not be the 'next legislature' after the people had voted in 1938 to approve of a constitutional convention. The legislature of 1939, having gone into history, and the legislature of 1941 having no power, we would have nothing to do but start again the vicious circle."

Again, section 5 of article 19, says:

"The provisions of section one of this article shall not be changed, altered, or abrogated in any manner *except through a general convention called to revise this constitution as herein provided.*" (Italics ours.)

Section 1 contemplates that the Constitution may be amended at either a general or special election. Conceivably, if defendant's views should prevail, 25 per cent. of the electors under section 1 of article 4 could change, alter, or abrogate the provisions of section 1 of article 19 so as to limit the submission of constitutional amendments to the voters at general elections by the simple process of filing referendum petitions.

We will now consider the contentions of defendant that the alternative writ was improvidently issued and that the plaintiff is not a person with capacity to sue. We treat them together because the same principles touch each contention.

In State ex rel. Owen v. Van Stone, 17 N.M. 41, 121 P. 611, 613, we said:

"Under the provisions of sections 3 and 13 of article 6 of the Constitution, this court

and the district courts each has original jurisdiction in quo warranto and mandamus against all state officers, boards, and commissions in all cases, whether the proceeding be instituted by the Attorney General, ex officio, in behalf of the state for some prerogative purpose, or be brought by some private person for the assertion of some private right.

"This court, in the absence of some controlling necessity therefor, of the existence of which this court is sole judge in each instance, should decline such jurisdiction and will do so in all cases brought at the instance of a private suitor. What will be considered by this court as a controlling necessity, it would be impossible, and indeed improper, to attempt to define in advance."

From this it is argued by defendant that it was a declared policy that this court will not issue its prerogative writ of mandamus "at the instance of a private suitor." What is meant in State ex rel. Owen v. Van Stone is that this court "should decline such jurisdiction and will do so in all cases brought at the instance of a private suitor * * * for the assertion of some private right." The court took notice of considerations that exceptions exist where the case "is publici juris; that is, a case which affects the sovereignty of the state, its franchises or prerogatives, *or the liberties of its people.*" (Italics ours.)

From what we have heretofore said, it appears that the right of the people to amend their Constitution is in the interest of the public peace or safety and is one of the "blessings of liberty" for which our people in the preamble to their Constitution expressed gratitude to Almighty God.

In State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242, 246, an application was made by a citizen for a writ of mandamus against the city of Albuquerque, and its commissioners, to require the submission to a vote of the people of a certain city ordinance. The capacity of the plaintiff to maintain the action was challenged by the respondent, and in discussing the point involved we said:

"While there are exceptions, it is the general rule that mandamus may be issued to enforce the performance of a public duty by public officers, upon application of any citizen whose rights are affected in common with those of the public. Such person is 'beneficially interested' in the enforcement of the laws."

Defendant argues that this case is not applicable because there the plaintiff was the man who presented the petition for referendum election and therefore his right to vote depended upon the filing of the petition. But the same principle applies to the person who shows that his right to vote depends upon the submission of the proposed constitutional amendments as commanded by the people in their Constitution. Article 19 commands the Secretary of State to cause any amendment or amendments proposed by the Legislature to be published, etc., a very solemn mandate from a very high authority. The beneficial interest re-

posed in the plaintiff in the Burg Case and in the case at bar is the same, namely, the right to vote.

We do not agree with defendant that in Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 1075, 58 A.L.R. 573, we announced principles contrary to the holding in the Burg Case. There are a number of considerations mentioned in the Asplund Case to be borne in mind in considering whether the holding there is in conflict with the decision in the Burg Case. In the first place, Mr. Asplund sued to enjoin the Governor himself, the chief executive whose duty it is to act in more than a ministerial capacity in taking care that the laws be faithfully executed. Some difference might be traced to the fact that the respondent in the case at bar, occupying an office of great dignity and importance, has only ministerial duties to perform in respect to the matters herein involved. Mr. Asplund sued as a citizen and taxpayer. We saw no right which Mr. Asplund was seeking to vindicate except the private right to be relieved from a burden of additional illegal taxation, and we pointed out that his complaint did not state "what effect, if any, the proposed action will have, either to increase or decrease the taxes of the appellant, or of any taxpayer of the state"; and again we said:

"As already pointed out, it is not satisfactorily shown that appellant will be in any way injuriously affected in his property by the proposed expenditures. Perhaps his failure to show such injury should be deemed decisive. We prefer, however, to assume, *for the purposes of this case,* that the necessary result of the proposed use of the '* * * fund,' will result in increasing state taxes." (Italics ours.)

Whatever may be the effect of the argument and declaration, it appears that the case could have been decided upon the proposition that it was not shown that the appellant was injuriously affected. And in Asplund v. Hannett a distinction is suggested between the jurisdiction of the Supreme Court in the exercise of its original jurisdiction and in the district court where injunction is sought to vindicate some private right. We referred to the decision of the Wisconsin Supreme Court in State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35, 17 L.R.A. 145, 35 Am.St.Rep. 27. We pointed out that in the Wisconsin case the question was publici juris and that the Wisconsin court reached the conclusion that mandamus and injunction were correlative writs with respect to their use by the Supreme Court in the exercise of its original jurisdiction. We said:

"The argument was that the design was to give the Supreme Court 'original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people.' That being the purpose, and injunction being one of the writs authorized for the purpose, it must be considered, when so sued, a quasi prerogative writ correlative with mandamus. But the court says it is firmly established that: 'In

matters strictly publici juris, in which no one citizen has any right or interest other than that which is common to citizens in general, a petition by a private person for leave to commence an action in this court in the name of the state cannot properly be considered until the Attorney General has been requested to move in the matter, and has refused or unreasonably delayed to do so.' "

The holding in the Cunningham Case was as follows:

"A state constitutional clause conferring upon the supreme court original jurisdiction to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, and other original and remedial writs, is designed to give to that court original jurisdiction of all judicial questions affecting the sovereignty of the state, its franchises or prerogatives, or the liberties of the people."

It is conceded in the case at bar that the Attorney General could not be expected, because of his position or affiliation and appearing as he does on behalf of respondent, to intervene in behalf of plaintiff in the case at bar or others similarly situated.

Section 105-113, N.M.S.A.1929, provides:

"When the question involved in a cause of action is one of common or general interest to many persons, or where the parties are numerous and it is impracticable to bring them all before the court one or more may sue or defend for the benefit of the whole number of persons so interested in said cause of action."

It is true, as we said in Asplund v. Hannett, neither this enactment nor the fact that the Attorney General refused or failed to act on behalf of plaintiff who asserts the vindication of a beneficial interest in the action or nonaction of a public officer, did not in that case create a cause of action. Still we think they are circumstances which aid the plaintiff in the case at bar. It must be apparent that the plaintiff does not claim that the exercise of his vote alone could result either in the approval or disapproval of the proposed constitutional amendments and that his right asserted is the same right which all of the electors are entitled to exercise.

Believing as we do that the plaintiff is a person "beneficially interested" in his own behalf and that the cause of action which he asserts is one of common or general interest to many persons, if it were deemed important to plaintiff's assertion of the right, we would deem his application to be amended so as to assert that he complains on behalf of himself and all other residents, citizens, and qualified electors, and that he brings his suit in the name of the state, the Attorney General not being circumstanced to sue in his behalf. See Kimberly v. Morris, 87 Tex. 637, 31 S.W. 808. As to the "controlling necessity" for the issuance of the writ, the allegations of the application heretofore quoted present a sufficient showing. We conclude that we are proceeding within our jurisdiction and discretion and that the plaintiff possesses capacity to maintain the action.

Defendant questions the constitutionality of chapter 117 of the Laws of 1937 involved herein, upon 2 grounds which we find it unnecessary to state. The defendant, as a public officer of the state not showing in her answer that she is either injured or jeopardized by the operation of the enactment and being a state official acting in a purely ministerial capacity, cannot be heard to question the constitutionality of such enactment. See State ex rel. Davidson v. Sedillo, 34 N.M. 1, 275 P. 765.

Another contention of the defendant somewhat similar to that last mentioned is thus stated in her brief:

"The purpose and effect of the matter contained in Joint Resolution No. 14, the so-called Constitutional Amendment No. 2, is solely to put into effect chapter 79 of the Laws of 1937, and is an unauthorized delegation of legislative power and in violation of the spirit and letter of article 9, section 8 of the State Constitution requiring the vote of the people at a general election to authorize bonded indebtedness in excess of One Hundred Thousand Dollars ($100,000.00)."

The proposed amendment is entitled "Constitutional Amendment No. 2," and in form at least is a proposed constitutional amendment. A contention similar to that here made by defendant was made in State ex rel. Marcolin v. Smith (1922) 105 Ohio St. 570, 138 N.E. 881, and was disposed of somewhat along the lines of the principle announced in State ex rel. Davidson v. Sedillo, supra. That was a per curiam opinion concurred in by Wanamaker, Robinson, Jones, Matthias, and Clark, Justices. Marshall, C. J., and Hough, J., dissented. Mr. Justice Wanamaker filed a concurring opinion reviewing extensively the authorities and from which we find it convenient to quote:

"The primary and paramount question in this case bared to the bone is this: Can the secretary of state, under the Constitution of Ohio, nullify or deny to the people their right of referendum on a proposed law, statutory or constitutional, upon the sole ground that the proposed law, if it shall receive a majority vote of the people and thus be adopted as a law, will be in conflict with some provision of the federal Constitution?"

Article 19, section 1, of our Constitution, after providing for the proposal by the Legislature of constitutional amendments, says:

"The secretary of state shall cause any such amendment or amendments to be published," etc.

Section 41-403, N.M.S.A.1929, being a portion of article 4 of chapter 41 of said compiled statutes, and what is known as "The 1927 Election Code," says:

"The secretary of state shall provide printed ballots for the use of electors in all cases where constitutional amendments or other questions to be submitted to the electors of the entire state are involved, and shall transmit the same to the county clerks, who shall deliver them to the elec-

tion officers as election supplies are delivered under the provisions of this act."

Section 41-404 makes it the duty of the Secretary of State, whenever a proposed constitutional amendment or other question is to be submitted to the electors of the state at large, to "certify the same to the county clerks." Said 1927 Election Code contains other directions to the Secretary of State.

We again quote from the opinion of Mr. Justice Wanamaker:

"I can imagine no more startling proposition to the sovereign people of Ohio, who in making our new Constitution in 1912 endeavored by amendments to generally enlarge their reserve powers and correspondingly limit the powers of their public servants, to discover 10 years after, as contended in the minority opinion, that, instead of having the right to alter and amend their own Constitution at will, that public will was at all times subject to the approval and consent of their own secretary of state.

"It is a novel doctrine, to say the least, that a public servant is greater than his master. Nineteen centuries ago it was written: 'Is the servant greater than his Lord?' The old doctrine that enumeration of certain duties excludes all others not enumerated is peculiarly applicable in this case. The Constitution itself specifies the duties that the secretary of state shall perform touching a proposed amendment, but nowhere is it suggested that he may pass on the question of whether a proposed amendment to the state Constitution is or is not in conflict with any provision of the federal Constitution."

Again:

"If there be that clear conflict between the state Constitution and the federal Constitution, as claimed by the minority, may we not abundantly confide in the judgment and patriotism of the majority of the people to likewise see that clear conflict, and vote accordingly? I commend the following sentiment of Abraham Lincoln in one of his great addresses:

"'Why should there not be a patient confidence in the ultimate justice of the people? Is there any better or equal hope in the world?'

"Suffice it to say, however, that the people themselves have reserved to themselves the right to pass upon this question by a referendum vote. If rejected by that vote, that is an end of the whole matter. If adopted by that vote, and anybody's rights under the federal Constitution are so affected as to present a judicial question, the matter of conflict will then be fairly and fully determined by the courts."

From the per curiam opinion we quote the following:

"It has thus become the established law of this state that no officer or tribunal may interfere either with the enactment of laws or the amendment of the Constitution while the same is in process, upon the ground that such legislation, if enacted, or constitutional amendment, if adopted, will be

in conflict with the Constitution, state or federal. These questions are and must necessarily be reserved for consideration and determination after the legislative or constitution-making body shall have fully performed its function and such new law or constitutional amendment shall have become effective."

We are in entire agreement with the foregoing principles announced by the Supreme Court of Ohio.

See, also, State ex rel. Cranmer v. Thorson, 9 S.D. 149, 68 N.W. 202, 33 L.R.A. 582, where the court held:

"Under Laws 1891, c. 57, § 12, providing that 'whenever any proposed constitution or constitutional amendment or other question is to be submitted to the people of the state for popular vote, the secretary of state shall * * * certify the same to the auditor of each county in the state,' it is the duty of the secretary to certify a question directed by the legislature as to whether a provision of the constitution shall be repealed, though an affirmative answer by the people would not affect the constitution."

The answer of the defendant, presenting no valid or legal reason for her failure or refusal to proclaim and call the special election and perform the duties enjoined on her in the Constitution and laws of New Mexico, the alternative writ of mandamus heretofore issued will be made permanent, and it is so ordered.

HUDSPETH, C. J., SADLER and BRICE, JJ., and NUMA C. FRENGER, District Judge, concur.

71 P.(2d) 646

HESTER v. SAWYERS et al.

No. 4230.

Supreme Court of New Mexico.

Sept. 7, 1937.

[redacted]

[redacted]

[redacted]

Hubert O. Robertson, of Silver City, for appellant.

Wilson & Woodbury, of Silver City, for appellees.

BRICE, Justice.

It will be unnecessary to refer to the pleadings. The question is whether the district court erred in holding that appellee has title by prescription to a right of way over appellant's land.

If there is substantial evidence to support the findings and judgment of the court, it will not be disturbed by us. The evidentiary facts are practically undisputed and are as follows:

The parties are adjoining landowners. At the time and before appellee bought his property in 1920, appellant was the owner of the land over which the easement is

claimed. Persons owning land on three sides had theretofore built fences around their own land, thus in effect placing fences on three sides of appellant's land; but the east side was open and all persons desiring so to do, could pass across it.

The two tracts of land are separated by a fence belonging to appellee, which is appellant's west boundary. The original way had its beginning at appellee's house, passed an opening in the fence, and ran easterly across appellant's land to a road along her boundary, which at that time was unfenced.

In 1922 a golf club secured the consent of appellant to place a fence along the east boundary, thus inclosing the land; after which it was used in part as a golf course. Appellee claimed a right to pass over the land at that time, though he did not know who owned it. The golf club secured his consent to the building of the fence. He had no deed to the road, paid no taxes on it, and based his claim of right on the fact that "it was the only way to get in and out and had been used for years."

At the time the east fence was built the road was materially changed. From the west boundary it followed the old road a very short distance, then turned away to the south of it some distance, thereafter paralleling it for the greater distance across appellant's land, and terminated on the road at the east side in a lane south of "the old road." A map was introduced in evidence showing the "old road," and the "present road," from which it appears that they are not substantially at the same location, though practically parallel.

Since the east fence was built, appellee, his tenants, visitors, and those having business with him (and no other persons), have used the road daily and openly, without interruption or objection from any one until just prior to the filing of this suit in the district court. Appellee did not have the affirmative consent or authority of appellant, or any person, to use the road. When he gave his consent to the golf club to build the fence, he stated to its representative: "I don't lose my right to come down and out of this canyon." He sells lumber at his house and has no other way out. He did not buy his land from appellant. He testified: "My business is selling lumber at my claim up above my house, with no other way than this road to get to and from my place. I have rent houses and this road is the only way my tenants have to go back and forth. If the road is closed I will have to discontinue my business and move out of there. I claim this road as my right of way."

Since the east fence was built, more than ten years prior to the filing of this suit, appellee has continuously graded and kept the road in condition for travel for his own use.

Just prior to the filing of this suit the appellant saw the appellee and insisted that he change the road to run further north so that it would interfere less with her property. Appellee agreed to do this, and to that end began the grading of a new

road. This appellant claimed did not comply with her directions, so she closed appellee out with a fence, which was torn down by him. This suit followed.

There is no specific statute in this state under which title to an easement or other incorporeal hereditament can be obtained by prescription, but appellant claims that section 83-122, Comp.St.1929, applies to corporeal and incorporeal hereditaments. It reads in part as follows: "No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against any one having adverse possession of the same continuously in good faith, under color of title, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments so held, shall be commenced within ten years next after the cause of action therefor has accrued: * * * 'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another."

If this statute applies to easements, then appellee has no title for he does not claim, nor did he prove, color of title.

It was the ancient rule of law that the words "lands, tenements or hereditaments" comprehended only freehold estates and did not apply to easements or other incorporeal hereditaments, Hutchinson v. Bramhall, 42 N.J.Eq. 372, 7 A. 873; likewise statutes of limitation like that to which we have referred, which bar actions to recover lands held adversely under color of title for a period of years, are generally held to apply to corporeal hereditaments only.

"Prescription may be defined to be a mode of acquiring title to incorporeal hereditaments by continued user, possession or enjoyment had during the time and in the manner fixed by law. The term properly applies only to incorporeal rights. An interest in the land of another greater than an incorporeal hereditament, such as the possession and use of a building thereon, cannot be established by prescription. Prescription is distinguished from custom in that the former is a personal usage or enjoyment confined to the claimant and his ancestors or those whose estate he has acquired, while the latter is a mere local usage, not connected to any particular person, but belonging to the community rather than to its individuals. Adverse possession is distinguished from prescription in that it is, properly speaking, a means of acquiring title to corporeal hereditaments only, and is usually the direct result of the statute of limitations; while prescription is the outgrowth of common-law principles, with but little aid from the legislature, and has to do with the acquisition of no kind of property except incorporeal hereditaments." 1 Thompson on Real Property, § 372.

"Prescription applies only to incorporeal hereditaments. An interest in the land of

another greater than an incorporeal hereditament, such as the possession and use of a building thereon, cannot be established by prescription. The statutes of limitations do not directly apply to actions in which incorporeal hereditaments, such as easements, are involved, but only to actions for the recovery of land." 1 Thompson on Real Property, § 375.

See 19 C.J. title Easements, § 18; 9 R.C. L. title Easements, § 32; 2 C.J.S. title Adverse Possession, § 2; Murray v. Scribner, 74 Wis. 602, 43 N.W. 549; Boyce v. Missouri Pacific R. Co., 168 Mo. 583, 68 S.W. 920, 58 L.R.A. 442.

Appellant does not seriously contend that the statute of limitation applies to easements, but insists that if it does not, then the right is one at common law and that twenty years use is necessary to acquire title by prescription.

The courts of England and, with few exceptions, of the United States, have adopted the rule that the period of use for acquiring such title by prescription corresponds to the local statute of limitation for acquiring title to land by adverse possession.

"The period for acquiring an easement in land corresponds to the local statute of limitation as to land. It would be irrational to hold that an easement may not be acquired by the same lapse of time required to confer title to the land by adverse possession. The period of limitation for the bringing of actions to recover the possession of land is generally adopted as the period for perfecting easements by prescription. This rule is based upon the assumption that if there had been no grant, the owner would have put an end to the wrongful occupation before the full period of limitation had expired. And while it is often said that from such user a grant will be presumed, the presumption in effect amounts to a positive rule of law, and evidence that no grant was made would not be material. * * *" 1 Thompson on Real Property, § 374.

See Boyce v. Missouri Pacific R. Co., supra; Johnson et al. v. Lewis et al., 47 Ark. 66, 2 S.W. 329, 14 S.W. 466; 19 C.J. title Easements, § 18; 9 R.C.L. title Easements, § 32; Vereen & Sons Inc. v. Houser et al., 123 Fla. 641, 167 So. 45. This seems to have been the assumption of the Territorial Supreme Court in Stamm v. City of Albuquerque, 10 N.M. 491, 62 P. 973. Also see Trambley v. Luterman, 6 N.M. 15, 27 P. 312.

Appellant, anticipating this holding, insists that if, following the general rule, we adopt the period of time provided by statute under which adverse possession will bar an action to recover possession of real property, then we should hold that appellee must establish color of title and that he had paid taxes as required by the statute of limitation in question, and cites Harkness et al. v. Woodmansee et al., 7 Utah, 227, 26 P. 291; North Point Consolidated Irrigation Co. v. Utah, Etc., Canal Co., 16 Utah, 246, 52 P. 168, 40 L.R.A. 851, 67 Am. St.Rep. 607; Funk v. Anderson, 16 Utah,

246, 61 P. 106; Coleman v. Hines, 24 Utah, 360, 67 P. 1122; Quanah, A. & P. R. Co. v. Wiseman (Tex.Civ.App.) 247 S.W. 695; Smith v. Jensen, 156 Ga. 814, 120 S.E. 417; Louisville & Nashville R. Co. v. Hays, 11 Lea (Tenn.) 382, 47 Am.Rep. 291. These cases in the main sustain the position of appellant, but we think are against the weight of authority. Also see Humphreys v. Blasingame, 104 Cal. 40, 37 P. 804, 805.

That an easement may be created by prescription, appellant agrees. If we should hold that one claiming an easement because of use for ten years is burdened further with proving he had color of title to such easement, and had paid taxes thereon if levied, then we would be applying the statute of limitation and not the law of prescription to easements, though we have just held the statute of limitation did not apply. Adverse possession of land could not apply to easements, for the use necessary to acquire them is not necessarily constant or exclusive. Cooper v. Smith, 9 Serg. & R. (Pa.) 26, 11 Am.Dec. 658. A prescriptive right is obtained by use alone and does not depend upon any statute. It is founded upon the presumption of a grant, though there may never have been one. The reason for the adoption by the courts of England and generally by those of the United States, of a time of use analogous to that required by statutes of limitation regarding adverse possession of land, is because the common law fixed no definite time. It was, "For a time whereof the memory of man runneth not to the contrary." The courts, through gradual change, ultimately adopted by analogy the time as that for the running of the statute of limitation in cases of lands held by adverse possession as the period of use necessary for a conclusive presumption of a grant. Statutes of limitation are not otherwise involved or material.

We hold that the period of use necessary to create an easement by prescription is ten years, following our statute of limitation with reference to adverse possession of lands. 19 C.C. title Easements, §§ 17 and 18; 9 R.C.L. title Easements, § 32; 1 Thompson on Real Property, § 374. We cite these texts only because the cases are numerous and are cited supporting the textbooks and encyclopedias.

Appellant cites Felberose Holding Corp. v. New York Rapid Transit Corp., 244 App. Div. 427, 279 N.Y.S. 645, 648, on this question. This case sustains the position this court has taken. It appears that the New York Court of Appeals adopted the rule of twenty years user by analogy from the statute of limitation regarding lands. A recent Legislature of New York State reduced the period of adverse possession necessary for acquiring title to lands by limitation, from twenty to fifteen years; and the appellate division held in the case cited that property rights had accrued under the twenty-year rule regarding easements, and the courts should not change it, as the legislature had not; but the principle was not disturbed by that decision.

It is stated in that opinion: "In any event, in so far as prescription is con-

cerned, the passage of 20 years merely creates a presumption that a deed was given and lost. Slight evidence only is necessary to rebut such presumption." This we do not think is supported by any recent authorities and particularly Hughes v. Metropolitan El. R. Co., 130 N.Y. 14, 28 N.E. 765, cited in support. The old English rule to that effect is not now the law. When there has been user of sufficient time to create the presumption of a grant, such presumption is conclusive. We have cited authorities to that effect.

The use necessary to acquire title by prescription must be open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continue for a period of ten years with the knowledge or imputed knowledge of the owner. 19 C.J. title Easements, § 32.

Having disposed of these questions of law, we come to apply the facts, about which there is little dispute. The evidence and findings establish appellee's user was continuous, open, uninterrupted, peaceable, notorious, and continued for a period of more than ten years; but it is contended by appellant that it was neither proven to be adverse under a claim of right, nor that it was with the knowledge, or imputed knowledge, of the owner.

If the user was open, adverse, notorious, peaceable, and uninterrupted, the owner is charged with knowledge of such user, and acquiescence in it is implied. 1 Thompson on Real Property, § 462. The real question in the case is whether the user was adverse under a claim of right or only permissive.

A prescriptive right cannot grow out of a strictly permissive use, no matter how long the use. 1 Thompson on Real Property § 471.

A road existed across appellant's uninclosed land before the appellee bought his land; and after he acquired it he continuously used this road that others had used before his time, until the east boundary fence was built. But there was no substantial evidence of an adverse user under claim of right.

Appellant quotes Boullioun v. Constantine et al., 186 Ark. 625, 54 S.W.(2d) 986, 987, as follows: "While not universally recognized, the prevailing rule seems to be that, where the claimant has openly made continuous use of the way over occupied lands unmolested by the owner for a time sufficient to acquire title by adverse possession, the use will be presumed to be under a claim of right; but, where the easement enjoyed is across property that is unenclosed, it will be deemed to be by permission of the owner and not to be adverse to his title." In the Boullioun Case it is also stated: "Cases might and do arise where those using a private way over unenclosed lands may, by their conduct, openly and notoriously pursued, apprise the owner that they are claiming the way as of right and thus make their possession adverse."

In this state, where large bodies of privately owned land are open and unin-

closed, it is a matter of common knowledge that the owners do not object to persons passing over them for their accommodation and convenience, and many such roads are made and used by neighbors and others. Under these circumstances it would be against reason and justice to hold that a person so using a way over lands could acquire any permanent right, unless his intention to do so was known to the owner, or so plainly apparent from acts that knowledge should be imputed to him. Waller v. Hidlebrecht, 295 Ill. 116, 128 N.E. 807; Evans v. Bullock, 260 Ky. 214, 84 S.W. (2d) 26; Shroer v. Brooks, 204 Mo.App. 567, 224 S.W. 53; Bridwell v. Arkansas Power & Light Co., 191 Ark. 227, 85 S.W. (2d) 712; 1 Thompson on Real Property, § 478.

So far as the record shows there was no claim of right to the use of the road communicated to appellant, or evidenced by any acts that indicated a claim of right, prior to the inclosure of the lands by the building of the fence on the east side by the golf club in 1922. The substance of the evidence is that the road was there when appellee bought his place and he used it not knowing to whom it belonged. It is presumed that the original use of the road by appellee and others was permissive.

A prescriptive right may be acquired, although the use was originally permissive, if in fact it became adverse. But the adverse user must be for the full ten years, which excludes the time under which the user was permissive. 1 Thompson on Real Property, § 472. If there was an adverse user by appellee, it must have begun at the time the east fence was placed around the property by Hahn in 1922.

If a use has its inception in permission, express or implied, it is stamped with such permissive character and will continue as such until a distinct and positive assertion of a right hostile to the owner is brought home to him by words or acts. Omodt v. Chicago, M. & St. P. Ry. Co., 106 Minn. 205, 118 N.W. 798; Clarke v. Clarke, 133 Cal. 667, 66 P. 10; Howard v. Wright, 38 Nev. 25, 143 P. 1184; Brandon v. Umpqua Lbr. & Timber Co., 26 Cal.App. 96, 146 P. 46; Scheller v. Pierce County, 55 Wash. 298, 104 P. 277; Pitzman v. Boyce, 111 Mo. 387, 19 S.W. 1104, 33 Am.St.Rep. 536; Smith v. Oliver, 189 Ky. 214, 224 S.W. 683; Smith v. Fairfax, 180 Ky. 12, 201 S.W. 454; Flagg v. Phillips, 201 Mass. 216, 87 N.E. 598; Holm v. Davis, 41 Utah, 200, 125 P. 403, 44 L.R.A.(N.S.) 89; Naporra v. Weckwerth, 178 Minn. 203, 226 N.W. 569, 65 A.L.R. 124; Johnson v. Olson, 189 Minn. 183, 248 N.W. 700; Reider v. Orme, 17 Tenn.App. 497, 68 S.W.(2d) 960.

We approve the rule as stated in Pitzman v. Boyce, 111 Mo. 387, 19 S.W. 1104, 1105, 33 Am.St.Rep. 536: "If permissive in its inception, then such permissive character, being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one

of an opposite nature, and exclusive and independent in its character."

Other courts state it as follows:

"the grantor who continues in possession must make an explicit disclaimer of subserviency to the grantee; that this disclaimer must be clear, unequivocal, and notorious." Omodt v. Chicago, M. & St. P. R. Co., 106 Minn. 205, 118 N.W. 798, 799.

"If this presumption is overcome by evidence showing the use to have been hostile, and that the owner knew of such hostile claim and took no steps to protect his property for a period of five years, then the presumption changes." Clarke v. Clarke, 133 Cal. 667, 66 P. 10, 11.

"A use acquired merely by consent, permission, or indulgence of the owner of the servient estate can never ripen into a prescriptive right, unless the user of the dominant estate expressly abandons and denies his right under license or permission, and openly declares his right to be adverse to the owner of the servient estate." Howard v. Wright, 38 Nev. 25, 143 P. 1184, 1186.

If the only evidence of an assertion by appellee of a hostile right to the use of a way across appellant's land after the fence was built was the fact that "he continually worked and graded" the road, it may be doubted (though we do not decide) whether this was sufficient to change a friendly and permissive use to a hostile and adverse one, according to the authorities we have cited. But after the fence was built a new road was established. A map introduced in evidence shows "the old road" used prior to the building of the fence and "the present road" made and used after the fence was built. The parties do not contend they are the same and all the evidence shows they are different. The two roads converge a short distance from appellee's land and pass through the same opening, otherwise they are entirely different roads. If appellee had used the present road for only eight years, he could not have tacked the use of the old road on it to give him a prescriptive right. A way claimed by prescription must be a definite, certain, and precise strip of land. Gentleman v. Soule, 32 Ill. 271, 83 Am.Dec. 264; Brake v. Crider, 107 Pa. 210, 212; Green v. Richmond, 155 Mass. 188, 29 N.E. 770; Johnson et al. v. Lewis et al., 47 Ark. 66, 2 S.W. 329, 14 S.W. 466; 19 C.J. Title Easements, § 77; 9 R.C.L. Title Easements, § 35.

"Where one, after using a private way over the land of another, abandoned it and used another way over the same land, though he did this at the request of the owner, he cannot tack the two periods of use together so as to establish an easement by prescription. To acquire a prescriptive right of way by consent and uninterrupted use, the use must relate strictly to the identical land over which the right is claimed. It was said in one case that a road cannot be established with a variance of ten or twenty feet; but a slight variation in the course at a given point, or at the terminus of the way, will not defeat the right." 1 Thompson on Real Property, § 399.

[redacted]

The prescription is not terminated by a deviation of a few feet because of mud, washing, pools, or obstructions. Kurtz v. Hoke et al., 172 Pa. 165, 33 A. 549; Kendall-Smith Co. v. Lancaster County, 84 Neb. 654, 121 N.W. 960. But such is not the case here. If in fact rights had been initiated in the first road, they would have been lost when it was abandoned. The two could not have been tacked together to make a prescriptive right, assuming that the first use was adverse. It was said in Peters v. Little, 95 Ga. 151, 22 S.E. 44, 45: "She might have acquired a prescriptive right over the first strip if she had continued to use it; but when she voluntarily abandoned it, although she did so with the consent and at the request of the defendant, the prescription ceased to run in her favor as to that particular strip. As to the second strip, her use of the same did not continue for the requisite time to give a prescriptive right of way over it."

It has been held that one claiming a road by prescription cannot, after such right is obtained, abandon it and claim a prescriptive right to a parallel road over the same land. Follendore v. Thomas et al., 93 Ga. 300, 20 S.E. 329.

[redacted] The permissive right was to use the old road, not the new one. When appellee abandoned the old road, he established a new road over inclosed lands. He kept the road graded and in repair, exercising control over the strip of land as though his own, for more than ten years. In the absence of proof that this use was permissive (and there is no such proof), it is presumed, after ten years use, to have been hostile, adverse, and acquiesced in by appellant. Carmody v. Mulrooney, 87 Wis. 552, 58 N.W. 1109.

There is substantial evidence to support the judgment of the district court, and it is accordingly affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

[redacted]

71 P.(2d) 653

WARDER et al. v. SHUFELDT.
No. 4116.

Supreme Court of New Mexico.
Sept. 7, 1937.

[redacted]

For former opinion, see 40 N.M. 442, 62 P.(2d) 812.

J. O. Seth, of Santa Fé, and J. R. Modrall and Waldo Spiess, both of Las Vegas, for appellant.

A. T. Rogers, Jr., of Las Vegas, for appellees.

BRICE, Justice.

A motion has been filed in this cause to recall the mandate and to strike therefrom the certificate of costs of the district clerk. The mandate was issued on December 7, 1936, but seems not to have been filed in the district court until in the month of April, 1937. There was filed in this court in December, 1936, a certificate of costs made by the clerk of the district court for costs of transcript $283.15. The cost was indorsed on the mandate as follows:

"Costs taxed in favor of appellant as follows:

Transcripts	$283.15
Supreme Court Clerk's costs.....	20.00
	$303.15"

It will be observed that no costs were taxed except for transcripts, $283.15, and $20 Supreme Court costs.

The following rules of 1928 with reference to costs were in force at that time:

Sec. 3. "The clerk of the district court shall be allowed 10¢ per folio for making out and certifying the original copy of the record on appeal or writ of error and 3¢ 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."

Sec. 4. "The stenographer shall be compensated for taking down testimony (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."

Sec. 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 19, sections 3, 4, and 8.

There was no provision in the rules of 1928 for certification of costs by the district clerk, as there is now, and as there was before the adoption of the rules of 1928; for which reason the cases of Dailey v. Fitzgerald, 17 N.M. 159, 130 P. 247, and State v. Board of Education, 18 N.M. 286, 135 P. 1174, are not authority in this case. Under the rules that apply the clerk of the Supreme Court was authorized to tax the costs for preparing and filing three transcripts of the record at 16 cents per folio and 15 cents per folio additional for transcript of stenographer's notes con-

tained therein. It is presumed that this was the charge objected to.

The judgment provided for the taxing of costs against appellee, and rule 19 provided what costs should be taxed. The clerk was authorized to tax such costs in this court.

The motion will be denied.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

71 P.(2d) 654

ARMSTRONG v. LLANO DEL RIO CO. et al.

No. 4232.

Supreme Court of New Mexico.

Aug. 30, 1937.

Carl P. Dunifon and H. H. Cowles, Jr., both of Silver City, and W. C. Whatley, of Las Cruces, for appellants.

C. C. Royall, of Silver City, for appellee.

BRICE, Justice.

This suit was brought to recover possession of certain real estate situated in Grant county, N. M., resulting in a judgment for plaintiff (appellee). The essential facts are as follows:

On the 27th day of December, 1927, J. D. Armstrong and Mary B. Armstrong, husband and wife, entered into a contract with Julian M. Bassett and Cora B. Bas-

sett, husband and wife, whereby the Armstrongs agreed to sell to the Bassetts certain tracts of land in Grant county, N. M., for upwards of $87,000, to be paid in installments; upon payment of which the Armstrongs agreed to deliver a deed.

There were numerous covenants which the Bassetts agreed to perform, and it was provided that in case they failed to keep any of them before a deed of conveyance had been executed to them that "* * * they shall, at the option of the Sellers, their heirs, legal representatives or assigns, forfeit their right to the possession thereof, and shall, upon the demand of the Sellers, their heirs, legal representatives or assigns, deliver up immediate possession of said premises, with appurtenances, to the Sellers, their heirs, legal representatives or assigns, or to their agents, and shall also forfeit to the Sellers, their heirs, legal representatives or assigns, as liquidated damages for such failure, neglect or refusal, all payments theretofore made or property assigned or conveyed to apply upon the purchase price of said premises."

It was also provided:

"And in case the Purchasers shall fail to make the payments aforesaid, or any of them, as above mentioned, or shall fail to perform and complete each and all of the Purchasers' agreements and stipulations aforesaid, without failure or default, then this contract, so far as it may bind said Sellers, shall become utterly null and void and all rights and interest hereby created, or then existing, in favor of, or derived from the Purchasers shall cease, and the right of possession and all equitable and legal interests in said premises shall revert to and revest in the said Sellers, without any declaration of forfeiture or act of re-entry, or any other act by said Sellers to be performed, and without any right of said Purchasers of reclamation or compensation for moneys paid or services performed, as absolutely, fully and perfectly as if this contract had never been made.

"And it is further agreed that the said Sellers shall have the right immediately, upon failure of the Purchasers to comply with the stipulations to enter upon the lands and premises aforesaid and take immediate possession thereof, together with the improvements and appurtenances thereto belonging. And the said Purchasers hereby covenant and agree that the Purchasers will thereupon surrender to said sellers the said land and premises and appurtenances without delay or hindrance, and that no Court shall relieve the Purchasers from the consequences of a failure to comply with this contract."

The Armstrongs entered into what was styled "A Supplemental Agreement" on the 21st day of February, 1933, between them, of the first part, and the appellant Llano Del Rio Company (hereafter called appellant), of the second part, and the Bassett Land & Livestock Company (successor to the Bassetts), of the third part; whereby appellant acquired the interest of the Bassetts in the original contract, except certain portions of the land that had been sold by agreement of parties. There was

some slight modification of the terms of the original contract. The following provision appears therein:

"Except as herein modified, all the terms, conditions, provisions, and covenants in the original agreements above referred to shall be and remain in full force and effect as heretofore, and as binding on the party of the second part as if it were a party thereto."

Thereafter, on February 21, 1933, a letter was addressed to the appellant on the stationery of the Merchants Bank Building Company and signed P. E. Thayer, secretary, on which the following appears:

"Approved and accepted.
"Llano Del Rio Company
"By Geo. T. Pickett, President."

The parties treat this as an amendment of the contract, though not signed by the Armstrongs. The first paragraph of the letter is as follows:

"The following provisions are hereby mutually agreed upon between the Llano Del Rio Company and J. D. Armstrong and Cora H. Armstrong, and are understood to be a part and parcel of that said agreement made and entered into by and between the said parties on the twenty-first day of February, 1933."

The manner and dates of payment of the balance due were modified. New security was taken on property in Louisiana. Paragraph 4 is as follows:

"That in the event a default shall occur in the payments and/or other terms of the said agreement of even date herewith, the parties of the first part may at their election enter upon any or all of the premises described therein, and sell the same in such portions on such terms, and for such amounts as the said parties or their representatives may elect, and the proceeds of sale so received shall be applied on the sum or sums due under said contract."

The appellant failed to perform a number of the covenants it agreed to perform and the appellee declared a forfeiture of the contract. Appellant states in its brief:

"All of the assignments of error relate to alleged error of the court in holding that the appellants were in default in the performance of their contract, and that the appellee therefore had the right to forfeit their rights under the contract, and such assignments will, therefore, be presented as appellants' sole point for reversal.

"The rights of the parties depend entirely upon the three contracts: Exhibit A (Rec. p. 13); Exhibit B (Rec. p. 27), and Exhibit C (Rec. p. 34). Under the provisions of Exhibit A, being the original contract with the Bassetts, appellee had the undoubted right, on failure of appellants to pay in exact accordance with the terms of that contract, to forfeit the appellants' rights under the contract. Exhibit B modified the terms of that original contract only to the extent of changing the terms and time of payment of the purchase price and as fixing a new and different purchase price. * * *

"It was upon the trial and is now the contention of appellants that this provision of the contract, which was written by

the 'real party in interest' necessarily operated to modify the terms of the two preceding contracts, and especially the contract providing for forfeiture in event of non-payment exactly as provided for." (Referring to paragraph 4 of letter.)

It is contended that all provisions for forfeiture in the original contract, which we have quoted, were eliminated by section 4 of the letter mentioned. Appellant states that appellee "saw fit to waive and expressly did waive his right to forfeit the contract in event of non-payment, as and when specified, and contracted for an entirely different remedy, to-wit, the right to enter upon and sell off any part or all of the lands in question and to apply the proceeds of sale on the 'sum or sums due under said contract.' Having thus contracted, he had no right to recover under his complaint in this case, unless and until he might have shown in evidence (if such could have been shown) that he had endeavored to exercise this remedy and had been unsuccessful by reason of inability to find purchasers, and even then the right to forfeit was gone."

But little need be said regarding this contention. The letter did not eliminate the forfeiture provisions of the original contract. Where there was conflict, of course the letter prevails, but otherwise the contract stands as originally written. Indeed the provision in the letter is that its terms "are understood to be a part and parcel of that said agreement made and entered into by and between the said parties on the 21st day of February, 1933." All terms of the original contract, not in conflict with those of the letter, remain in force. Section 4 of the letter provided for an additional remedy in case of default, to which "the parties of the first part might at their election, resort." If section 4 had been written into the original contract, there could be no question of a conflict, as it is only an additional remedy in case of appellants' default, given appellee to be exercised at his election. There is not the slightest evidence of an intent to cancel any provision of the original contract regarding forfeiture.

Appellants cite 13 C.J., title "Contracts," § 645, as follows: "Provisions for forfeiture may be waived by the person entitled to enforce them, either expressly or by implication, and the courts as a rule are quick to take advantage of circumstances indicating such an intention, although a waiver cannot be inferred from mere silence."

This has no reference to the cancellation of forfeiture provisions in a contract; but to the waiver of an existing right of forfeiture by some act inconsistent with an intention to exercise it. Appellants concede that if the provisions for forfeiture had not been canceled, then they were properly exercised if in fact it was in default.

There were offers made to purchase two tracts of the land, for $12,000, a sufficient sum to liquidate the past-due indebtedness if paid in cash, but the cash payment offered was but $500, which, of course, was insufficient to pay arrears.

Appellants contend that it was the duty of appellee under the terms of paragraph 4 of the letter mentioned to accept such offer and credit appellant's indebtedness with $12,000, in which case there would be no default. But the terms of said paragraph 4 are not mandatory upon appellee and he elected to resort to the remedy of forfeiture rather than to that of selling land, even assuming such sale would pay up the arrears. We have examined the record and find that appellant had broken a number of the covenants in the contract in addition to its default in failing to make its payments, and the forfeiture was not declared alone on account of default in payments of purchase money and interest.

We find no error in the record and the judgment of the district court is affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

71 P.(2d) 683

BELL v. CARTER TOBACCO CO. et al.

No. 4235.

Supreme Court of New Mexico.

Sept. 3, 1937.

H. B. Hamilton, of El Paso, Tex., for appellants.

J. Benson Newell, of Las Cruces, for appellee.

BICKLEY, Justice.

The appellee sued the appellants for killing a Shetland pony. From a judgment following a jury verdict for $625, this appeal was taken.

There were a number of assignments of error, but only two urged in this court: First, that there was no evidence to establish the negligence of appellants; and, second, that the evidence conclusively proves that the proximate cause of the killing of the pony was the contributory negligence of appellee.

If there is substantial evidence in the record to support the judgment, then it must be affirmed. There is substantial evidence to establish the following facts:

The appellee lives in the village of Oro Grande, N. M., and there operates a store in a building facing east at the west side of the highway. At the back of his store building (the front porch of which abuts upon the highway) is a corral in which appellee kept a horse and the pony that was killed. The gate to this corral was held shut by weights on a rope and in addition had a fastening. The pony could open the gate and did so when the horse was taken out, unless the gate was fastened. Appellee and his son, hereafter mentioned, knew the pony could open the gate and would get out and follow the horse when taken from the corral if the gate

was not fastened. On the day in question, appellee's son took the horse from the corral, leaving the gate held closed with the weights only; and had just brought it to the north end of the porch of the store, when the pony loped or trotted out into the highway from the south side of the store, coming onto the highway from between the store and some cars parked along the side of the highway south of it.

Appellant James C. Love, traveling salesman for appellant company, was driving a company automobile on this highway, one of the main state roads. There was evidence that Love was driving at sixty or sixty-five miles per hour. He neared appellee's store just as the pony loped or trotted directly across the road from the south side of the store building. The pony could not have been seen by Love as he drove the car down the road from the north until it had passed the side of the store and was almost on the highway. Love saw the pony and applied his brakes to avoid hitting it. The tires scraped the ground for a distance of twenty steps before colliding with the pony, and the car went seventy steps further before stopping. The pony did not see the car until almost against it, when he stopped, reared, and threw his head up; was missed by the radiator, but the edge of the wind shield hit and crushed his head. He was killed about the center of the highway, which is sixty or eighty feet wide, with a graveled surface in the center twenty-four feet wide. It was straight for a quarter of a mile north of Oro Grande to a mile south. There was nothing to prevent the driver from turning either to the left or right to avoid killing the pony, in so far as the condition of the road was concerned, as there was no ditch at either side.

There was thirteen cars parked along the highway at and south of the store, and one or two in front of it. The pony went between the cars parked south of the store and the store building, and passed south of the car or cars parked in front of the store, onto the highway, following or looking for the horse, which had just been brought around and tied at the north end of the store building porch by appellee's son. Instead of turning north, as the horse had done, the pony continued in a lope or trot directly east, starting to cross the line of traffic. Appellee testified that appellant could not have seen the pony until it was on the highway.

It is provided by subsection (b) of section 1 of chapter 118, N.M.L.1933, among other things: "No bus or truck shall be operated at a speed greater than 45 miles per hour. Passenger automobiles may be operated at such speeds as shall be consistent at all times with safety and the proper use of the roads."

The jury was not instructed as to this statute, but the court advised them of section 11-803, N.M.S.A.1929, which is as follows: "Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful and wanton disregard

of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished as provided in section 61 [11-861] of this act." And the jury was properly instructed that a violation of this statute was negligence per se. Appellant Love testified that he was driving at from 40 to 45 miles per hour. There was testimony that he was driving at from 60 to 65 miles per hour and other witnesses testified that he was "speeding." There was sufficient testimony from which the jury could properly infer that Love violated the penal statute quoted and therefore was negligent; but that fact did not justify a verdict for damages unless such negligence was the proximate cause of the collision with the pony. Henderson v. Northam et al., 176 Cal. 493, 168 P. 1044; Texas & N. O. R. Co. v. Harrington et al. (Tex.Com.App.) 235 S.W. 188.

Contributory negligence was not pleaded by defendants. They denied negligence on their part and alleged: "That if said horse was killed as alleged in paragraph III of plaintiff's complaint, that the killing of said horse was caused by the gross negligence of plaintiff in permitting said horse to run at large upon a public highway." Such denials of negligence and allegations of negligence of plaintiff are not a plea of contributory negligence. See Thayer v. D. & R. G. R. R. Co., 21 N.M. 330, 154 P. 691, where we decided: "The plea of contributory negligence is a plea in confession and avoidance, which admits negligence on the part of the defendant, but seeks to avoid liability therefor by alleging that the plaintiff was guilty of negligence which contributed to his injury, and the plea is bad if it denies that defendant was negligent." But we turn to the instructions which were not objected to by appellants to see the theory upon which the case was submitted to the jury. See Thayer v. D. & R. G. R. R. Co., supra. Among other instructions was instruction No. 11, which was as follows: "Under the instructions given you, if the Plaintiff has sustained the allegations set out in his Complaint, and has established negligence on the part of the defendants and that plaintiff's horse was killed as a proximate cause of such negligence, then your verdict should be for the plaintiff, unless at the same time the defendants have sustained their claim of contributory negligence on part of the plaintiff in permitting the horse to run at large on the public highway, and that defendant, Love, exercising reasonable and prudent care, could not have avoided the results of such contributory negligence on part of plaintiff; or to put it another way: If Plaintiff has not sustained his case, then your verdict should be for the defendants, irrespective or whether or not the defendants have sustained their claim of contributory negligence by the Plaintiff; or if Plaintiff has sustained his case, but at the same time defendants have sustained their claim of contributory negli-

gence, then your verdict should be for the defendants *unless* (emphasis ours) the defendant Love could still have avoided the accident by the exercise of reasonable care and prudence considering all of the conditions and circumstances then existing, such care and prudence being measured by what a reasonably prudent man similarly situated would probably do under like conditions and circumstances, having regard for his own safety."

It thus appears that both contributory negligence and the doctrine of last clear chance were incorporated and submitted. Being unobjected to, this was the law of the case, Marchant v. McDonald, 37 N.M. 171, 20 P.(2d) 276; and is not open here to objection that it is not supported by the evidence. 64 C.J. 958. Neither was pleaded, but appellants (defendants) must take the bitter with the sweet, and getting advantage by the instruction of the submission of contributory negligence, they are confronted with the doctrine of last clear chance also submitted.

In this situation it was for the jury to determine whose negligence was the proximate cause of the injury. Under the issues as submitted and from a survey of the testimony, we are unable to say that there was not substantial evidence to support a verdict for plaintiff, even though the jury might have thought that the plaintiff was guilty of contributory negligence in permitting the horse to be in a situation where it could go on the highway.

From all of the foregoing we conclude that the judgment must be affirmed and the cause remanded, and it is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

71 P.(2d) 686

GARCIA et al. v. ANDERSON.

No. 4221.

Supreme Court of New Mexico.

Sept. 3, 1937.

Bryan G. Johnson and Gino J. Matteucci, both of Albuquerque, for appellant.

J. Lewis Clark, of Estancia, for appellees.

BRICE, Justice.

This was an action on an account. At the close of appellees' (plaintiffs') testimony, the appellant (defendant) moved for judgment of dismissal because of failure of proof. The motion for judgment was sustained but not entered until seven days later, to wit, June 10, 1935. On June 8, 1935, and prior to the entry of the judgment, the appellees (plaintiffs) filed a motion to vacate the order of dismissal and reopen the case. This motion was not called up until October 14th, following; at which time it was overruled by the court upon the ground that the court had lost jurisdiction. Thereafter on November 20, 1935, a second motion to vacate the judgment was filed, upon the ground that it had been irregularly entered because the plaintiffs had filed a motion on June 8, 1935, seeking to vacate and set aside such judgment, and such motion was undisposed of at the time judgment was entered. This motion was sustained and an order vacating said judgment of dismissal was entered in March 9, 1936, from which order this appeal is taken.

The question is whether the judgment of dismissal entered on June 10, 1935, was irregularly entered.

In the recent case of Animas Consolidated Mines Co. v. Frazier, 41 N.M. 389, 69 P.(2d) 927, 928, the question was whether the filing and entry of a judgment signed before, but entered after, the answer was on file, was such an irregularity as would authorize the court to set it aside. We held: "The judgment in question did not become effective until one day after the filing of the answer and as, according to the Ortega Case, supra, its entry was irregular and the application to set it aside for irregularity should have been sustained unless some disposition was made of the answer."

The appellees, probably thinking the judgment had been entered, filed their motion before there was an effective judgment. If it is treated as directed against this particular judgment as intended by the movants, then the motion was overruled by operation of law, because not ruled upon within thirty days after it was filed. Section 105-801, St.1929. The regular procedure would have been to have awaited the filing of the judgment and then moved to set it aside, as the motion was without foundation and could not have been acted on until the entry of the judgment. Appellees created the situation by their own irregular proceedings. If at the request of appellees the court had timely acted on the motion without objection from appellant and have set aside the judgment, we would not have disturbed the ruling of the court because filed out of time. It was either ineffective because filed against a nonexisting judgment, or overruled by operation of law. In either case the court had no jurisdiction to set the judgment aside several months after its entry, as it was not irregularly entered.

The order of the district court setting aside the judgment for alleged irregularities was erroneous.

The cause will be reversed and remanded, with instructions to set aside the order vacating the judgment of dismissal, and let the cause stand dismissed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

71 P.(2d) 1029

LOOMIS MACH. CO. v. PROCTOR et al.

No. 4165.

Supreme Court of New Mexico.

Nov. 18, 1936.

On Rehearing Aug. 30, 1937.

J. Lewis Clark, of Estancia, for appellant.

Marron & Wood, of Albuquerque, for appellees.

BRICE, Justice.

This action in replevin was brought by the appellant against the appellees to recover

the possession of certain well-drilling machinery and accessories. The complaint and affidavit are in statutory form. Attached to the complaint is an exhibit showing a list of the machinery and supplies, the possession of which is sought. The answer admits the corporate capacity of the appellant and that the appellees are residents of Torrance county, N. M., but denies generally the remaining allegations of the complaint. The sheriff of Torrance county, by virtue of the writ of replevin issued in the cause, took into his possession the property in dispute.

Upon the trial of the cause the plaintiff called the clerk of Torrance county as a witness and proved by him that a certified copy of a certain document handed to him for identification was filed in his office on the 13th day of October, 1934, and indexed in the chattel mortgage records of the county, and thereupon offered it in evidence. The instrument had indorsed thereon the following certificate:

"Doc. No. G-332

"State of New Mexico }
"County of Torrance } ss.

"I hereby certify that a true copy of this instrument was filed in my office on the 13th day of October, A. D. 1934, at 10:10 o'clock, A. M., and was duly indexed as Instrument No. G-332 in the Chattel Mortgage records of said county.

"Witness my hand and seal of office.

"Pedro Zamora, County Clerk, Torrance County, New Mexico
"By Richard Caldwell,
Deputy."

"Fee: 50¢

The court admitted the instrument "merely to show that this instrument was filed with the Clerk at the time." The instrument appears to be a proposal to purchase certain well-drilling machinery and accessories, subject to the approval and acceptance of the appellant, and was approved by it on April 27, 1931, and thereupon became a conditional sales contract, by the terms of which title to the property remained in the seller until paid for.

There is an affidavit attached to the instrument to the effect that "the within writing is the true copy of contract of sale by the said Loomis Machinery Company to the within named P. D. Gilbert of the within described property"; that there is a balance due of $1,950, with interest from the 27th day of April, 1931, at the rate of 6 per cent. per annum. The instrument does not appear to have been acknowledged by either of the parties.

The document offered in evidence is in form a conditional sales contract and to this the parties agree. The filing of a certified copy of it in the office of the county clerk did not make it admissible in evidence without proof of its execution. The pertinent statute is section 21-302, N.M. Code 1929, and it reads as follows: "Every such instrument described in section one (21-301) of this act shall be either recorded or filed in the office of the county clerk of the county where such personal property is situate, in accordance with the provisions of chapter 71 of the Session Laws of 1915, en-

titled 'An Act Relative to Chattel Mortgages,' and all acts amendatory thereof."

Other provisions of the act require that such contracts shall be acknowledged, and, when so acknowledged, may be recorded; which "shall have the full force and effect given to the recording of an instrument affecting real estate." Section 21-303. The failure to so record renders it void as to subsequent mortgagees in good faith, purchasers for value without notice, etc.

There is no statute of New Mexico authorizing the admission of such instruments in evidence without proof of their execution; in the absence of which, such proof must be made as required by the general rules of evidence in such cases. The execution of the instrument was not proved. The district court held correctly that the plaintiff had not established its right to the possession of the property involved. The fact that the district judge made certain statements indicating that appellant had proved the existence of the contract is immaterial. In fact, the contract had not been admitted in evidence, and the court would have erred had he admitted it.

The evidence amply supports the finding of damages assessed against appellant.

The judgment of the district court is affirmed.

It is so ordered.

SADLER, C. J., and HUDSPETH and BICKLEY, JJ., concur.

ZINN, J., did not participate.

On rehearing.

BRICE, Justice.

Upon granting a rehearing the court had in mind the question of whether appellees had proven damages on account of being deprived of the use of the well drilling machine. The evidence shows, and the court found, that the "usable value" of the machine was $2 a day. Judgment was entered for statutory damages of double this amount for seventy days, the time which appellees were deprived of its use. The testimony further shows that the machine had not been operated continually while in appellees' possession; that they had drilled four wells with it in five months; that they were using it at the time the sheriff took possession of it.

"Q. And from June (the time they obtained the machine) did you use it continually, or off and on? A. Off and on, I did not get work all the time."

The burden was on appellees to prove the damage. There is no evidence to indicate that they could have rented the machine or had work for it during the time it was held by the sheriff or any portion of such time.

We stated in Roth v. Yara, 19 N.M. 8, 140 P. 1071, 1072, a replevin action, in regard to damages for the retention of a stallion: "It would seem clear that, while appellee might properly recover damages for loss of the use of the animal in question, it would nevertheless be incumbent upon him to prove with definiteness and certainty the damages actually suffered by him. It does not appear

from the record in this case that he could have used the animal in question at any time, had the animal been in his possession, and his testimony upon the subject reduces the element of damages in this case to one of speculation and uncertainty, in our opinion."

There being no definite testimony upon which damages could be predicated, the district court erred in allowing any damages for the retention of the machinery.

Our former judgment will be vacated; the cause will be reversed and remanded, with instructions to enter judgment for appellees in the replevin action, without damages for the retention of the property.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

71 P.(2d) 1032

In re LEWIS' WILL.

WAGNER v. THORNTON.

No. 4254.

Supreme Court of New Mexico.

Sept. 23, 1937.

Juan A. A. Sedillo and R. P. Fullerton, both of Santa Fé, for appellant.

Herbert K. Greer and B. P. Wood, both of Santa Fé, for Robert P. Lewis, and Robert L. Thornton.

BRICE, Justice.

The only question is whether the will of a man is revoked by his subsequent marriage from which there was no issue.

There is no dispute about the facts, which are substantially as follows: Robert

S. Lewis died the 16th day of June, 1935, leaving a will dated August 10, 1934, under the terms of which his only child, Robert P. Lewis, 2d, was bequeathed $10 and the appellant (his sister) the residue of his estate. On the 4th day of June, 1935, deceased married Irene Barger Lewis, who as his wife survived him. The mother of Robert P. Lewis, 2d, had been divorced by deceased prior to the making of the will. All of the property involved was the separate estate of the deceased Robert S. Lewis, except $200 which was community property of the deceased and his wife, Irene Barger Lewis. All of the estate of the deceased excepting about $400 is an interest in the estate of Ella M. Hilliard, deceased, who at the time of her death was a resident of Clinton, Conn.; and her estate consists of real estate and personal property in the State of Connecticut, now in course of administration in that state.

This case originated in the probate court of Santa Fé county by the filing of a petition by Irene Barger Lewis, widow of the deceased, for the appointment of Robert L. Thornton, administrator of the estate of Robert S. Lewis, deceased, to whom letters of administration were issued by the probate court. It was alleged in the petition (to which the will was attached) that such will was of no force and effect. On the 25th day of February, 1936, appellant filed her petition in the same cause, for probate of the will of deceased, removal of the administrator, and appointment of an administrator with the will annexed. This petition was heard the 6th day of April, 1936, and dismissed; and from the order of dismissal an appeal was taken to the district court. The parties stipulated that the order of dismissal should be taken as equivalent to an indorsement on the will that it had been held invalid by the probate court. The district court concluded that deceased's marriage revoked the will, and dismissed appellant's petition; from which order this appeal has been prosecuted.

It is unnecessary now to go deeply into this controversial question. The law has been settled in this state for more than thirty years.

The question was before this court in Re Teopfer's Estate, 12 N.M. 372, 78 P. 53, 55, 67 L.R.A. 315; the facts in which were: Mina Toepfer, an unmarried woman, made a will devising her property to her sister and others, subsequent to which she married, and thereafter died leaving her husband surviving her, but no children. The question was whether her marriage revoked the will. After holding that a will could be revoked by operation of law, the court said:

"All of the states, so far as we have been able to discover, which hold that the marriage of a woman does not set aside a will made before such marriage, make such holding on the ground that the law amply provides for the survivor; but in those jurisdictions where the husband and wife are heir to each other, in the event of no children being born, the rule is generally held to be that marriage works such a change in the condition and circumstances

of the testator as to revoke a will made prior to such marriage. It is presumed that the intent of the testator was that such a will should not take effect upon the happening of such a contingency. We do not think that the mere marriage of a woman would set aside her will, but it is the coming of a new heir; for under the laws of this territory, by marriage not only does a man or woman get a wife or husband, but also an heir.

"We think that under the laws of this territory by which the surviving spouse is the heir to the other in the event of no children being born of the marriage and no valid will being made during coverture, that the common law is so altered that on marriage the antenuptial will of a husband would be set aside as well as that of his wife, and that both of them are now on the same footing. Marriage and the coming in of an heir to all the property works such a natural change in the testator's condition that it is not to be expected that the devise was made in view of such changed conditions."

The contention is that in so far as this applies to a man's will it is dictum. That under the common law a woman's will made prior to marriage was absolutely void, whereas that of a man was void only in case there was issue of the marriage.

It is held, in substance, in the Teopfer Case that the revocation of wills under the common law was the effect of law and not the law itself. The rule adopted by the Territorial Supreme Court, and which we have quoted, goes deeper than the mere holding that a will made by a woman, who subsequently marries, is revoked by such marriage.

It is, that by marriage in the territory the testator not only acquired a new spouse but a new heir, which so changed his or her condition and circumstances that it created a presumption of the testator's intention that the will should be revoked upon the happening of such contingency. That, as under the territorial statutes the law of property and inheritances made no distinction between the rights of husbands and wives, the reason for the common-law distinction had disappeared. The rule adopted necessarily applied to both husbands and wives and was therefore not dictum.

Under the laws of the State of New Mexico, the husband, and wife, as to property rights and inheritances (except as to community property), are placed in identically the same situation. Upon marriage each is an heir to the other. The effect of the rule adopted in the Teopfer Case is that a will made prior to marriage by either husband or wife is revoked by marriage because of the advent of a new heir who is entitled to share in the property of the other upon his or her decease. It operates the same whether the testator is a husband or wife.

This has become a rule of property in this state, acquiesced in by the nonaction of the Legislature for more than thirty years, and for this reason, if no other, it will be adhered to. It is supported by Morgan v. Ireland, et al., 1 Idaho 786; Brown v. Scherrer, 5 Colo.App. 255, 38

P. 427; Tyler v. Tyler, 19 Ill. 151, and other authorities.

The principal cases cited, opposing the view adopted by the Territorial Supreme Court, are: In re Estate of Hulett, 66 Minn. 327, 69 N.W. 31, 34 L.R.A. 384, 61 Am.St.Rep. 419; Hoy v. Hoy, 93 Miss. 732, 48 So. 903, 25 L.R.A.(N.S.) 182, 136 Am.St.Rep. 548, 17 Ann.Cas. 1137; In re Adler's Estate, 52 Wash. 539, 100 P. 1019; Herzog v. Trust Co. et al., 67 Fla. 54, 64 So. 426, Ann.Cas.1917A, 201. The New Mexico and other cases we have cited supporting the rule here adopted, are usually distinguished in the cases opposing the rule, because of the difference in the statutes regarding property rights and inheritances.

The judgment of the district court is affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

71 P.(2d) 1034

MOMSEN-DUNNEGAN-RYAN CO. et al. v. PLACER SYNDICATE MINING CO. et al.

No. 4250.

Supreme Court of New Mexico.

Sept. 13, 1937.

E. L. Medler and Ove E. Overson, both of Hot Springs, for appellants.

Edward D. Tittmann, of Hillsboro, for appellees.

SADLER, Justice.

This is an appeal from an interlocutory judgment in the above-entitled cause rendered before the district court of Sierra county in insolvency proceedings by creditors against Placer Syndicate Mining Company, a domestic corporation.

The proceedings were instituted under our corporation insolvency act, a receiver was appointed, and subsequently a referee named to pass upon claims against the corporation. The referee caused a notice to be published limiting the time within which claims could be filed. Certain creditors filed their claims prior to expiration of the time limit, but before the referee had filed his report with the district court the appellants herein, Arthur G. Freitchling, W. V. Williams, Marc E. Welliver, and A. J. Welliver, officers or directors of the company, on April 9, 1934, filed a motion with the court to be permitted to submit proof of their claims before the referee. Objections to granting such leave were filed by plaintiff creditors and, while this motion was pending undisposed of, the referee proceeded to hold a hearing and pass upon claims already filed. Appellants' counsel appeared at such hearing before the referee and renewed their application for leave to prove claims. The referee denied such application upon the ground that the time for proving claims had expired.

Thereafter, the referee filed his report with the district court. The appellants filed objections and exceptions thereto upon the ground, among others, that he had erred in refusing to allow them to make proof of their claims before him, in that a motion for leave so to do was then pending before the court undisposed of. On the same day these objections were filed, appellants gave notice of a hearing on their motion pending

before the court for leave to prove claims before the referee. Upon the hearing on said motion and the objections and exceptions to referee's report, the court allowed the claims of certain creditors. As to the claims of appellants, the action of the referee in disallowing said claims was overruled and they were granted permission to file and submit proof in support thereof on or before the first day of the next term of court. This order overruling the referee's action and granting leave to prove claims is not in the record before us. Appellants' counsel assert it was entered nunc pro tunc as of May 31, 1934, by an order signed September 6, 1934, and that they will file motion for certiorari to bring it up. However, inasmuch as appellees' counsel do not challenge the statement concerning the making and entry of such order, it will be treated as before the court.

The basis of the objection made by appellees' counsel to the filing of appellants' claims was that they had refused to comply with an order of court contained in the judgment appointing receiver, reading as follows: "And the said defendant corporation is hereby ordered to deliver to the receiver hereinabove appointed all its books, records, and papers which by law the said corporation is required to keep and have at its office in the State of New Mexico."

However, the specific ground contained in appellees' objections to filing claims reads as follows: "That the claimants A. G. Freitchtling, M. E. Welliver and A. J. Welliver and perhaps others of said claimants are officers of the defendant company, and have failed and refused to deliver to the receiver the books of the company which were kept in Hamilton, Ohio, including the cash book, ledger, stock transfer books, and minutes of the meetings of the stockholders and directors, duplicates of which should have been but were not kept in the State of New Mexico, and that said claimants are not entitled nor have they a right to appeal for relief to this court until they have complied with the order of the court appointing the receiver."

Pursuant to the court's order granting leave, the appellants took deposition proof in support of their claims showing promissory note indebtedness of the insolvent corporation to appellants in amounts as follows: To Arthur G. Freitchling, $3,800; to W. V. Williams, $4,650; to Marc E. Welliver, $550; and A. J. Welliver, $250.

Later, when the matter came on for hearing before the district court on appellants' claims and after a portion only of the depositions had been read in evidence, the following proceedings transpired, to wit:

"Mr. Tittmann: We object to the further reading of any of the depositions bearing upon the alleged claims of these creditors, who are officers of the Company, or the exhibits attached to the deposition, and object to their introduction into evidence, upon the ground, that all of the claimants mentioned are and were officers of the defendant Placer Syndicate Mining Company, and as such had the charge and control of the books of the defendant Company, and upon the adjudication of insolvency, it was their duty to turn the books over to the

Receiver appointed by the Court in this cause, and that they failed to do so, and after demand had been made upon them by the Receiver they still failed to do so, and so far as the record in this case shows, they never did turn them over. That these claimants have no standing in this Court to ask the indulgence of the Court to excuse them from presenting their claims at the time required by the notice of the Receiver, or to excuse their failure to turn over the books, and so long as they failed to turn over their books, they are in default and in contempt of the orders of the Court, and the Court should reject their claims for that reason.

"After argument.

"The Court announced that he still was of the same opinion that he entertained at the time of the former hearing of this case, when he allowed certain claims of stockholders, but would not at that time allow the claims of these present claimants because they were officers of the Company and were in default in complying with the demands of the Receiver, or withheld sending the books to this jurisdiction, and for that reason he was still of the opinion that their claims should not be allowed. That he was willing to rule that way, regardless of what may appear in the depositions, and that he did not believe that the further reading of the depositions at this time would serve any useful purpose, and would dispense with it."

Following this indication of its views by the district court, a formal order denying appellants' claims was entered, to review which this appeal is prosecuted. While errors are assigned upon the refusal of the court to make certain requested findings of fact, in reality but a single point is presented, viz., was it error in the court to deny outright the claims of appellants upon the ground indicated? The trial court, although not permitting appellants to complete the reading of their depositions, did rule that they might be considered in evidence and they are in the record before us. It is obvious that the court simply declined to pass upon the merits of their claims because deeming their conduct contumacious in failing to comply with the order to produce in this jurisdiction the books and records of the company.

We are constrained to hold that the trial court abused its discretion in declining to hear proof in support of appellants' claims and in disallowing them outright for a contempt of which they had never been convicted. nor given an opportunity to appear to and defend:

"A litigant in contempt has no standing in the court, but a notice of contempt proceedings should be served on the offender before his privilege as litigant can be denied. The mere failure of a complainant to comply with an interlocutory order of the court without any adjudication that he is in contempt does not preclude him from being heard in the case." 13 C.J. 91, § 139.

In the case before us no order to show cause why they should not be adjudged in contempt was ever served on appellants or their counsel. Moreover, the same penalty

was imposed on all, a denial of their claims. Conceivably, at a contempt hearing some might be adjudged guilty and others not. If, when it came to such a hearing, the court should believe their testimony, at least two of the appellants (directors) testified by deposition that they had never had any of the books or records of the company in their possession.

"Where there are several defendants representing not only themselves, but other members of an organization to which they belong, the court cannot strike out defenses standing for the benefit of all the defendants because some of the defendants are in contempt." 13 C.J. 91, § 139.

If appellants be in contempt, it is a "constructive contempt"—one committed out of the presence of the court—and can only be initiated by filing an affidavit setting out the facts constituting same. In re Fullen, 17 N.M. 394, 128 P. 64; Nunn v. Sikes, 28 N.M. 628, 216 P. 493. The fact that appellants are nonresidents, though to be considered upon the question of service in a contempt proceeding, does not present an insuperable objection. The appellants are in court, represented by counsel, seeking affirmative relief. Under such circumstances, service of an order to show cause in contempt on attorneys for defendants concealing themselves or otherwise attempting to avoid service has been held sufficient to sustain an order adjudging them in contempt. Golden Gate Con. H. M. Co. v. Superior Court, 65 Cal. 187, 3 P. 628; Eureka Lake & Yuba Canal Co. v. Superior Court, 66 Cal. 311, 5 P. 490; Foley v. Foley, 120 Cal. 33, 52 P. 122, 65 Am.St.Rep. 147.

"Under some circumstances, service on the party's attorney of record is sufficient, as where defendant conceals himself, or in a proceeding to punish a judgment debtor for failure to appear for examination in supplementary proceedings, or on an appeal from an interlocutory judgment. If, however, such attorney has ceased to act as counsel, service on him will be insufficient, but there is some authority to the contrary." 13 C.J. 70, § 96, "Contempt"; Brown v. Brown, 96 N.J.Eq. 428, 126 A. 36; Billingsley v. Better Business Bureau, 232 App.Div. 227, 249 N.Y.S. 584.

If the proceeding be one in criminal contempt, personal service is, of course, necessary, and service on defendants' attorney would not suffice. Brown v. Brown, supra; Bradstreet Co. v. Bradstreet's Collection Bureau (C.C.A.) 249 F. 958.

In the case at bar the record before us renders it plain that the court never passed upon the credibility of appellants' testimony. The reading of the first deposition was halted when scarcely begun with a statement by the court that, regardless of what the depositions contained, the court would adhere to its original view and deny the claims because of appellants' default in complying with the receiver's demand to turn over to the receiver in this jurisdiction the books and records of the company. The appellants may be guilty of contempt as the court seemed to feel. But, until so adjudged upon notice and opportunity to defend, we think the trial court

abused its discretion in visiting upon them the penalty of disallowance of their claims.

That a party in contempt may be denied certain favors and privileges as a litigant until he has purged himself of the contempt seems not open to doubt. 13 C.J. 91, § 139, "Contempt"; 6 R.C.L. 526, § 39, "Contempt"; case note, 21 Ann.Cas. 453; 27 L.R.A.(N.S.) 1062. A distinction is made in the better reasoned cases, however, between the position of a plaintiff and that of a defendant.

In the leading case of Hovey v. Elliott, 167 U.S. 409, 17 S.Ct. 841, 42 L.Ed. 215, it was held a denial of due process for a court possessing plenary power to punish for contempt, unlimited by statute, to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, to refuse to allow him to answer or strike the answer from the files, to suppress the testimony in his favor, and condemn him without a hearing on the theory that he is guilty of contempt of court. This case contains an exhaustive review of the cases on the subject both in this country and in England.

The text in 6 R.C.L. at page 526 notes the distinction between the operation of the rule as against a plaintiff and a defendant as follows: "As to a right to a hearing on the merits, however, there may well be some distinction between a plaintiff in contempt and a defendant. A plaintiff in contempt is not entitled to proceed with the trial of his case as a matter of right, while to refuse the defendant a trial may be unconstitutional as depriving him of his constitutional right to a hearing."

In O'Neill v. Thomas Day Co., 152 Cal. 357, 92 P. 856, 859, 14 Ann.Cas. 970, the court explains the reason for such distinction as follows: "Plaintiff is always a voluntary actor before a court. A defendant is always under compulsion. The plaintiff is always seeking affirmative relief at the hands of the court. The defendant is merely contesting plaintiff's right to such relief. While, therefore, it is improper, under such circumstances, to deprive a defendant of the right to make his showing as to the matter urged against him, and, by striking out his answer, to compel him to submit to a judgment without a hearing upon the merits, the case of a plaintiff is far different, he is seeking the court's aid, and it is manifestly just and proper that, in invoking that aid, he should submit himself to all legitimate orders and processes. And certainly no plaintiff can, with right or reason, ask the aid and assistance of a court in hearing his demands, while he stands in an attitude of contempt to its legal orders and processes. Section 1991 of the Code of Civil Procedure declares as to such a plaintiff that his contumeliousness may be punished as a contempt and his complaint may be stricken out. By analysis, this section manifestly requires that before a plaintiff is punished he must be adjudged guilty of contempt. To such a judgment for a contempt, committed out of the immediate presence of the court, a citation and showing is necessary."

In the instant case the appellants appear before the court in the position of plaintiffs asking affirmative relief in the allowance of their claims. We do not doubt the power of the court, if, after hearing, it shall adjudge them guilty of contempt for disobedience of the lawful order of the court to produce the books and records of the company, to refuse to entertain proof on their claims or even to deny them the right to file same. But, because they have not been adjudged in contempt after notice and an opportunity to be heard, the judgment of the trial court will be reversed and the appellants awarded a new trial.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, and BRICE, JJ., concur.

ZINN, J., did not participate.

71 P.(2d) 1037

ABBOTT v. SHERMAN MINES, Inc.
No. 4248.

Supreme Court of New Mexico.
Sept. 23, 1937.

Joseph Gill and Harold O. Waggoner, both of Albuquerque, for appellant.

Wm. A. Gillenwater, of Hot Springs, for appellee.

HUDSPETH, Chief Justice.

This is an appeal by the defendant from an order overruling a motion to set aside a judgment rendered in the absence of defendant's attorneys in favor of plaintiff for $8,771.35. Parties will be referred to as plaintiff and defendant. The defendant filed with its answer a demand for a bill of particulars. On the day the cause was set for trial the defendant filed a motion for judg-

ment of dismissal because of the failure of the plaintiff to furnish a bill of particulars under Comp.St.1929, § 105-525. Court denied the motion. Plaintiff volunteered to furnish a bill of particulars and requested a copy of his account on defendant's ledger. After delay, about 5 o'clock in the afternoon, he was given access to the books of the defendant which showed a balance due plaintiff of $7,213.93. There was discussion between court and counsel before adjournment of the appointment of a referee. The record states:

"The Court: You gentlemen get together and come in here tomorrow morning at ten o'clock, and we will see what we can do."

This discussion was continued after the judge left the bench. The court, in his remarks at the conclusion on the hearing of the motion to set aside judgment, said in part: "When the question first came up Mr. Gill said he had just come into the case, as I recall, and he was not very familiar with it, and he said that these matters would have to be investigated and it would take considerable time; that it might take several weeks, ten days anyway. And I think I then said, 'Well, if that is a fact, the case is a proper case for a referee.' Then as I left the bench, I recall very distinctly that conversation on the floor when you gentlemen suggested this, that, and the other person might be a proper referee, but nothing definite was decided, and nothing was said about how it would be financed. Those are the things that stand out very clearly in my mind."

W. H. Gillenwater, Esquire, attorney for plaintiff, testified in part as follows: "There was some discussion in the presence of the Court as to the appointment of a referee to take the evidence in this case. I made two or three suggestions as to who would be appointed, and I take it maybe Mr. Gill made a suggestion or two. I think he did suggest appointing some of the young lawyers from Albuquerque, but we didn't get together on any particular person. I suggested then that if a referee was appointed that we leave the matter to Judge Owen and let him appoint anybody he wanted to. Mr Waggoner indicated that that would be agreeable to him, and Mr. Gill didn't say whether it was or not."

Later in the evening the attorneys for plaintiff and defendant met by appointment for the purpose of agreeing upon the form of order overruling defendant's motion for judgment. Mr. Gillenwater testified regarding that conversation in part, as follows: "The order was short and I glanced over it, and they asked me to O. K. it. I put the paper up against the car and signed it. Mr. Waggoner then took it and put his initials on it, and he then said, 'We are leaving town and will you send us a copy of your bill of particulars when it is filed?' I told him that I would and they got in the car immediately. * * *"

On the following morning the case was called; the court inquired for the attorneys for the defendant and was informed by Mr. Gillenwater that he understood that they had returned to Albuquerque. The rec-

ord does not show that the attorney for plaintiff informed the court that he had agreed the evening before to send the defendant's attorneys a copy of the bill of particulars. The testimony of plaintiff was heard and judgment rendered in his favor for the amount prayed for in his complaint.

There seems to have been no objection on the part of plaintiff to the appointment of a referee to take the testimony, as shown by the quotations from the record. The matter had reached the point where names were considered, and finally the attorney for plaintiff suggested that they leave the matter of the selection of the referee to Judge Owen. Both attorneys for defendant testified that they thought the matter was definitely settled that Judge Owen would appoint a referee and returned to Albuquerque on the night of the 11th, after the interview with Mr. Gillenwater, without thought of neglecting their client's business or offending the court. An attorney occupies a dual position, owing duties to his client as counsel and to the court as an officer of the court. The learned trial judge stated the issue presented upon the motion for rehearing, as follows: "The crux of this whole controversy here seems to involve the question of good faith of the attorneys engaged in this case representing the Sherman Mines. * * *"

The court was evidently annoyed by the departure of the attorneys without further communication with him, and he remarked that the attorneys for the defendant had been adroit throughout the proceedings. If the trial court's theory was true, the attorneys for the defendant imposed upon the judge and should have been punished for contempt. However, the intent of the attorney is an essential element of the offense. Sparks v. Commonwealth, 225 Ky. 334, 8 S.W.(2d) 397. The practice of the attorneys in leaving Hillsboro where the court was sitting without a stipulation with counsel for plaintiff or definite permission from the court is not to be commended. The right of the litigant should not be overlooked. In Gilbert v. New Mexico Const. Co., 35 N.M. 262, 295 P. 291, the court, speaking through Mr. Justice Watson, said: "To deprive a party of his day in court is a severe penalty for his merely negligent failure to appear. Such penalty should be avoided if it can be done without impeding or confusing administration or perpetrating injustice."

It appears that the court could have appointed a referee without further consulting counsel, or, if he desired to try the case, set it for trial and given counsel time to return from Albuquerque. It appears that the attorneys for the defendant might have concluded—not without reason—that the suggestion of counsel for the plaintiff would have been followed, and the court would appoint a referee of his own choice. This leaves only the offense of negligence on their part in not having a stipulation signed by counsel or a definite understanding with the court.

No doubt the learned trial judge approached the question on the motion for

rehearing with every effort toward impartiality, and a realization of his duty to guard against the influence of any previous thought or feeling in the matter. However, after a thorough examination of the record and consideration of the arguments of counsel, we are constrained to hold that there was an abuse of discretion on the part of the learned trial judge in overruling the motion to set aside the judgment. For the reasons stated, the judgment should be reversed and the cause remanded, with directions to set aside the judgment. The costs in this court will be taxed against the defendant. It is so ordered.

SADLER, BICKLEY, and BRICE, JJ., concur.

ZINN, J., did not participate.

72 P.(2d) I

PAULOS v. JANETAKOS.

No. 4259.

Supreme Court of New Mexico.

Sept. 28, 1937.

W. A. Keleher and Theo. E. Jones, both of Albuquerque, for appellant.

John F. Simms, Robert Hoath La Follette, and Augustus T. Seymour, all of Albuquerque, for appellee.

SADLER, Justice.

The plaintiff (appellant) sued before the district court of Bernalillo county to enforce an alleged executory agreement to devise property in exchange for personal services. At the trial, upon plaintiff resting his case, the defendant, William B. Janetakos, individually and as executor of the estate of Mary Cornetto Janetakos, deceased, made a motion to dismiss, the equivalent of a demurrer to the evidence. After argument, the trial court sustained the motion and dismissed plaintiff's complaint. From the judgment of dismissal the plaintiff prosecutes this appeal.

The contract was pleaded in the complaint as follows: "That in said year 1921, the said Mary Cornetta Janetakos promised the plaintiff that if he would go to live in her household in the City of Albuquerque, New Mexico, and care for her in sickness and in health as a son until the time of her death, he should have and be entitled to all her

property, both real and personal, as fully and to the same extent as if he were her sole lawful issue."

Then follow allegations of acceptance of the contract by plaintiff and performance on his part from the year 1921 until March, 1933, when the contract allegedly was repudiated by the said Mary Cornetto Janetakos by her refusal to let plaintiff live longer in her household or further to perform the contract, although he alleged himself at all times ready, able, and willing to perform.

The making of the contract and performance thereunder were denied in defendant's answer and certain affirmative defenses pleaded, among them, the statute of frauds. Other affirmative defenses related chiefly to breaches of the supposed contract on plaintiff's part. It should be here stated that Mary Cornetto Janetakos was a widow at the time of entering into the alleged contract. However, in 1932 she married William B. Janetakos and died in 1934, leaving a last will and testament whereby she devised all her property to her surviving husband, the defendant herein. The case having been disposed of below as on demurrer to the evidence, it is of first importance to examine plaintiff's evidence.

The alleged contract was stated in evidence by plaintiff as follows:

"Q. Did you later start to work for her? A. While I was running the confectionery business I had a failure and I stayed with her until I was getting the bankruptcy papers here, and that is when I became more acquainted with Mrs. Cornetto at her place, and while I was laying over to take the bankruptcy I began to work for her as she agreed with me to do it.

"Q. Did she make you any kind of proposition? A. Yes.

"Q. What was that proposition? A. Well, she didn't have anybody at all, that was the first thing she told me and I rendered some service to her there for private quarters, cooking, she was always asking me to come into her place, and she told me if I stayed in her place she would give me everything she had at her death, and she told me that one million times, all the time I was there.

"Q. What were you to do for her? A. Well, I was supposed to take care of her in the way of cooking or anything that she needed to be done around the house.

"Q. And did she say how the property would go to you at the time of her death? A. Well, she just absolutely told me that I didn't need to worry about anything at all, that everything that she had she was going to leave it to me provided I stayed there and took care of her as much as I can.

"Q. Did you accept that proposition? A. Yes."

Again, on cross-examination, plaintiff stated substance of the contract as follows:

"Q. How did she bring this question up of your being her son? A. This is the way she brought it up, this is exactly what she said, 'Now, if you will stay here and take

care of this place, take care of me, you don't need of anything, everything I have got I am going to leave it to you' she said.

"Q. What did she say you were to do, what were going to be your duties? A. Well, it wasn't necessary for me to do anything except be there and take care of her business, I didn't have to do a whole lot, that is the way she expressed herself, that I was at her favors and do a little work for her around the house and all I could do for her, which I did."

Several witnesses testified to statements by deceased that when she died all she had belonged to "Louis," the plaintiff. One witness quoted her: "I took Louis to raise it and keep it just like my son, nothing ashamed, nothing dirty, nothing that I can be ashamed before nobody, but just like it was my son, and whenever I die everything I got go to Louis."

Others testified: "When I die everything belong to him." "Anything I have belongs to Louie."

The testimony of Andy Pettini, a witness for plaintiff, as nearly furnishes corroboration, if it does, as anything coming from the lips of witnesses. He stated:

"A. Well, one time I finish a job in Flagstaff, I come back to Albuquerque, any time I finish a job I come back to Albuquerque, she had some picture there in the room and I call attention 'Mary, who is that picture there'; she say 'It is my boy'; 'You don't have no boy'; she say 'Yes, it is a boy that is room here, he do all my work, care for me, if I die everything belong to him'; that is what she tell me.

"Q. Whose picture was that? A. Louie's picture.

"Q. Louis Paulos? A. Yes.

"Q. Did she ever say anything else about her property on any other occasion? A. She just tell me if he stay over there and care for her and care for the property, that is all.

"Q. Then what? A. 'Then when I die, everything belong to him.' "

Pete Urioste, plaintiff's witness, testified:

"Q. Did you ever talk with Mrs. Cornetto about what she was going to do with her property? A. Many times.

"Q. What did she say? A. The only thing she would say when she would arrive that all she had was for Louie, she said.

"Q. How many times did she tell you that? A. I can't tell you how many times because she told me many times.

"Q. What were the words she used? A. That all that she had was his."

In July, 1926, plaintiff being absent in Texas, Mrs. Cornetto wrote him, "I sure hate for you to be away from me. Just think if anything happened to me nobody here in this big place you want it to go to the state or county you think this over."

A month later, plaintiff being still absent, she wrote him: "* * * and when I got your letter this morning I sure got sick again Louis you know I am alone and it

is very hard for me some times you say you don't want to come back here. well louis I told you I would leave you all I had some day, and if you only want to make me sick and unhappy I thought if you would spend a few months their and come back in fall I think things will be better dont go any farther away it seems to me you change your mind every day louis when you left here you did not have to go. you went yourself, and it was not so bad 400.00"

The plaintiff testified that he accepted under the contract, went to live at the hotel owned and operated by Mrs. Cornetto, remaining there continuously from 1921 to 1926. He spent the years 1926 and 1927 in Texas, in and around Borger in said state, returning to Albuquerque and Mrs. Cornetto's home about January 1, 1928. As to the nature of the services rendered by him under the alleged contract, the plaintiff seems to have been the handy man about the place. He cooked, fixed plumbing, did errands; when Mrs. Cornetto was sick (and she was sick often) he called in the doctor and took care of her; met trains, painted, kalsomined, cleaned rooms, washed dishes, etc. So ran the testimony of the plaintiff.

During this time Mrs. Cornetto financed him in numerous small business enterprises. He had a fish market in 1922 in property owned by her. She put $200 into the fish market. This business continued about a year. Then he went into tailoring business in her building. She put up the money, about $400. Then he sold tailor-made clothes to individuals. Sold real estate in 1928, 1929, and 1931. As above stated, he was in Texas for two years, 1926 and 1927. Plaintiff testified the trip to Texas was made with her consent and that he visited Mrs. Cornetto every two months and was in continuous correspondence with her. He further testified that he remained with her constantly from date of his return from Texas (though one of his witnesses placed him in restaurant business in Los Lunas for six months during this period), except possibly a short trip to El Paso, until 1932 when Mrs. Cornetto gave plaintiff $20 and told him to get out; to go to Santa Fe or Gallup; that she didn't want him around any more. About this time she married the defendant, W. B. Janetakos, who claims under a will devising him all her property. She died in 1934. At the date of the alleged contract plaintiff was 23 years of age and Mrs. Cornetto, a childless widow, about 55 to 57 years of age.

At the outset, the appellee suggests that the practice prevailing in this state of treating a motion for judgment or motion to dismiss as a demurrer to the evidence, whether the action be one at law or a suit in equity, is by persuasive authority not the correct rule. He argues, if the case be one in equity, that by moving to dismiss at the close of plaintiff's case the defendant is not demurring to the evidence, as at law, but is submitting his whole case on plaintiff's evidence, just as though he had stated defendant did not wish to offer any evidence. The distinction urged has never been made in this state and the practice to the contrary

seems too thoroughly imbedded in the minds of the bench and bar to attempt at this late day to give different effect to such a motion in an equity case from that attending in an action at law. Rogers v. Balduini, 28 N.M. 102, 206 P. 514; Sanchez v. Torres, 35 N.M. 383, 298 P. 408; Mansfield v. Reserve Oil Co., 38 N.M. 187, 29 P.(2d) 491; Merchant's Bank v. Dunn, 41 N.M. 432, 70 P.(2d) 760.

The defendant denied the contract, pleaded the statute of frauds, Comp.St. 1929, § 117-101 et seq., and also invoked Comp.St.1929, § 45-601, requiring corroboration of the contract and its performance, and further denied that the contract had been performed, if it ever in fact was made. We are met at the outset with the rule applicable to plaintiff's testimony when it is tested as on a demurrer to the evidence. The demurrer admits the truth of all of the plaintiff's testimony tending to support the material allegations of the complaint and reasonable inferences flowing therefrom, thus ignoring in plaintiff's favor conflicts in the testimony. Merchant's Bank v. Dunn, supra, and cases cited. In the light of these rules we shall now proceed to a consideration of the points presented.

We have not had before us a case exactly like the one now reviewed. The nearest are Barney v. Hutchinson, 25 N.M. 82, 177 P. 890; Wooley v. Shell Petroleum Corp., 39 N.M. 256, 45 P.(2d) 927; and Candelaria v. De Lucero, 41 N.M. 211, 67 P.(2d) 235. These cases related to written or oral unexecuted agreements of adoption. In the Barney and Wooley Cases where it would have operated a fraud on the beneficiaries of such agreement to afford no relief, we considered as done that which should have been done, thus bringing to their aid the laws of inheritance. In the Candelaria Case, both because the contract of adoption was not satisfactorily proved and because, if so considered, its nonenforcement was no fraud on the beneficiary who greatly profited by benefactions of the alleged promisor, relief was denied.

That contracts of the kind here alleged, where substantially performed and proved by clear, cogent, and convincing evidence, may be made the basis of relief in equity in the nature of specific performance, notwithstanding the statute of frauds, is no longer open to question. See exhaustive annotations in 69 A.L.R. 14, supplemented in 106 A.L.R. 742; 25 R.C.L. 306 et seq., §§ 120–125; 58 C.J. 1060.

"An oral agreement to devise property is like any other agreement for the conveyance of lands as far as the statute of frauds is concerned. If it is an oral promise it is within the operation of the statute of frauds, and hence is not of itself an enforceable contract, and in ordinary cases cannot be established by parol evidence alone. But an agreement to leave property to compensate for services is not within the statute of frauds if the contract is fully established by written correspondence, even though the letters are lost and their contents proved by oral testimony. Furthermore, if the contract is an oral one to devise land and is

reasonably certain, equity may decree a specific performance if there has been such a part performance as will take a parol agreement to convey land out of the statute of frauds." 25 R.C.L. 307.

"It is settled by a line of authorities which are practically uniform that while a court of chancery is without power to compel the execution of a will, and therefore the specific execution of an agreement to make a will cannot be enforced, yet if the contract is sufficiently proved and the usual conditions relating to specific performance have been complied with, then equity will specifically enforce it after the promisor's death by seizing the property which is the subject matter of the agreement, and fastening a trust on it in favor of the person to whom the decedent agreed to give it by his will." 25 R.C.L. 311.

Rules applicable to contracts of this general nature may be deduced from our own decisions hereinabove cited. The agreement must be established by clear, cogent, and convincing evidence. Wooley v. Shell Petroleum Corp., supra; Candelaria v. De Lucero, supra. The services rendered must be incapable of compensation according to any definite pecuniary standard. Wooley Case, supra. And, finally, assuming existence of the oral contract, to warrant equitable relief and thus avoid the statute of frauds, it should appear that to leave it unperformed will operate as a fraud upon the promisee. Wooley v. Shell Petroleum Corp., supra; Candelaria v. De Lucero, supra.

With these principles in mind we are constrained to hold that the evidence adduced in support of the existence of the alleged contract, viewed most favorably to plaintiff, is sufficient to withstand the demurrer. The plaintiff testified to it. His statements must be taken as true upon demurrer. So accepted and considered in the light most favorable to him, we have the case of a childless widow, around 57 years of age, proposing to plaintiff, a young Greek immigrant 23 years of age, that if he would come to live with her, practically assuming the place of a son toward her, take care of her and assist around the place, she would leave him all her property at her death.

Both parties concede that such a contract asserted after death of the promisor requires corroboration under Comp.St. 1929, § 45-601. The trial judge apparently took the position that written corroboration was necessary, though defendant concedes such is not the case. We conclude also that corroboration under the statute mentioned was shown. We are not unmindful of the rule stated at 69 A.L.R. 196: "Where the evidence indicates that it was the thought of the promisor to give the promisee certain property, not to execute an obligation in his favor, or to contract for services to be rendered in consideration of the promise to give, the agreement is testamentary in character, and will not be specifically enforced by a court of equity."

But the annotation continues: "However, it has been held that, although the agreement

to will property in consideration of the promisee moving in, living with, and caring for the promisor, is testamentary in character and ambulatory, yet, after performance on the part of the promisee of substantially everything to be done on his part, this objection is not tenable. To hold the agreement revocable under such circumstances would be to permit a fraud which a court of equity could not sanction."

In this connection observe the testimony of the witness Pettini quoting the promisor referring to plaintiff as "my boy" and finally:

"Q. Did she ever say anything else about her property on any other occasion? A. She just tell me if he stay over there and care for her and care for the property, that is all.

"Q. Then what? A. 'Then when I die, everything belong to him.' "

Also note the statement in the promisor's own handwriting in a letter to plaintiff while he was absent in Texas, suggesting an escheat of the property if she should die with him absent; and her further statement in another letter, "well Louis, I told you I would leave you all I had some day. * * *"

The rule is that the corroborating evidence must be such as in and of itself tends to establish the essential fact necessary to a recovery. Bujac v. Wilson, 27 N.M. 105, 196 P. 327. That such is the tendency of Pettini's testimony, at least, we think there can be no doubt. Pettini, it is true, does not quote the promisor as saying she had "agreed" or "promised" plaintiff if he did the things on his part to be performed she would leave him all her property. Merely, that if he did them the property was to "belong" to him. Forced as we are to draw every favorable inference reasonably flowing from the facts disclosed, we deem it permissible, if the fact finder sees fit, to infer that this proposal was in its nature a promise. It might appeal to the fact finder as more reasonable so to assume than that plaintiff, a stranger to promisor's blood, rendered the services shown in the mere expectation of a bounty. We refer to the case of Simons v. Cromwell (C.C.A. 2d) 262 F. 680, reviewed on second appeal Cromwell v. Simons (C.C.A.) 280 F. 663. Upon the first appeal the court held that language, not so strong as that here presented in corroboration of plaintiff's story of the contract, made out a prima facie case sufficient to go to the jury. On the second appeal the same court, differently constituted, held it insufficient, but, under an application of the doctrine of the "law of the case" established by the former holding, permitted a judgment in plaintiff's favor to stand. The first decision supports the conclusion we reach. The second does not in reality oppose it in view of the stronger facts here present. We conclude that plaintiff made out a prima facie case on the existence of the contract alleged.

This brings us to a consideration of the second important issue, proof of which is essential to recovery, viz., performance

on plaintiff's part. Here, too, must the plaintiff have corroboration. Substantial performance may be deduced from his own testimony as hereinabove recited. It is an essential to equitable relief. 69 A.L.R. 110–112, and cases cited. Testimony of several other witnesses, particularly of Eulalio Naranjo, who served as janitor for about seven years beginning in 1921 at promisor's hotel, the home of herself and plaintiff; of Pete Urioste, who apparently succeeded Naranjo in charge of the boiler and worked for Mrs. Cornetto from 1927 to time of her death; and the testimony of others as to seeing plaintiff engaged on different occasions in labor and services of the kind he testified to all tends to corroborate plaintiff's testimony of substantial compliance with the agreement claimed. Residence at promisor's home to afford companionship seems also to have been an element of consideration in the agreement. It is undisputed under plaintiff's evidence that he did spend approximately nine years at her home in purported compliance with the agreement.

It is urged by defendant that plaintiff's two years' absence in Texas shows abandonment. Plaintiff stated this was with her consent; that he visited her at least every two months and was in constant correspondence with her. That she was wounded by his absence appears from statements in two letters to him that are in evidence. But that she did not herself consider it abandonment is suggested by the fact that she took him back into her home upon his return, where he continued to reside for about four years under like conditions until she told him to leave about the time of her marriage to defendant. We are constrained to hold that proof of performance meets the requirement of substantiality as against a demurrer to the evidence. The evidence of abandonment is not so strong as that appearing in Bahney v. Gross, 135 Kan. 446, 10 P.(2d) 844, where the trial court sustained a demurrer to the evidence and its action was affirmed.

This conclusion meets the contention made by defendant that, notwithstanding proof of the contract and performance thereunder, equity will afford no relief unless the conscience of the chancellor is moved to grant enforcement to prevent a fraud on the promisee. We approved this doctrine in Candelaria v. De Lucero, supra. But if it be true that plaintiff rendered nine years services under the claimed contract and was willing further to perform but for the promisor's repudiation of the agreement, who can say nonenforcement would not operate as a fraud? This contention is, no doubt, based in some measure on the view entertained by the trial judge who said in his opinion: "I can say I have not been much impressed from the testimony of the plaintiff that he had suffered any hardship which would excite a court of equity. It seems to me from his own testimony it is apparent, looking back over the eleven years when he lived with the deceased, that

he was the beneficiary, rather than one who has suffered any inconvenience or hardship."

It may be that plaintiff, even though he never has performance of his claimed contract, is better off than he would have been in other employment or avocations. So to conclude, however, is pure speculation and should not control our views in passing upon the demurrer.

Defendant's counsel argues, citing many authorities, that plaintiff's proof fails in that it is not clear, cogent, and convincing. This rule will be of more potency when the court passes upon the credibility of plaintiff's testimony. If sufficient to make a prima facie case, and true, it must be accepted as convincing. Evidence of the contract, while simply stated, is not wanting in clearness. Most contracts of this nature are stated in the decisions in language of similar purport to that here shown.

In concluding, as we do, that plaintiff has made out a prima facie case, all we have said is to be considered in the light of our assumption that his testimony and that of his witnesses is true. The prima facie case thus made may be entirely overcome when defendant puts on his case. The trial court, without additional evidence, when it has the right to pass upon its credibility, may disbelieve material portions thereof. Even believing it, the court may conclude from the whole evidence that plaintiff has not shown himself entitled to equitable relief. The case is not now ripe for such a conclusion. The price the demurrant must pay for having his adversary's case tested on demurrer to the evidence is a heavy one. But he suffers no prejudice if he loses. He still may meet the case on the merits. Merchant's Bank v. Dunn, supra.

The judgment of the district court must be reversed, with a direction to overrule defendant's motion to dismiss treated as a demurrer. Inasmuch as the judge who sat at the trial of this case is no longer on the bench, it seems advisable to award a new trial and it is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

72 P.(2d) 7

STAPLIN v. VESELY, Commissioner of Public Lands.

No. 4226.

Supreme Court of New Mexico.

Sept. 29, 1937.

Carl B. Livingston, of Santa Fé, for appellant.

Mariot H. Murphy, of Santa Fé, for appellee.

BRICE, Justice.

The Commissioner of Public Lands issued to the appellee, in consideration of $32, an oil lease upon lands conceded by the parties to be owned by the United States, being a numbered 16 section in an unsurveyed township. Presumably this land, when the township is surveyed, will become the property of the State under the provisions of the Act of Congress of 1910, authorizing the people of New Mexico to organize a state government, commonly known as "The Enabling Act." The appellee brought proceedings to recover the $32 paid for such lease under chapter 99, New Mexico Laws 1931, section 1 of which is as follows: "Any moneys heretofore at any time, or hereafter, erroneously paid on account of any lease or sale of state lands, which moneys are not carried in any suspense fund but have been distributed to the proper income fund, shall be repaid in the manner hereinafter prescribed."

Provision is made in that act for filing claims with the Commissioner of Public Lands; action on it by the Commissioner; then the filing of the proceedings in the district court, and a determination of the issues there upon hearing; and for an appeal to this court. The object of the act is to authorize the return to the owner of

moneys erroneously paid to the Commissioner of Public Lands in the transaction of business when it is covered into his funds in the State Treasury. Large sums of money had been collected from people in such dealings and covered into the several funds of the Commissioner of Public Lands in the State Treasury, and the Supreme Court had held that for constitutional reasons such funds could not be paid out by the Commissioner of Public Lands by virtue of section 132-110, 1929 Comp. Sts., which is as follows: "Any money erroneously paid on account of any lease or sale of state lands shall be repaid by voucher drawn by the commissioner presented to the state auditor who shall draw his warrant upon the state treasurer for the amount thereof, who shall pay same out of the fund to the credit of which said money was placed." McAdoo Petroleum Corporation v. Pankey, Commissioner, 35 N.M. 246, 294 P. 322.

The land was not leased by the State to appellee, and therefore appellee is not disputing his landlord's title, as contended by appellant. The relation of landlord and tenant does not exist in this case. An oil lease is not what is ordinarily denominated a lease, it is a sale of an interest in land. Terry et ux. v. Humphreys et al., 27 N.M. 564, 203 P. 539; Jones-Noland Drilling Co. v. Bixby, 34 N.M. 413, 282 P. 382.

It is alleged in appellee's application as a ground for a refund: "Applicant states that his reasons why such payment was erroneously made are as follows: This township has never been surveyed, hence the state has never had title to this section, and no right to lease same."

The court found as facts on the question of "erroneous payment": "That at the time the aforesaid lease was executed the said lands were not surveyed nor have the said lands been surveyed to the date hereof, nor did Orrin L. Staplin have any knowledge at the time said lease was made that the said lands were not surveyed."

The appellant attacked that part of such finding which reads, "nor did Orrin L. Staplin have any knowledge at the time said lease was made that the said lands were not surveyed," upon the ground that it is not supported by any evidence.

We find no evidence in the record to support that portion of the finding, and it is accordingly stricken.

The facts alleged and proved are in substance that the Commissioner of Public Lands executed and delivered to appellee, in consideration of $32, an oil lease upon section 16 in an unsurveyed township. But to authorize a refund under the statute in question there must be an error of fact; and none is alleged or proved. The money may have been voluntarily paid with knowledge of the facts, in which case it could not be recovered. Territory of N. M. v. Newhall et al., 15 N.M. 141, 103 P. 982.

An "error of fact" is "that error which proceeds either from ignorance of that which really exists, or from a mistaken

belief in the existence of that which has none." Delogny v. Her Creditors, 48 La. Ann. 488, 19 So. 614; Scott et al. v. Ford, 45 Or. 531, 78 P. 742, 80 P. 899, 68 L.R.A. 469; Mowatt v. Wright, 1 Wend.(N.Y.) 355, 19 Am.Dec. 508.

As no "erroneous payment" is alleged or proved, the judgment of the district court is reversed, with instructions to dismiss the case.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

72 P.(2d) 8

Frank STAPLIN, Appellee, v. Frank VESELY, Commissioner of Public Lands of the State of New Mexico, Appellant.

No. 4225.

Supreme Court of New Mexico.

Sept. 29, 1937.

Carl B. Livingston, of Santa Fé, for appellant.

Mariot Murphy, of Santa Fé, for appellee.

BRICE, Justice.

The issues in this case are identical with those of Staplin v. Vesely, Commissioner of Public Lands, etc., 41 N.M. 543, 72 P.(2d) 7, this day decided; and it is reversed and remanded, with instructions to dismiss, for the reasons stated in our opinion in said cause.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

72 P.(2d) 9

WITTMER OIL & GAS PROPERTIES, Appellee, v. Frank VESELY, Commissioner of Public Lands of the State of New Mexico, Appellant.

No. 4227.

Supreme Court of New Mexico.

Sept. 29, 1937.

Carl B. Livingston, of Santa Fé, for appellant.

Mariot Murphy, of Santa Fé, for appellee.

BRICE, Justice.

This is a companion case to Staplin v. Vesely, Commissioner, 41 N.M. 543, 72 P.(2d) 7, this day decided; the issues are identical, and it is reversed and remanded,

with instructions to dismiss for the reasons stated in our opinion in said cause.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

72 P.(2d) 9

STATE v. STONE.

No. 4258.

Supreme Court of New Mexico.

Aug. 24, 1937.

Rehearing Denied Oct. 18, 1937.

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

Frank H. Patton, Atty. Gen., and Fred J. Federici, Asst. Atty. Gen., for the State.

ZINN, Justice.

The prosecution in this case was based upon an information alleging that the defendant (appellant here) did unlawfully and knowingly sell one head of neat cattle of the property of Mrs. L. McLaughlin. Mrs. McLaughlin testified that she owned one bob-tailed white-faced cow branded three links; that the three-link brand was her registered and recorded brand; that the cow disappeared from her place; and that at no time had she either sold the cow or given permission to sell said cow. In 1934, the government was buying cattle. The defendant sold four head of cattle to the government. One of the cows sold to the government by the defendant was the cow that had disappeared from the McLaughlin place and was the cow of Mrs. McLaughlin. Of this fact, there is no dispute.

The record shows that the cow herein involved bore the three-link brand of Mrs. McLaughlin and that this brand had been burned over by a running W brand. This burning over is what is known in the cowman's parlance, as a "burnt" or blotched brand.

The record shows that the selling of the McLaughlin cow was knowingly and unlawfully done by the defendant. This is borne out by two plain facts. At the same time the defendant sold the McLaughlin cow he also sold another cow, known as the Leyba cow, which cow was the property of Gregorio Leyba. The defendant knew this cow belonged to Leyba because the defendant had not long prior thereto sold it to Leyba. When first questioned by Leyba, the defendant denied that he had sold the Leyba cow to the government, and, subsequently, when Leyba identified the cow as his own, the defendant agreed to pay for the cow and did pay Leyba the sum of $22.50 for said cow. The only explanation the defendant could give was by first denying that he ever sold said cow to Leyba, and then later explaining that the reason he paid Leyba the $22.50

was because he and Leyba were friends and he did not want to have any trouble over it. In connection with the McLaughlin cow, he also offered to give her a calf and settle with Mrs. McLaughlin, if she would obtain for him a certain purported bill of sale relating to this cow and also a piece of hide of the same cow bearing the burnt running W brand over the three-link brand, which bill of sale and piece of hide were then in the possession of Ivan Shoemaker, a state cattle and brand inspector. This clearly was an attempt on the part of the defendant to destroy incriminating evidence.

The defendant's only defense was that he purchased the McLaughlin cow from one H. C. Williams, a trapper. To substantiate this, the defendant offered in evidence a purported bill of sale which he contended dealt with the McLaughlin cow. There is evidence in the record that this bill of sale was not a bill of sale to the McLaughlin cow, that the brands on the bill of sale and the brands on the piece of hide did not correspond. The defendant is the only witness that testified as to the actual execution of the bill of sale in question. The bill of sale purported to have been acknowledged before a notary public. The alleged notary public, George Larkin, did not testify nor did the purported vendor, H. C. Williams, testify. There is some testimony to the effect that Williams was dead.

The defendant depends on numerous assignments of error for a reversal of this cause. The principal claim of error, toward which defendant has directed several different assignments, has to do with proof of the fact that as a part of the same transaction by which the McLaughlin cow was disposed of to the government, the defendant also sold another cow, the property of one Gregorio Leyba, as hereinabove recited. The defendant objected to all testimony regarding the Leyba cow, as having no connection with the charge of unlawfully disposing of the McLaughlin cow on which the prosecution alone was based, and as tending to show commission by him of a separate and independent offense, all to his prejudice. The general rule excluding testimony of other crimes, to which there are well-recognized exceptions, is urged upon us here in support of this claim of error.

The sale of the McLaughlin cow and the Leyba cow, together with two other head of cattle sold to the government, occurred at the same time. The evidence relating to the sale of the Leyba cow may have tended to show that the defendant was guilty of another crime, yet the sale of the Leyba cow was a part of the same transaction which resulted in the sale of the McLaughlin cow. It often happens that two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other. In such a case, on a prosecution for the commission of one crime, evidence proving it cannot be excluded because such evidence also proves the commission of the

other. 16 C.J. 588; State v. Riddle, 23 N.M. 600, 170 P. 62; State v. Graves, 21 N.M. 556, 157 P. 160. This case is very similar to the case of State v. Riddle, supra. The opinion of Mr. Justice Parker in that case is sound law and applicable here. We see no need of repeating here what this court said through Mr. Justice Parker, except that the law as therein enunciated is clearly in point here.

Another objection urged below and made the basis of a claim of error here relates to the qualifications of certain witnesses who testified what the brands were on the cows. Such testimony required no expert witnesses. The witnesses testifying had been in the cow business for many years and were competent to testify respecting the brands.

Error is assigned upon the trial court's admission over objection of a printed brand book purportedly from the office of the cattle sanitary board. The basis of the objection was that it was not certified, sealed, or otherwise authenticated as the book which it purported to be and was hearsay evidence so far as defendant was concerned. The purpose of offering the brand book, State's Exhibit 7, rendered obvious by the pages thereof, 25 to 27, to which the jury's attention was alone directed, was to show that the "C running W" brand, which had been burned over the recorded brand of the prosecuting witness, Mrs. McLaughlin, on the cow alleged to have been unlawfully sold by defendant as his own property, was not a recorded and registered brand. Proof of her ownership of said cow had been furnished both by introduction of a duly certified copy of her brand found on the cow from the office of the cattle sanitary board as well as by independent testimony. For purpose of ruling on this point, we may concede defendant's objection to the printed brand book was well taken and should have been sustained. But this does not settle the matter. The witness who produced and identified the brand book was brand inspector for Union county and had been for more than a year. He had been inspecting brands for a period of twenty years. Over the unsustained objection of immateriality, which was not well taken, the State put in evidence through this witness the same fact for which the brand book was offered, viz., the nonexistence of the "C running W" as a registered or recorded brand.

An accused may not complain at the admission over objection of evidence or testimony which he later lets in without objection or, the equivalent thereof, an improper objection. Even if it be conceded that materiality of the questioned testimony does not readily suggest itself, at least, its admission lay within the trial court's discretion.

Assignment of error No. 13 is without merit. This refers to another cow claimed by Gregorio Leyba, and a cow that the evidence shows throughout the record was bought from a man by the name of Graves, and was run by the defendant for several

years. This cow was not connected with the McLaughlin cow in any way. However, the only objection made by defendant to this evidence was sustained by the court.

Two other assignments of error relate to evidence admitted by the court which the defendant claims was prejudicial. This was testimony by a witness, Ivan Shoemaker, the brand inspector, who testified that a certain brand was on various other cattle that had no connection whatever with either the McLaughlin or Leyba cows. He also testified that he and defendant had had some trouble at Mount Dora, and that the brand about which he was testifying was on the right side of some cattle that the defendant had at Mount Dora. The defendant testified that the brand was on the left side. Assuming that all this testimony was immaterial, it was first injected into the case by the defendant, and the State offered Shoemaker's testimony in rebuttal. This is not error.

The next assignment of error claimed by the defendant is with reference to the effect that the evidence shows the theft of the McLaughlin cow occurred at a time more than three years prior to the time the information was returned, during the March, 1935 term of court. The defendant is not charged with the crime of stealing the cow. The information charges that the defendant unlawfully sold the McLaughlin cow in 1934. The evidence is undisputed that the sale took place on September 17, 1934. This was within three years from the time the offense charged was committed. Comp.St.1929, § 83-125. The information was timely filed.

The defendant also claims that there is no substantial evidence to support the verdict of the jury and the sentence of the court. We have examined the record. There is substantial evidence in the record to support the verdict of the jury and sentence of the court. Other claims of error are presented, but, after considering same, we find them to have no merit.

For the reasons given, the judgment and sentence of the court will be sustained.

It is so ordered.

HUDSPETH, C.J., and SADLER and BICKLEY, JJ., concur.

BRICE, Justice (dissenting).

The district court erred in admitting in evidence over appellant's objection the printed brand book, mentioned in the majority opinion. I do not agree that it was error for the witness Shoemaker to testify that he had been inspector of brands for a period of twenty years and that he had never seen the C running W brand on any livestock. This evidence was admissible to show that such brand was used to conceal a "sleeper," as is customary with cow thieves.

The majority seems to hold that, because no objection was made by appellant to perfectly proper testimony, he waived

[redacted]

error in the admission of clearly improper testimony tending to prove the same fact. I am unable to agree to this.

We stated, through Mr. Justice Parker, in State v. Riddle, 23 N.M. 600, 170 P. 62, 63:

"The practice of branding a maverick in an unknown or unrecorded brand, which is so formed as to be easily altered, and then permitting the animal to run at large on the open range until all thought of suspicion is past, and then altering the brand upon the animal to conform to the brand of the person practicing this form of deception, is not uncommon in a cattle country, and constitutes a highly systematic attempt to become possessed of the property of another. Such evidence is unquestionably of high probative value, especially in cases like this, where the half circle P brand is so similar to the circle R brand of appellant. That such evidence tends to prejudice the appellant is also unquestioned, but the question is whether the trial court erred in admitting it."

The evidence was highly prejudicial. The jury might not have believed Shoemaker's testimony, or doubted that it established the fact attempted to be proved, to wit, that there was no C running W brand recorded. But the brand book was conclusive evidence that there was no such recorded brand in the State of New Mexico as the C running W, and that, therefore, it was used in this instance by a cow thief to hide his handiwork. The case should be reversed.

72 P.(2d) 12

GAMMILL v. MANN et al.

No. 4188.

Supreme Court of New Mexico.

Sept. 27, 1937.

[redacted]

R. E. Rowells and Hatch, Grantham & Manson, all of Clovis, and Keith W. Edwards, of Fort Sumner, for appellants.

Charles F. Fishback, of Fort Sumner, for appellee.

BRICE, Justice.

This is a statutory action to quiet title. The appellee bought from the county of De Baca a tax sale certificate which had been recorded more than three years; and demanded, and there was issued to him by the county treasurer a tax deed to the real property described in the certificate. The appellants claiming title to the property answered denying appellee's claim and filed cross-actions to quiet their respective claims of title. It is admitted that the tax proceedings up to and including the issuing of the tax certificate to De Baca County were legal.

The defense was that appellants were the owners of the property; that on the 20th day of October, 1927, long prior to the purchase of the tax certificate by appellee, one of the appellants had tendered to the county treasurer the full amount of taxes, interest, and penalties due and necessary to redeem the property from sale, and to pay all back taxes due thereon; that the county treasurer had refused to accept such money and to issue a redemption certificate; that on February 18, 1930, appellants again tendered to the treasurer of De Baca county all taxes, interest, and penalties due upon the land for the year of 1925, which was refused.

The tax sale certificate was dated September 20, 1926, and filed for record January 3, 1927, and duly recorded in the De Baca county tax sale certificate records. The county treasurer of De Baca county assigned such certificate to appellee on the 17th day of February, 1930, and issued a tax deed thereon, dated February 10, 1932 The district court held that the tender of money by appellants, to pay all taxes before redemption was barred, was not a defense to the action; that the only defenses to the tax title were: (1) That the land was not subject to taxation; and (2) that the taxes had been paid. That as neither of these defenses had been pleaded or proved, appellee's tax deed established his title; and judgment was accordingly entered for him.

The trial court evidently had in mind section 435, c. 133, N.M.L.1921, as follows: "After the expiration of such period of ninety days, any final judgment for the sale of property for delinquent

taxes rendered in accordance with the provisions of this act shall estop all parties from raising any objection thereto, or to a tax title based thereon, which existed at or before the rendition of such judgment or decree and might have been presented as a defense in such action in a court wherein the same was rendered, and as to all such questions the judgment shall be conclusive evidence of its regularity and validity in all collateral proceedings; except in cases where the taxes had been paid, or the property was not liable to the tax or assessment. Counties purchasing at tax sales shall be deemed purchasers within the meaning of this act."

Clearly this statute does not apply here, as the tender (if made) was subsequent to the rendition of judgment and could not have been presented as a defense at the trial.

Section 449, c. 133, N.M.L.1921, is as follows: "Real property sold under the provisions of this act may be redeemed by the owner or any person having a legal or equitable right therein, at any time before the expiration of three years from the date of the sale, by payment to the county treasurer, to be held by him subject to the order of the purchaser, of the amount for which the same was sold, with interest thereon from date of sale at the rate of one and one-fourth per cent per month for the first twelve months, or fraction thereof, after sale, and one per cent per month for the remaining twenty-four months, or fraction thereof, together with the amount of all subsequent taxes paid by the purchaser or levied by the county."

We indicated in State ex rel. McFann v. Hately, 34 N.M. 86, 278 P. 206, 208, that this redemption statute should be liberally construed in favor of the landholder, stating: "Redemption cannot be prevented by the fault or mistake of the collecting officer whose duty it is to furnish to the taxpayer the requisite information."

This seems to be the general rule. Logan's Heirs et al. v. Logan, 31 Tex.Civ. App. 295, 72 S.W. 416; McGraw v. Potts et al. (Tex.Civ.App.) 27 S.W.(2d) 550; McLain v. Meletio et al., 166 Miss. 1, 147 So. 878; Laist v. Nichols et ux., 139 Cal. App. 202, 33 P.(2d) 866; Gibson v. Pekarek et al., 27 S.D. 423, 131 N.W. 728; Ford Lbr. Co. v. Bartlett, 32 Idaho 638, 186 P. 709; Wilson v. Reasoner, 37 Kan. 663, 16 P. 100; Backus v. Killmaster, 162 Mich. 594, 127 N.W. 779; Gonzales v. Harrington Co., Inc., 126 A. 40, 2 N.J. Misc. 316; Id., 126 A. 38, 2 N.J.Misc. 311; 61 C.J. Title Taxation, § 1760.

"The owner of the land, having tendered the full amount due for redemption before the execution of the tax deed, had performed all the duty the law required, and the tender unquestionably had the effect, not only to stop interest, but to prevent the officers of the county from executing any valid tax deed to the land. When the defendant in error offered to pay, and the county treasurer refused to receive the amount tendered, it being suf-

ficient for the purpose of redemption, right then and there the owner was discharged of all obligation to pay interest to any one on the taxes due and tendered." Wilson v. Reasoner, 37 Kan. 663, 16 P. 100, 101.

"Defendant next contends that the statute requires that payment of the amount due be made to the collector of taxes and that complainant made no such payment or tender of payment. Complainant did call on the collector of taxes, and endeavored to ascertain from that official how much he was required to pay to redeem the property from all the tax sales. The collector declined to inform him, or to accept any money from him, and referred complainant to defendant for settlement and payment. Complainant was entitled to the information he sought from the collector, and, failing to obtain it, he was practically refused the right to redeem, and it would have been idle for complainant to have tendered the collector any sum of money after the collector had declined to deal with complainant." Gonzales v. Harrington Co., Inc., 126 A. 40, 2 N.J.Misc. 316; Id., 126 A. 38, 40, 2 N.J.Misc. 311.

"A person wishing to redeem land sold for taxes should tender the necessary amount unless a formal tender is waived; and, when the person entitled to redeem duly offers the proper amount to the proper person, it is immaterial that the money is not accepted; for a sufficient tender will ipso facto work a redemption." 61 C.J. Title "Taxation" § 1760.

A Texas statute (Rev.St.1895, art. 5232n) provides: "Where lands are sold under the provisions of this chapter the owner or any one having an interest therein shall have the right to redeem said land, or his interest therein, within two years from the date of said sale upon the payment of double the amount paid for the land."

It was held in Logan's Heirs v. Logan et al., 31 Tex.Civ.App. 295, 72 S.W. 416, in construing this statute, that the tender of a sufficient sum of money to the holder of the tax certificate to redeem the land from taxes has the effect of redemption.

The treasurer and tax collector was, by statute, made the agent of the owner of the tax certificate, whether such owner was the county or another; and was the only officer or person authorized by law to receive the money. The law gave appellants the right to redeem the property from tax sale, and to that end required payment to be made to such officer. His refusal to receive the money or to give information with reference thereto cannot affect the rights of appellants, if they or either of them tendered payment in good faith; at least if such tender was kept good. The trial court should have considered the testimony with reference to a tender, and, if tender was actually made, have rendered judgment for appellants.

No question seems to have been made of whether such tender was, or should

be, kept good, or whether appellants are entitled to relief, having not tendered payment of taxes, etc.; and we do not decide them.

In view of the fact that Judge Armijo, who tried the case below, is not now available to officiate, the cause will be reversed, with instructions to grant to the parties a new trial, and to that end permit such amendment of pleadings as the parties may desire to file.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

72 P.(2d) 15

SOUTHERN PAC. CO. v. STATE CORPORATION COMMISSION OF NEW MEXICO.

No. 4213.

Supreme Court of New Mexico.

Sept. 8, 1937.

Frank H. Patton, Atty. Gen., and J. R. Modrall, Asst. Atty. Gen., for appellant.

E. R. Wright, of Santa Fé, and Del W. Harrington, of El Paso, Tex., for appellee.

BRICE, Justice.

The questions are: Is the manner of laying a franchise tax upon that portion of the appellee's capital stock represented by railway property and business in New Mexico illegal? Has such taxation been so applied to appellee as to deprive it of constitutional rights? And does the act under which the tax was laid violate certain prohibitions of the Constitution of the United States?

The tax was assessed and levied by the State Corporation Commission by virtue of chapter 116, N.M.L.1935; sections 2, 4, and 6 of which are as follows:

"Sec. 2. Every domestic or foreign corporation for profit engaged in any business in this State, beginning with the calendar year 1935, shall pay to the Corporation Commission on or before the first day of May of each year, an annual franchise tax at the rate of One ($1.00) Dollar for each One Thousand ($1,000.00) Dollars, or fraction thereof, of the par value of that proportion of its authorized and issued capital stock represented by its property and business in this state, to be assessed by the State Corporation Commission as provided in this Act. The tax hereby imposed shall be in addition to all property taxes and other taxes and fees now or hereafter required by law."

"Sec. 4. Every foreign corporation for profit engaged in business in this State shall annually on or before the fifteenth day of March, make and file with the Commission, a report in such form as the Commission may prescribe, and signed and sworn to by the president, vice-president, secretary or principal accounting officer of the corporation, which report shall show as of the first day of January preceding, the following: * * *

"(5) The amount of authorized capital stock; the amount of capital stock subscribed; the amount thereof issued and outstanding and the amount of capital stock paid up. * * *

"(7) The value of the property owned and used by the corporation in this State and where situated; and the value of the property owned and used outside of this state and where situated.

"(8) The total gross receipts derived from its property and business both within and without this state during the last preceding year. * * *

"From such report or such other information as it may be able to procure, the Commission shall prior to the fifteenth day of April of each year, determine the proportion of the authorized and issued capital stock of such corporation represented by its property and business in this State and shall assess the amount of the annual state franchise tax to be paid by each such corporation, at the rate of One ($1.00) Dollar for each one thousand dollars, or fraction thereof, of the par value of that proportion of its issued capital stock, represented by its property and business in this State, as determined by the Commission, and which tax shall attach as of January 1st of the year in which assessed."

"Sec. 6. In making the assessment provided by this Act there shall be excluded the property of any corporation situate without the State of New Mexico, or used exclusively in interstate or foreign commerce."

The proportion of the capital stock of the appellee, as a basis for taxation, was determined by the following formula: To the total value of appellee's property within and without the State of New Mexico was added the total gross receipts from its business for the year of 1934. In like manner to the value of its property in

New Mexico was added the gross receipts from intrastate traffic of the corporation's business in New Mexico. The latter amount is .0218 per cent. of the former; and that per cent. of the total capital stock of the corporation was determined to be subject to the tax as "the par value of that proportion of its authorized and issued capital stock represented by its property and business in this state."

Domestic corporations, by other provisions of the act, are subjected to the same tax, so there is no claim of discrimination against appellee.

The words "property and business in this state," as used in section 2 of the act, are construed by the State Corporation Commission to mean all property of appellee in New Mexico not used exclusively in interstate business, plus the total gross receipts from intrastate business therein; the sum of which represents the authorized and issued capital stock allocated to such corporation's property and business in New Mexico as a basis for the tax. This seems to be the legislative intent.

The nature of the tax as expressed in the title is as follows: "An Act to Levy an Annual Franchise Tax on Domestic and Foreign Corporations for Profit Doing Business in This State, for the Privilege of Carrying on, doing Business, or the Continuance of its Charter Within This State." The parties agree that it is an excise or franchise tax, and that the title correctly describes it. The property of the corporation is not taxed, neither is its capital stock. Values of property and gross receipts are used as factors to determine the number of shares of the corporate stock that measures the tax "for the privilege of carrying on, doing business, or the continuance of its charter within the State" but are not subjects of the tax.

Certain contentions of appellee, with reference to the construction of the statute and constitutionality of the tax may be here disposed of. It is stated in appellee's brief: "While the New Mexico statute limits the 'property' to that owned in the state in the process of determining the tax, it places no limitation upon the business transacted within the state, and, therefore, leaves the Commission free to include interstate as well as intrastate business in its process of determining the proportions of the capital stock to be allocated to the state of New Mexico for the purpose of fixing the amount of the tax."

"Business in this state" means just that. It does not mean business across state lines, but that transacted wholly within the state. It cannot be assumed, except for compelling reasons that we do not find to exist, that the Legislature intended a meaning that would render the act unconstitutional. Green v. Frazier, 253 U.S. 233, 40 S.Ct. 499, 64 L.Ed. 878. Appellee takes an inconsistent position later, and agrees with our construction in asserting a proposition that would render its tax nominal in amount. It states in its brief:

"* * * The legislative intention in the use of the term 'property and business in

this state' as a measure of the taxable capital stock, is disclosed in the provisions of said section 4 of the act, which undertakes to prescribe the information which shall be shown by the corporation's return for the purpose of calculation of the tax. * * * Paragraph 8, however, of the section appears to be the key to the construction of the material tax provisions of the Act, in providing that 'the total gross receipts derived from its property and business, both within and without this state during the last preceding year' shall be reported and used as a basis for calculating the tax. * * *

"The total gross receipts derived from property and business within the state and the total gross receipts derived from property and business without the state, required to be reported by paragraph 8, would give the factors for a calculation of the total gross receipts derived from all property and business of the taxpayer, and the percentage of the intrastate revenues to the whole revenues would be simply a matter of calculation."

Appellee seems thus to conclude that "business within the state" has reference to intrastate business; to which we agree. But the words "property and business in this state" cannot be limited to business alone; it would contradict the plain wording of the statute, and we need not discuss it further than to state our disagreement. The word "property" speaks for itself, and as the statute specifically excludes as a factor for determining the tax all property of any foreign corporation situated without the state and that used exclusively in interstate commerce, there remains all property of such corporation within the state not so used; which includes property used for both interstate and intrastate business, as well as that used exclusively for intrastate business, the value of which is to be used as one of the factors in determining that proportion of the authorized and issued capital stock of a foreign corporation represented by its property and business in this state.

Appellee states: "New Mexico cannot impose property taxation and then impose a franchise tax measured by the value of the same property without clearly imposing a double ad valorem tax." But the trouble is the Supreme Court of the United States, which has the last word on this very question, has expressed its disagreement with appellee's views.

In Western Cartridge Co. v. Emmerson, 281 U.S. 511, 50 S.Ct. 383, 384, 74 L.Ed. 1004, a statute of Illinois (Smith-Hurd Ill. Stats. c. 32, § 157. 131 note) was held valid, which is as follows: "Each corporation for profit, * * * except insurance companies, * * * organized under the laws of this State or admitted to do business in this State, * * * shall pay an annual license fee or franchise tax * * * of five cents on each one hundred dollars of the proportion of its authorized capital stock represented by business transacted and property located in this state." The petitioner corporation had issued in round

numbers $5,700,000 par value capital stock; it owned property of the value of $6,925,000, of which $6,800,000 was situated in Illinois; its business for the year amounted to $11,671,000 of which $1,900,000 was intrastate and $9,750,000 was shipped outside the state.

"Respondent treated all of petitioner's business as having been transacted in Illinois and based the tax on such proportion of its outstanding capital stock as its business plus its Illinois property was of such business and all its property. The tax so calculated amounted to $2,808.03, a substantial part of which resulted from the inclusion of the transactions reported by petitioner as interstate commerce.* * *

"Unquestionably Illinois has power to tax all petitioner's property therein without regard to its use in connection with interstate transactions and to impose a license fee or excise upon petitioner's local business. [authorities] The tax in question was not laid directly upon interstate commerce or any of its elements. For the determination of the amount the taxpayer's business and property located in Illinois is divided by the total of all its business and property and that percentage is applied to the issued shares and the resulting number taken for taxation at the rate of 5 cents per $100. As the amount depends on the relation each to the others of the various elements employed in the calculation, the fee or tax does not directly depend upon the amount of the taxpayer's interstate transactions. The exaction may arise while the sales to customers outside Illinois decline and may fall while such sales increase."

It was held that this tax was not a burden upon interstate commerce.

"The mere fact that a corporation is engaged in interstate commerce does not exempt its property from state taxation. [citing authorities]. It is the commerce itself which must not be burdened by state exactions which interfere with the exclusive Federal authority over it. A resort to the receipts of property or capital employed in part, at least, in interstate commerce, when such receipts or capital are not taxed as such, but are taken as a mere measure of a tax of lawful authority within the state, has been sustained." Baltic Mining Co. v. Massachusetts, 231 U.S. 68, 34 S.Ct. 15, 17, 58 L.Ed. 127.

The State of North Carolina provided for a railway franchise tax equal to one-tenth of one per cent. of the value of the company's property within the state. In Southern Railway Co. v. Watts, 260 U.S. 519, 43 S.Ct. 192, 197, 67 L.Ed. 375, it was stated by the Supreme Court of the United States, on the question of the statute's constitutionality: "It is argued that this franchise tax is an additional property tax which is not imposed on others, and that, consequently, it violates the uniformity clause of the state Constitution and the equal protection clause of the federal Constitution. It is true that the franchise tax is measured by the value of property already subjected to the ad valorem tax. But a privilege tax is not converted into a prop-

erty tax because it is measured by the value of property [authority]; nor by the fact that in this measure is included property not used in the transportation service. Railroads differ in so many respects from other properties that they may, as a class, be taxed differently or additionally, if that is not inconsistent with the Constitution of the state."

The Supreme Court of the United States held constitutional an excise tax of the State of Massachusetts, somewhat similar to that of New Mexico, and said:

"The statute provides that every foreign corporation shall pay annually 'with respect to the carrying on or doing of business by it within the Commonwealth,' an excise consisting in part of an amount 'equal to five dollars per thousand upon the value of the corporate excess employed by it within the Commonwealth,' which is defined as 'such proportion of the fair cash value of all the shares constituting the capital stock * * * as the value of the assets, both real and personal, employed in any business within the commonwealth * * * bears to the value of the total assets of the corporation,' * * *

"It is settled law that a State may lawfully impose upon a foreign corporation a tax for the privilege of doing business within its borders which is measured by the proportionate part of its total gross receipts that are received within the State, [authority]; or by the proportionate part of its total capital stock which is represented by the property located and business transacted within the State [authorities]; or by the proportionate part of its total net income which is attributable to the business carried on within the State." National Leather Co. v. Commonwealth of Massachusetts, 277 U. S. 413, 48 S.Ct. 534, 72 L.Ed. 935.

A like conclusion was reached by the Supreme Court of the United States regarding an Illinois statute.

"The statute under which the tax was assessed reads: 'It shall be the duty of the Secretary of State to propound interrogatories from time to time to officers of such foreign corporations (with negligible exceptions) doing business in this state to ascertain the proportion of capital stock actually being represented by property located and business transacted in the state of Illinois, which porportion shall be determined by averaging the percentage of the total business of the corporation transacted in Illinois with the percentage of the total tangible property located in this state.' * * *

"The tax is not imposed directly upon the proceeds of interstate commerce and is not computed upon it. The $235,000 of interstate business of the company is only one of three factors used in estimating or measuring 'the amount of the capital stock represented by property and business transacted in Illinois,' upon which the privilege tax in dispute was computed. The other two factors were $5,540,000 of property in Illinois and $25,000 of business stipulated as done with residents of that state. If the fee or privilege tax were computed at the

statutory rate on the whole of the interstate business, it would be trifling in amount, but if computed on the property admitted to have been in use in the state it would be but slightly less than the tax collected.

"If this same amount of tax had been imposed upon such a manufacturing corporation as we have here without reference being made to the basis of its computation, very certainly no objection to its validity would have been thought of." Hump Hairpin Mfg. Co. v. Louis L. Emmerson, 258 U.S. 290, 42 S.Ct. 305, 306, 66 L.Ed. 622.

An Arkansas statute (Acts 1911, pp. 69, 70, §§ 4, 6) provided: "Each foreign corporation for profit, doing business in the State, and owning or using a part or all of its capital or plant in this State," to pay "for the privilege of exercising its franchise in this State, one-twentieth of one per cent. each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this state." The Supreme Court of the United States copied from the decision of the state court from which the cause was appealed (106 Ark. 321, 152 S.W. 110), and among other things stated:

"We therefore accept the construction of Act No. 112 that we have quoted from the opinion of the state court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the state, the amount of the tax being fixed solely by reference to the property of the corporation that is within the state and used in business transacted within the state, and excluding any imposition upon or interference with interstate commerce. * * *

"So, in Atlantic & P. Tele. Co. v. Philadelphia, 190 U.S. 160, 23 S.Ct. 817, 47 L.Ed. 995, the court, reviewing numerous previous cases, laid down certain propositions as well-established, and among them the following: (a) No state can compel a party, individual, or corporation, to pay for the privilege of engaging in interstate commerce; (b) this immunity does not prevent a state from imposing ordinary property taxes upon property having a situs within its territory, although it be employed in interstate commerce; and (c) the franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to state taxation, provided, at least, the franchise is not derived from the United States.

"Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, the tax being based upon the amount and value of its property within the state. It is fixed at a definite percentage (1/20 of 1 per cent) of 'the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in

this state.' It is not contended that there is here any substantial discrimination. The gist of the criticism seems to be that the two acts in question subject the property of plaintiff in error, as well as that of all other corporations that are within the operation of those acts, to double taxation, and that this is a denial of 'equal protection' in favor of other classes of taxpayers." St. Louis S. W. Ry. Co. v. State of Arkansas, 235 U.S. 350, 35 S.Ct. 99, 102, 59 L.Ed. 265.

The statute was held not subject to any constitutional inhibitions.

Section 181, article 9, of the Tax Law of New York (chapter 62, L. of 1909, as amended [Consol.Laws, c. 60]), imposes on every foreign corporation doing business in that state a tax computed upon the basis of the capital stock employed by it within the state during the first year it does business there; the amount of its stock so employed being that proportion of its total issued capital stock which its gross assets employed within the state bear to its gross assets wherever employed. This statute was held valid by the Supreme Court of the United States. People of State of New York v. Latrobe et al., 279 U.S. 421, 49 S. Ct. 377, 73 L.Ed. 776, 65 A.L.R. 1341.

Also see Southern Ry. Co. v. Commonwealth of Kentucky, 274 U.S. 76, 47 S.Ct. 542, 71 L.Ed. 934; Judson Freight Forwarding Co. v. Commonwealth of Mass., 242 Mass. 47, 136 N.E. 375, 27 A.L.R. 1131; Old Dominion Steamship Co. v. Virginia, 198 U.S. 299, 25 S.Ct. 686, 49 L.Ed. 1059, 3 Ann.Cas. 1100; Pacific Tel. & Teleg. Co. v. Tax Commission of State of Wash., 297 U.S. 403, 56 S.Ct. 522, 80 L.Ed. 760, 105 A. L.R. 1; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 46 S.Ct. 375, 70 L.Ed. 827, 45 A.L.R. 1495.

The appellee states that "property and gross receipts" can no more be added than "hens and eggs," and therefore the statute has no clear basis for establishing the capital stock. It is unnecessary for us to worry over the addible qualities of poultry and its fruit. When reduced to dollars "hens and eggs" may be added and we apprehend the same may be said of property and gross receipts. In any event, the feat has been accomplished more than once and sustained as permissible, if not approved as scientific, by high authority. Great Northern Ry. Co. v. Weeks, 297 U.S. 135, 56 S.Ct. 426, 80 L.Ed. 532; People of State of New York v. Latrobe et al., supra; Roberts & Schaefer Co. v. Emmerson, supra; Chicago, M., St. P. & P. R. Co. v. Harmon, 89 Mont. 1, 295 P. 762; State v. Pierce Pet. Corp., 318 Mo. 1020, 2 S.W. (2d) 790.

The demurrer admits that the intrastate business for 1934 was $196,674, which was a loss; that approximately a half million dollars was paid in ad valorem taxes; that the franchise tax imposed "can only be paid by petitioner out of its interstate revenues, thereby imposing a burden upon its interstate business, thus contravening the commerce clause of the national constitution." The whole state and county

ad valorem tax may not be charged against the intrastate gross income to create a deficit. It could be levied against the appellee's property in this state, if its business was wholly interstate. Pacific Tel. & Teleg. Co. v. Tax Commission, supra. No other figures are given whereby it may be determined if there is in fact a loss, and if so, the amount of it.

It may be that an abandonment of the intrastate business would entail a still greater loss on appellee's interstate business, in which case the loss would not exist in fact.

The case is not unlike that of Pacific Tel. & Teleg. Co. v. Tax Commission, supra.

"A finding that the statute, though fair upon its face, is oppressive toward the railway in its practical operation cannot rest upon so fragmentary and partial a showing of facts. We must bear in mind steadily that the burden is on the taxpayer to make oppression manifest by clear and cogent evidence." Norfolk & W. R. Co. v. North Carolina, 297 U.S. 682, 56 S.Ct. 625, 628, 80 L.Ed. 977.

The facts alleged and admitted do not establish that the operation of the statute burdens appellee's interstate business. Great Northern R. Co. v. Weeks, supra; People of State of New York v. Latrobe et al., supra; Roberts & Schaefer Co. v. Emmerson, supra; Hump Hairpin Mfg. Co. v. Emmerson, supra; Chicago, M., St. P. & P. R. Co. v. Harmon, 89 Mont. 1, 295 P. 762; State v. Pierce Pet. Corp., 318 Mo. 1020, 2 S.W.(2d) 790.

Section 5 of the act provides: "The capital stock of foreign and domestic corporations for profit having no fixed par value shall be presumed to have a par value of one hundred dollars ($100.00) per share, but such value shall be subject to examination and revision by the State Corporation Commission from the information contained in the report by the said corporation, as herein provided, and from any other information obtained by the Corporation Commission, but in no event shall such value be less than as shown on the books of the said corporation."

Appellee's stock is of the market value of $16 and of the par value of $100, and the statute requires assessments thereon at its par value; whereas assessment of no par value stock is on a different basis. Is there such discrimination against appellee and others similarly situated as to deny them the equal protection of the laws, so that the act runs counter to section 1 of the Fourteenth Amendment of the Federal Constitution?

This question has been before the courts many times and decided against appellee's contention. There are sufficient differences of importance between the two classes of stock to authorize this classification. People of the State of New York v. Latrobe, 279 U.S. 421, 49 S.Ct. 377, 73 L.Ed. 776 and note, 65 A.L.R. 1341; Roberts & Schaefer Co. v. Emmerson, 271 U.S. 50, 46 S.Ct. 375, 70 L.Ed. 827, 45 A.L.R. 1502 and note; State v. Pierce Pet. Corp., supra; also see annotation in 36 A.L.R. 794.

The cause will be reversed and remanded with instructions to the district court to sustain appellant's demurrer to appellee's petition for certiorari.

It is so ordered.

SADLER, BICKLEY, and ZINN, JJ., concur.

HUDSPETH, C. J., did not participate.

72 P.(2d) 21

In re AKIN'S ESTATE.

AMENT v. WATKINS et al.

No. 4276.

Supreme Court of New Mexico.

Sept. 28, 1937.

Wilson & Woodbury, of Silver City, and Mae M. Ament, of Alpine, Tex., for appellant.

A. W. Pollard and A. W. Marshall, both of Deming, for appellees.

BRICE, Justice.

This appeal was taken from a judgment of the district court of Luna county in an

action to contest the will of Martha C. B. Akin, deceased, adjudging that such will was in fact the will of the testatrix.

A number of grounds were alleged in the petition to defeat the will, but all abandoned except one to the effect that the will was not executed as provided by sections 154-105 and 154-108, Ann.Comp.St. 1929, which are:

"All wills by which any property, real, personal or mixed, is devised or bequeathed, shall be reduced to writing and signed by the testator, or some one in his presence and by his direction, and attested in the presence of the testator by two or more credible witnesses. Provided, however, that any will which has been admitted to probate in any other state according to the laws of such state, shall be admitted in this state in the manner provided by law." Section 154-105.

"The witnesses to a written will must be present, see the testator sign the will, or some one sign it for him at his request as and for his last will and testament, and must sign as witnesses at his request in his presence and in the presence of each other." Section 154-108.

The court made numerous findings of fact, most of them evidentiary and unnecessary to a determination of the case; but it is agreed that all facts necessary to support the district court's judgment were proven except the manner of the execution of the will.

The will was dated December 23, 1931; the testatrix died on the 8th day of May, 1935, in Luna county, N. M.; the will was duly probated as the last will and testament of the alleged testatrix, on the 10th day of June, 1935, and the contest petition was filed December 26th following.

The instrument (except the word "witnesses" and their signatures) was in the handwriting of the testatrix and her purported signature thereto was in fact her genuine signature. Beneath her signature was the word "witnesses," and underneath that word were the genuine signatures of W. P. B. McSain and J. J. Aragon, Jr.

The closing of the will, including the signatures of the testatrix and witnesses, is as follows:

"In witness thereof

"I Martha Chesebrough Burdick Akin have here unto subscribed my hand this day

"Martha Chesebrough Burdick Akin
"December 23rd, 1931

"Witnesses
"Wm. P. D. McSain
"J. J. Aragon, Jr."

The substance of the district court's findings of fact, Nos. 12, 13, and 14, is: The will was signed by the testatrix as and for her last will and testament on the 23rd day of December, 1931, at the First National Bank of Las Cruces, N. M., in the presence of W. P. B. McSain and J. J. Aragon, Jr., who saw the testatrix sign the same as

stated by her, as and for her last will and testament, and, at her request and in her presence and in the presence of each other, the said McSain and Aragon signed the will as subscribing witnesses. That in fact it was duly executed with all the formalities required by the New Mexico statutes.

It is these findings of fact only that are attacked. The question is whether they were established by substantial evidence.

The witness W. P. B. McSain died in 1933, and the only testimony of appellee with reference to the execution of the will was that of Mrs. Florence Watkins, a daughter of the testatrix, and J. J. Aragon, Jr., the only living witness to the execution of the will.

Mrs. Watkins testified that in December, 1931, she took her mother from Deming, N. M., to El Paso, Tex.; that her mother stopped at the First National Bank of Las Cruces to see Mr. McSain, who was an old friend. When her mother came back to the automobile, she said, "That is done." Witness did not know her mother's purpose in going into the bank; that she had found the will in her mother's home at a place where her mother told her it would be in case of her death; that it was in her mother's handwriting.

J. J. Aragon, Jr., one of the subscribing witnesses to the will, testified that on December 23, 1931, he was an assistant cashier of the First National Bank of Las Cruces; that he had known W. P. B. McSain, the other subscribing witness, since 1928; that he and Mr. McSain saw Mrs. Akin sign her name to the will, and that Mr. McSain and Mrs. Akin were both present at the time he and Mr. McSain signed as subscribing witnesses; that the genuine signatures of himself and Mr. McSain appear thereon; that he signed it in the presence of Mr. McSain and Mrs. Akin, but that he did not know whether at Mrs. Akin's or Mr. McSain's request, or both; that Mr. McSain signed it in the presence of Mrs. Akin and the witness, but he did not know at whose request.

This testimony was greatly weakened by his further examination in which he stated in substance that he had only a faint recollection of what took place; that it was several years ago and he did not remember all the details; that he did not recall where it was signed; that he was often called upon to witness wills and other instruments at the bank and to take acknowledgments; that the signature of Mrs. Akin must have been affixed when he signed as a witness, else he would not have witnessed it; nor would he have done so unless he had been requested so to do. He stated: "I don't remember seeing anybody sign it. Evidently I was asked to witness it or I wouldn't. I don't remember anything about it except, like I said, I witnessed it, and I was asked to witness it. I don't believe I would have witnessed a signature unless the principal signed in my presence and before I signed it as a witness. I wrote to Mr. Pollard (Proponent's attorney) that I did not remember witness-

ing Mrs. Akin's will. However, my signature appeared on it as a witness. At that time I had no independent recollection of the transaction whatever, and any recollection I have now is based on the fact that my name appears on the instrument as a witness. I don't remember where the paper was signed nor where Mr. McSain and Mrs. Akin were at the time. At that time I was working at the window and Mr. McSain worked toward the front, next to the window. I don't remember whether Mrs. Akin came into the bank. I never knew her, and don't ever remember seeing her. I must have seen her; I witnessed the will. The only way I can fix the date is because it appears on the will. It looks to me like the signatures are written in different ink. I wrote mine with my fountain pen. Mr. McSain's signature is written in a different ink from any of the others. My recollection is based entirely on the instrument itself to a certain extent. I knew what the instrument was when I signed it, but have no independent recollection of it. I don't remember whether Mrs. Akin said: 'This is my will' or whether she asked me to sign as a witness, or whether Mr. McSain or both of them did. I wouldn't witness anybody's signature unless I saw them sign it; I could not say whether I would or not. I have no recollection of seeing Mrs. Akin sign the paper; nor that Mrs. Akin stated what the paper was; but Mrs. Akin or Mr. McSain, or both, asked me to sign it. I know some one requested me to sign it because my name is on it and I would not have done it otherwise."

The whole effect of this testimony is that the witness has no distinct recollection of the transaction, or any of its details. His name appears on the will as a witness, and from this he draws the conclusions to which he first testified. He has, as he states, only a faint recollection of the matter.

Appellant introduced no testimony regarding the execution of the will. It is established as a fact and admitted by appellant that the instrument is in the handwriting of the testatrix; that her genuine signature is subscribed thereto; that the word "witnesses" appears below and to the left of her signature; underneath which are the genuine signatures of W. P. B. McSain, who is dead, and J. J. Aragon, Jr., who recalled none of the details of the transaction, but had "a faint recollection" that such transaction occurred; that he would not have witnessed the signature of testatrix unless she had signed first and in his presence, and unless he had been asked to do so.

While we are limited to the one question, that of the proper execution of the will; though the fact that it is a holographic will indicates it was deliberately made for her will and last testament. There is no suggestion in the testimony of fraud or undue influence.

Such is the frailty of human recollection that in an incredibly short time the average person will forget such details as occur in the execution of documents, though, from his habits of care or otherwise, he

may be entirely certain in his own mind of facts he cannot remember. The witness Aragon testified that he would not sign his name as a witness to the signature of a person he did not know unless he saw him write it.

It has been held innumerable times by the courts of this country and England that a complete attestation clause above the signature of witnesses to a will raises a presumption of the due execution of the will, if the signatures of the testator and witnesses are proven to be genuine. German Evangelical Bethel Church of Concordia v. Reith, 327 Mo. 1098, 39 S.W. (2d) 1057, 76 A.L.R. 604, and annotations at page 617; and it is generally held, and we so hold, that in the absence of an attestation clause, if the will is subscribed by the genuine signature of the testator with the genuine signatures of two persons under the word "witnesses" below the signature of the testator, that the same rule applies if the subscribing witnesses are dead or cannot recall with certainty any of the details of the transaction.

And such should be the rule; for, if the proponent of a will is compelled to establish its due execution by affirmative testimony unaided by such presumptions, in practically all similar cases wills will be canceled, not because of any failure to comply with the law in their execution, but because of the frailty of human recollection.

The statutes of California and Massachusetts regarding the manner of executing wills are almost identical, and in substance the same as those of New Mexico. The identical question has been before the courts of those states with like holding.

It was said in Re Pitcairn's Estate, 6 Cal. (2d) 730, 59 P.(2d) 90, 92:

"It is sometimes suggested that the recitals in the attestation clause furnish the basis for the presumption, so that the court in upholding the will against contradictory evidence is really making a finding from the declarations in the instrument. Following this theory contestants seek to limit the presumption to cases where a full attestation clause is contained in the will.

"In our view the distinction thus drawn is illogical and the rule is too narrow. There is no need of an 'attestation clause'; it is sufficient that a will be witnessed or attested, and the recital of the steps in execution is not required. 68 C.J. 711, § 392. It does not seem reasonable, therefore, to have the important presumption of due execution turn upon the presence or absence of this unnecessary provision. The foundation of the presumption is the proof of genuineness of the signatures, for the instrument is then on its face a valid will. Doubtless recitals in an attestation clause are entitled to greater weight, but the logical basis for the presumption, as well as its practical necessity, are the same whether or not there is such a clause."

That case affirmed the District Court of Appeals, the opinion of which is reported in 50 P.(2d) 78.

In a similar case it was stated by the Supreme Judicial Court of Massachusetts in Leatherbee v. Leatherbee, 247 Mass. 138, 141 N.E. 669, 670: "There is no statutory provision that an instrument drafted in the similitude of a formal will shall not be set up because the witnesses are dead, are insane, are beyond the jurisdiction of the court, or, after a lapse of many years, are unable to recollect anything material to the execution of the will other than the fact that the signatures to the proffered instrument are those of the testator, and of the persons who appear as witnesses upon it. Such a rule would make the validity of the will dependent, not upon the order and time of affixing signatures, not upon the capacity of the testator to execute a will, nor upon the absence of fraud and undue influence, but upon the fullness, accuracy, and persistency of the recollection of one or more of the persons who signed it as a witness."

To the same effect is Nickerson v. Buck, 12 Cush. (Mass.) 332; Dewey v. Dewey, 1 Metc. (Mass.) 349, 35 Am.Dec. 367; Orser v. Orser, 24 N.Y. 51; Jauncey v. Thorne, 2 Barb.Ch. (N.Y.) 40, 45 Am.Dec. 424; Abbott v. Abbott, 41 Mich. 540, 2 N.W. 810; Re Rosenthal's Will, 100 Misc. 84, 164 N.Y.S. 1060; Carpenter v. Denoon, 29 Ohio St. 379; In re Peverett (1902) Probate (Eng.) 205; Scarff v. Scarff (1927) 1 Ir.R. 13; (See annotations in 76 A.L.R. 622); German Evangelical Church v. Reith, supra; 1 Page on Wills, § 675. The Supreme Church of Washington holds to the contrary. In re Chafey's Estate, 167 Wash. 185, 8 P.(2d) 959.

The appellee made prima facie proof that the execution of the will complied with the requirements of the statute, and these facts were admitted; only the presumptions of due execution following such proof were denied.

The judgment of the district court is affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

72 P.(2d) 24

MORITZKY v. BOBO et ux.

No. 4231.

Supreme Court of New Mexico.

Sept. 27, 1937.

G. Thurston Maltby, of Clovis, for appellants.

G. L. Reese, Sr., of Roswell, for appellee.

ZINN, Justice.

On September 3, 1934, plaintiff G. B. Moritzky, entered into a written contract with defendant M. C. Morgan agreeing to make an exchange of certain properties between them.

The contract between plaintiff and Morgan, and which is the foundation of the subsequent transfers of property as hereinafter related, reads as follows:

"The State of New Mexico
"County of Curry.

"Known all Men By these presents. I C. M. Morgan Party of the first part and G. B. Moritzay Party of the second part Do this day make and inter into the following agreement to wit.

"The said M. C. Morgan Have this day Sold traded and convayed to G. B. Moritzay. The following described property to wit. Beeing 300 acres of land out of the east half Nancy Gawin League and Labore survey. IN Hardin County Texas. Clear of det, Above described land is practuley level. $7.000. in $5.000. notes each. Executed by P. G. McKinley in favor of M. C. Morgan, said notes bare 8 per ct. intrest and beeing first lean notes out of the ease half of the Nancy Gawen League and Labore. Hardin Co. Tex. Also $3100. in first vendore notes executed by A E Parker. and A. M. Hopper, on the following described property. Beeing 80 acres of land out of the Robert Moore survey. Abstract No. 1074 Section No. 923. Cert. No. 2005. In Star County Tex. Said notes bare 8 per-

cent intrest. Said land is *eragated* land and on ditch with water *wr*ight. G. B. Moritzky. Is this day conveying to M. C. Morgan the following described property for the above described property. Property known as the Roswell Ho*tell* in Roswell New Mexico. Located on North V*eginia* St. Lot 50 by 75. Feet. With all improvements the*are*on. All in*det*ness *not* e*xcede* $2.000. Which Morgan takes title subject to. With all furniture except what belongs to Mrs. Brure. M C Morgan gets am*eda*te po*setion*. M C Morgan guarantees the above titles to all property conveyed to G. B. Moritzky. By good and merch*antible* title. And is to furnish Abstracts for examination by Moritzky. After examination of abstracts they are to *bee* returned to Morgan, But in event that Moritzky wan*t* abstract at any time the said Morgan agrees to lend for a short time The said M C Morgan F*other* guar*ent*ees that in case said titles *is* not merchan*tib*le then in that event the said Morgan agrees to *Celiver* title and *posetio*n to Hotel at once. On b*ee*ing l*eagl*e notice. And the said G. B. Moritzky is to have the *m*organ notes and land. for rents on Hotel. M C Morgan is to furnish title in a rea*sne*ble le*nth* of time.

"[Signed] M. C. Morgan
"G. B. Moritzky.

"Witness. This the 3*th* of Sept. 1934."

Morgan made a deed of conveyance (presumably such deed was executed pursuant to the terms of the above contract) to plaintiff on September 4, 1934, purporting to convey to plaintiff the real estate in Texas and at the same time transferred to plaintiff the vendor's lien notes referred to in the contract. On September 8, 1934, Moritzky conveyed to Morgan the property known as the Roswell Hotel, which latter deed was entered of record on September 11, 1934. On December 4, 1934, Morgan conveyed by deed the Roswell Hotel property to defendant J. S. Bobo which deed was recorded December 8, 1934. The contract hereinabove set forth between plaintiff and defendant Morgan was recorded on November 3, 1934.

Upon investigation, Moritzky discovered that Morgan had no title to the property in Texas which he had conveyed to him. The plaintiff thereupon brought suit for the cancellation of the deed from himself to Morgan and also the deed from Morgan and wife to defendant Bobo. In addition to J. S. Bobo and his wife as defendants, Morgan and his wife were made party defendants. Defendant Morgan and wife defaulted; defendant Bobo and wife answered. The case was tried to the court, and judgment was entered in favor of plaintiff canceling the deeds from Moritzky to Morgan and from the Morgans to Bobo and directing a return of the property to plaintiff. From this judgment J. S. Bobo and his wife, Florence M. Bobo, appeal.

The answer of the Bobos discloses that their defense was based on the theory that they had neither actual or constructive notice of the written contract entered into between the plaintiff and Morgan, and also upon the additional theory that, inasmuch as the contract which provided for recon-

veyance, in the event Morgan did not have title to the property, was not signed by Hattie I. Morgan, the wife of Morgan, that therefore such contract was not binding and valid and when plaintiff conveyed the Roswell Hotel to Morgan it became the community property of Morgan and his wife. The Bobos also denied that the conveyance from Morgan and wife to them was made with intent to defraud the plaintiff, and further that, if there was any intentional fraud on the part of Morgan, these defendants had no knowledge thereof and were not a party thereto.

The judgment was entered by the court on December 23, 1935. Three days thereafter, defendants filed certain objections and exceptions to findings and conclusions made by the court in its judgment. No motion was made to vacate the judgment of the court, and only a general objection and exception was made to the findings and judgment. On January 22, 1936, the court entered an order denying the exceptions, requested findings of fact and conclusions of law proposed by the defendants. We consider the record upon the findings and conclusions of the court, and upon the issues tendered by the answer.

The court found that the defendant Bobo had due notice and knowledge of the contract between plaintiff and Morgan at the time the Bobos purchased the Roswell Hotel from the Morgans, and thereby took the property subject to any rights and equities in favor of the plaintiff.

The court also found that Morgan did not own the lands in Texas which he purported to convey to plaintiff pursuant to the agreement, and that Morgan obtained the deed to the Roswell Hotel property through fraud and misrepresentation.

From what has been said it is apparent that the judgment under review is before us with only a general objection and exception to the findings therein contained and to the judgment itself. While it is true defendants filed certain objections and exceptions to the findings and conclusions of the court, this was not done until three days after judgment had been entered and is ineffective to impose upon us a duty to review the evidence to ascertain whether the findings are supported by substantial evidence. This has been so often decided that we need not cite authority.

The findings and conclusions support the relief awarded cancelling the deed from Moritzky to Morgan; also the deed from Morgan and wife to defendant Bobo because of the latter's constructive knowledge of the contract on Morgan's part to reconvey and redeliver possession of the property in the event Morgan's title was not merchantable.

There is no merit in the contention that the Moritzky property became community estate in Morgan's hands, because his wife did not sign the contract containing the covenant to reconvey in the event Morgan's title prove unmerchantable. The court convicted Morgan of fraud and mis-

representation in the transaction. That fraud permeated the entire transaction. Equity imposed upon him a trust to reconvey in accordance with the covenant in the event of a failure of consideration. His wife's signature was unessential to an enforcement of the trust. We have heretofore enunciated this equitable principle. Mapel v. Starriett, 28 N.M. 1, 205 P. 726.

We need not concern ourselves with the claim of Bobo that the original executory contract of conveyance was merged into the executed deed. This theory is urged here for the first time. The point was not raised in the trial below.

Other claims of error presented by defendant Bobo have been considered and found to be without merit.

While the decree canceling Bobo's deed and restoring the property to its rightful owner entails loss upon the former, it may be attributed to his own loose business practices. Bobo himself testified: "Q. Did you find anything in that deed relative to any contract between Mr. Morgan and Mr. Moritzky? A. No, sir. When Mr. Morgan offered to trade it to me, I told him, I said to him, now, Mr. Morgan, I don't want this property if Mr. Moritzky holds anything against it. He said, 'He hasn't got a thing in the world against it. I will show you what I have got.' That is when he pulled the deed out and I looked at it."

Thus aware of a possible claim by Moritzky, he did not pursue the matter. He traded for the Roswell Hotel without having seen it at the time of the trade and without an abstract of title to the property, merely relying upon the warranties contained in a deed given him by a man whom he had just met and of whom he had never heard before. He gave to Morgan a farm of doubtful value in exchange for property having an approximate value of $20,000. The trade itself was made in a loose manner. As expressed by Bobo:

"Q. So you traded without exchanging abstracts or anything of the kind? A. Yes, sir.

"Q. Just like you would swap knives. A. Sight unseen."

Parties may anticipate loss when important business transactions are negotiated in such fashion.

Finding no error in the record, the judgment of the district court will be affirmed. It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

72 P.(2d) 27

In re KENNEY'S ESTATE.

No. 4260.

Supreme Court of New Mexico.

Sept. 28, 1937.

Bryan G. Johnson and Gino J. Matteucci, both of Albuquerque, for appellant American Surety Co. of New York.

W. A. Keleher and A. H. McLeod, both of Albuquerque, for appellant L. N. Cary.

Mechem & Hannett and Donald B. Moses, all of Albuquerque, for appellee.

BRICE, Justice.

This is an appeal from a decree of the district court in an action for an accounting brought by appellee as administrator de bonis non of the estate of Eugene F. Kenney, deceased, against appellants, as administrator with the will annexed of the same estate, and his surety on his bond. The appellant American Surety Company will be referred to as "Surety Company," and the other parties as appellant and appellee, respectively.

The record shows the following proceedings in the probate and district courts:

On July 7, 1924, an instrument purporting to be the last will and testament of Eugene F. Kenney, deceased, was filed in the office

of the probate clerk of McKinley county, by E. L. Kenney, one of the legatees, and recorded in the records of wills. The will accompanied a petition requesting that it be admitted to probate, and that letters testamentary issue to John C. Spears and Simeon Frost, named executors therein. An order was entered on the 15th day of July, 1924, fixing the 2d day of September following as the date for proving the will; for which purpose statutory notice was duly given. On the 2d day of September, 1924, the testimony of Dr. A. H. Delong, a subscribing witness to the will, was taken and filed in the case. No order probating the will appears in the record or on file. If it was made, it has been lost. On the 18th day of September, 1924, a petition was filed in the cause by appellant, in which it was stated that the two persons named for executors in the will had refused to qualify as such and had expressed the desire that the petitioner "be appointed as the person to administer upon said estate." On the same date an order appointing appellant administrator was entered, in which among other things it was stated: "* * * that decedent died testate, leaving two persons named as executors, each of which have refused to act as such executors; that L. N. Cary, who has petitioned to be appointed as administrator, is legally competent to act for said estate. It is therefore ordered that L. N. Cary be and he is hereby appointed administrator of the estate of Eugene F. Kenney, deceased."

Appellant did not file an oath as administrator; but made and filed his bond with appellant surety company as his surety. The bond is in form that of an ordinary administrator's bond. No mention is made of the fact that he was appointed administrator with the will annexed in the order, bond, or letters. Notice was duly published of appellant's appointment.

On the 21st day of January, 1925, appellant as "administrator of the estate of Eugene F. Kenney, deceased, with the will annexed," petitioned to remove the proceedings into the district court of McKinley county; which was accordingly done by order of the district court, in which it was recited that the matter came on for hearing on "the petition of L. N. Cary, petitioner and administrator with the will annexed," etc.

An application was made by appellant, as administrator of the estate with will annexed, to have the will construed by the district court; and process duly served. The court thereafter entered his decree construing the will, in which it was recited:

"This cause coming on to be heard upon this 16th day of February, 1926, in a suit brought by L. N. Cary, administrator of the estate with the will annexed, of Eugene F. Kenney, deceased, the court doth find the following facts:

"First: That Eugene F. Kenney aforesaid died testate on or about the 5th day of July, 1924, in Gallup, New Mexico, leaving a will, a copy of which is attached to and made a part of the bill filed herein; that letters of administration with the will annexed were issued unto L. N. Cary as

administrator on or about the 15th day of December, 1924, by the Judge of the probate court of McKinley County, New Mexico. That said L. N. Cary, administrator as is set forth hereinbefore has qualified as such administrator by giving the bond required by the order of the probate judge, and that said will was duly probated by said court."

In fact, since appellant's appointment, it has been assumed by the courts and all persons concerned in the administration of the estate, as all proceedings show, that the will was duly probated and appellant was the administrator with the will annexed.

In a petition by some of the heirs for the removal of appellant, he was designated "administrator cum testamento annexo," as he was in the order of removal, and the order appointing appellee administrator de bonis non.

Upon order of the court, appellant filed a final report and accounting, to which the appellee filed objections and gave notice thereof to appellant and the surety company, both of whom appeared at the hearing on the objections to the final report.

At such hearing counsel for the surety company stated: "Mr. Johnson: I am appearing in this proceeding on the objections filed to the final report of L. N. Cary on behalf of the American Surety Company of New York, by reason of the fact that the American Surety Company of New York appears as the surety on a bond executed by L. N. Cary as principal, and that notice of this proceeding was given to the American Surety Company of New York. The general rule of law is apparently that a surety who has notice of a hearing on an administrator's account will be bound in any suit on the bond as to the judgment entered by the Court against the administrator, and we therefore appear in this proceeding solely to protect our interests in that regard; but, this appearance, in so far as the law may permit, does not or is not intended to submit the Surety to the jurisdiction of the Court for the purpose of entering judgment in this proceeding, nor does the American Surety Company of New York waive any rights that it may have to question the liability of the Surety Company on the bond itself."

The fact that the bond designates appellant "administrator" instead of "administrator with the will annexed" is immaterial, if in fact the order of appointment shows the true intent was to appoint him administrator with the will annexed. The appellant's application and the order appointing him administrator recite in substance that Eugene F. Kenney died testate; that the executors named in the will had refused to act as executors and that appellant was legally competent to act. This state of facts permitted only the appointment of an administrator with the will annexed; and such was the effect of the order of the court. Bull v. Bal, 17 N.M. 466, 130 P. 251. For more than ten years the court and all parties interested have assumed in all proceedings in the cause that appellant was the administrator with the will annexed. This was the evident inten-

tion of the court, and the district court did not err in holding that appellant was the administrator with the will annexed. It may be stated in passing that the Surety Company and not the appellant raises this question.

The Surety Company raises the question that the will was never probated, by reason of which there could be no administrator with the will annexed. The whole proceeding has been conducted as though the will had been probated; the appellees have taken the benefits as though it had been probated, received a distribution of cash, and the administrator has proceeded to sell real estate and otherwise act under the terms of the will.

So far as the liability of appellant is concerned, it is immaterial whether a formal order was entered probating the will. In fact, all parties to the proceeding, including the probate and district courts, have acted under the assumption that the will was duly probated. Appellant took possession of the property of the estate and made disposition of it under this assumption. Except for the bond, appellant could not have obtained possession of the estate, and his surety (appellant does not raise the question) cannot now release itself from its obligation by denying the only authority under which its principal could have secured possession of these funds. A voluntary surety of one who takes possession of property as a trustee cannot release himself from liability on his principal's bond after he becomes liable thereon, upon the ground that the appointment of the principal as trustee was irregular or unauthorized. Under these circumstances the surety of a trustee will not be permitted to say that his principal was not in fact a trustee; he is estopped under well-recognized principles of law.

"If the proceeding was irregular for want of notice to the children of Mrs. Lynch, they might object to it in a proper manner for that cause; but Lynch, after having obtained the property upon the pretence of being the trustee, cannot be permitted to deny his liability to account as such. The defendant, who voluntarily became his surety in order that he might take the trust property, is for a like reason precluded from denying his liability as surety." People v. Norton, 9 N.Y. 176.

Also see U. S. to Use of Hine v. Morse, 218 U.S. 493, 31 S.Ct. 37, 54 L.Ed. 1123, 21 Ann.Cas. 782; 65 C.J. Title "Trusts" § 1020.

The district court did not err in holding that the Surety Company was estopped from defending upon the ground that appellant's appointment was not authorized because of the failure of the probate court to enter a formal order admitting the will to probate.

The district court concluded that items of expense of administration aggregating more than $2,000 were "claims against the estate" and should have been filed, approved, and allowed within twelve months of the appointment of the ad-

ministrator, as provided by the following sections of N.M.Comp.St.Ann.1929:

Section 47-504: "It shall be the duty of the probate judge to hear and determine claims against the estate. All such claims shall be stated in detail, sworn to and filed, and five days' notice of the hearing thereof, accompanied by a copy of the claim, shall be served on the executor or administrator, unless the same have been approved by the executor or administrator, in which case they may be allowed by the judge without such notice."

Section 47-505: "All claims against the estates of deceased persons not filed and notice given, as provided in the preceding section, within one year from the date of the appointment of the executor or administrator, shall be barred. No suit upon any claim shall be maintained unless the same be begun within eighteen months after the date of such appointment."

He refused to hear testimony in support of these items of appellant's account and denied credit therefor, not because unjust, but because not filed as "claims against the estate."

Expenses of administration are not "claims against an estate."

"Claims against the estate" are provided for by article 5 of chapter 47, N.M.Comp.St.Ann.1929, entitled "Executors and Administrators," in which is section 47-504, supra, and are debts made by deceased in his lifetime, and funeral expenses; whereas settlement of accounts of administration is provided for by article 6 of the same chapter, and are expenses of administration. None of the provisions of article 5, entitled "Allowance and Payment of Claims," have reference to settlement of the accounts of an executor or administrator.

"Claims against an estate" must be filed within one year from the date of the appointment of the executor or the administrator and, if not approved, are barred by limitation if suit is not filed thereon within eighteen months after such appointment. The probate judge may hear and determine such claims upon five days' notice to the administrator if not approved by him. Section 47-505, N.M.Comp.St.1929, supra. An order approving such claim is a judgment, which if not appealed from becomes final in a specified time. In re Field's Estate, 40 N.M. 423, 60 P.(2d) 945.

The expenses of administration are cared for in a different manner. The administrator is required to render an account of his trusteeship at the end of the first six months, and thereafter as the court may direct. Section 47-601, Comp.St.1929. But the statute that applies to the settlement of the accounts for the administration of the estate is section 47-604, Comp.St.1929 (since amended by chapter 81, N.M.L. 1931), the essential parts of which are as follows:

"When the estate is fully administered, it shall be the duty of the executor or administrator to file his final account and

report. Such final account and report shall contain a detailed statement of the amount of money received and expended by him from whom received and to whom paid, and refer to the vouchers for such payments, and the amount of money and property, if any, remaining unexpended or unappropriated. The account and report shall also contain the names and addresses of all of the heirs of said decedent so far as the same are known to said executor or administrator, and as the same shall appear from the records and files in the probate court, and also the names and addresses of any and all devisees and legatees, as the same shall appear in the last will and testament of such decedent. Such account and report shall be verified by the oath of said executor or administrator, and upon the same being filed, the court or judge thereof shall appoint a day at some term subsequent thereto for the hearing of objections to such final account and report, the settlement thereof, and for a hearing and determination of the heirship to said decedent, the ownership of his estate, and the interest of each respective claimant thereto or therein, and the persons entitled to the distribution thereof."

Provision is made in this section for service of process upon all heirs, legatees, and devisees, so that all interested persons could be before the court with an opportunity to object to and contest the final account.

Notwithstanding there may have been accountings semiannually, or at other times, any orders entered thereon are tentative and interlocutory. Ordinarily they are entered by the court in the absence of interested parties other than the executor or administrator; but at the final accounting all parties are before the court. The administrator or executor upon final accounting is required to present an itemized, sworn account, supported by vouchers, any item of which may be contested by any interested party. Section 47-604, N.M.Comp.St.1929, supra.

No authority has been cited by appellee in support of the decision of the district court on this question, and we have found none. The district court erred in refusing to hear testimony upon the merits of these items of expense of administration.

Appellant was charged with $5,805.10, representing a mortgage debt due the Gallup bank, which was secured by a mortgage against the deceased's real estate, regarding which he tendered the following evidence: "The administrator now offers to prove that the sum of $5,805.10 was paid by the administrator to the Gallup bank to discharge a note in that amount which was secured by real estate belonging to the Kenney estate, and which sum of $5,805.10 was a part of the money received on the sale of said real estate, the total sale price being $8,000; and further offers to prove in connection with the payment and discharge of said note to the Gallup bank that the payment thereof was a part of the transaction for which the real estate was sold."

The district court sustained the following objections to the tender: (1) That the claim is barred by the statute of limitation; (2) that the claim had not been filed and sworn to as required by law; (3) that the debt was not made by him, but some other person before appellant was appointed administrator.

The court refused the tendered testimony and charged appellant with this amount.

One provision of the will was as follows: "4th: I appoint John C. Spears and Simeon Frost, both of Gallup, New Mexico as joint executors of this my last will and testament and direct that they shall sell all of my Property, real, personal and mixed, in New Mexico and divide the cash received therefrom equally as above set forth to my brother L. L. Kenney, and my nephew, Willis Kenney and my stepsister Nellie A. Babb."

A mortgage debt is not barred by limitation because not filed for payment with the executor or administrator. The only effect is to defeat any deficiency after the application of the proceeds of a sale of the real estate under foreclosure to the payment of the debt. It does not become a debt of the estate unless the payee elects to file it as a claim. This is the general rule, though there are some exceptions in the early cases of California and Florida. The Texas decisions are exceptions. See the cases collected on the subject in an annotation in 78 A.L.R. beginning at page 1126.

It is provided by section 47-301, N.M. Comp.St.1929: "The executor shall exercise all the authority conferred upon him by his appointment, and if it should be necessary, in order to carry out the desires of the testator, to sell a portion or the whole of the estate, he may dispose of the same at public sale, without being allowed to purchase, under penalty of the sale being declared null and void."

It was held in Bull v. Bal, supra, that this section of the statute does not prohibit a private sale by the executor or administrator. From the terms of the will and from the record, it is quite evident that the power given the executors was not intended to be personal to them. The legatees lived in a distant state and were not in a situation to look after their interests; from which it may be inferred that it was the intention of the testator that the property be sold and the proceeds divided among the legatees in any event.

The tendered evidence, if uncontradicted, would establish that at the time the property was sold for $8,000 there was a mortgage lien against it for $5,805.10, which in making the sale (and a part of that transaction) was paid off. It may be assumed that the property could not be sold without the payment of the mortgage debt. Other evidence shows that the property was appraised at $8,000, as unincumbered property; and no question is raised as to the correctness of this valuation. The estate therefore had an equity

in the property of $2,194.90. The property should have been appraised at that figure. We stated in Shortle v. McCloskey, 39 N.M. 273, 46 P.(2d) 50, 53: "It appears to us that the executor does not become 'possessed' of property mortgaged by the deceased during his lifetime, except as it is incumbered by the lien, or, in other words, that he only becomes 'possessed' of the equity in such mortgaged property and not of the property itself."

In our opinion in that case we quoted with approval 24 C.J. title "Executors and Administrators," § 1182, as follows: "'Property which is subject to a lien or incumbrance can in a strict sense be considered assets of the estate only so far as its value exceeds the amount of the incumbrance, and hence it follows that the rules of priority applicable to the case of general assets of the estate must be subject to considerable modification when applied to incumbered property, although the excess after payment of the incumbrance will be applied according to the usual rules of priority.'"

We also cited other authorities in that opinion, to which reference is made.

Now the estate received the proceeds of the sale of the equity in the property at its appraised value; but it is here sought to charge the appellant with money he never received and to which the estate was not entitled. There is no claim of fraud in the transaction, nor that appellant did not secure for the estate its full value, taking into consideration the mortgage debt against it. Appellant could not have exercised the power of sale without liquidating the mortgage debt. Had he sold the estate's equity in the property subject to the debt, no one could have questioned the transaction on the grounds here advanced; and that in effect was done.

The appellant was chargeable with the value of the equity in the property only, and this was paid into the estate.

The district court will not be permitted to charge against the appellant money he did not receive and to which the estate, under no consideration, was entitled. It was error to do so.

The statute of limitation does not bar a recovery of the expenses of administration. No judgment could have been entered thereon until appellant's final report had been filed and accounting had thereon.

The Surety Company entered its general appearance in the case and the court was authorized to enter judgment against it.

Ordinarily cases involving estates can be disposed of in two years; and we agree with appellee that it was inexcusable that this case was not closed years ago. The fault is primarily that of appellant, but the legatees were not without remedy, which they tardily exercised. The district court could, by exercising his powers, have compelled an accounting years ago. But the delay is no reason, as appellee seems to contend, for denying appellant rights to which in all conscience he is entitled.

The cause will be reversed and remanded, with instructions to the district court to proceed with the consideration of the objections to the appellant's final report, not inconsistent herewith.

It is so ordered.

HUDSPETH, C. J., and SADLER and BICKLEY, JJ., concur.

ZINN, J., did not participate.

72 P.(2d) 606

SCHEER v. STOLZ et al.

ATLER v. SAME.

No. 4236.

Supreme Court of New Mexico.

Sept. 28, 1937.

J. S. Vaught, of Albuquerque, for appellant.

Robert Hoath La Follette, of Albuquerque, for appellees.

BRICE, Justice.

These cases were consolidated for trial in the district court. Separate judgments were entered, though the whole proceedings are in effect one case and should have been determined in Atler v. Stolz et al., which we will consider first.

On July 2, 1932, the appellee recovered judgment against Victor Stolz (a party hereto in the district court) for the sum of $698.33 in the district court of Bernalillo county, the transcript of which was filed of record on the 21st day of December, 1932, in the office of the county clerk of Valencia county, in which county the land hereinafter mentioned is located. After obtaining that judgment, the present action was brought by appellee against appellant and others to foreclose that judgment lien against lands belonging to Stolz, the record title to which was in appellant.

The appellant answered, claiming title to the land in question by virtue of a warranty deed executed by Edward E. Enderlin and wife before appellee had obtained her judgment lien against the lands. In Scheer v. Stolz, appellant alleged that such deed was intended as a mortgage to secure an indebtedness of more than $7,000 due him by Stolz. The companion case of Scheer v. Stolz et al. was brought to foreclose such mortgage.

A decree was entered in the district court, foreclosing appellee's judgment lien securing the sum of $1,001.89; holding such lien superior to appellant's mortgage, which was in form a warranty deed from Enderlin and wife, in which appellant's name was inserted as grantee by Stolz, the owner of the land; and superior to any right or interest of any of the defendants (including appellant) in the land. The judgment lien was foreclosed and the property ordered sold at a special master's sale, and proceeds of sale applied to the payment of appellee's judgment.

Scheer alone has appealed from such decree.

In the case of Scheer v. Stolz et al., the court entered a decree holding appellee's judgment lien superior to appellant's mortgage; decreeing the foreclosure of both and directing that appellee's debt be first paid out of the proceeds of such sale, and the balance, to the extent of the amount due appellant, applied to the payment of his mortgage debt.

Exceptions were taken by appellant to the findings of fact and conclusions of law

made by the court, and to the refusal of the court to make certain requested findings and conclusions, and assignments of error properly based thereon were filed; but no point is made by appellant that the findings of fact, made by the court or any of them, are not supported by substantial evidence. These findings, therefore, must stand as the facts in the case, and from them we deduce the following material to a determination of the questions presented:

Prior to the 19th day of May, 1927, appellee owned in fee simple certain real estate in Valencia county, N. Mex., and on that date sold it to one Stolz, a party defendant in the district court, receiving certain promissory notes as a part of the consideration. Appellee joined by her husband, on May 29, 1927, executed and delivered to Stolz a warranty deed, intending thereby to convey to him said real estate. Stolz fraudulently altered said deed, by inserting the name of Edward E. Enderlin as the grantee therein, for the purpose of hindering, delaying, and defrauding the creditors of Stolz, including the appellee; after which the deed was duly recorded. Enderlin paid no consideration for said deed nor for the property thereby conveyed, of which Stolz is the owner. Thereafter, Stolz prepared a warranty deed in which Enderlin and wife were grantors, but the name of the grantee was left blank, which Enderlin and wife executed with the purpose of conveying said property to Stolz, and with the belief that his name appeared as grantee therein. They gave no authority to Stolz to insert the name of any other person in said deed. Stolz, for the purpose of hindering, delaying, and defrauding his creditors, including appellee, inserted the name of appellant as grantee in said deed many months after its execution, of which appellant then and there had knowledge. Said deed was in fact a mortgage made to secure a promissory note of said Stolz in the sum of $5,000. At a subsequent date an additional promissory note of $2,000 was made by Stolz, and by written agreement it was provided that it should likewise be secured by said warranty deed. In July 1932, appellee Atler recovered a judgment in the district court of Bernalillo county against Stolz on the promissory notes she had taken as part consideration for the land she sold him in 1927, which (including interest, costs and attorney's fees) amounted to $761.05. A transcript of that judgment was filed in the office of the county clerk of Valencia county on the 21st day of December, 1932, on which there was due $1,001.89, and thereupon became an effective lien against all real estate owned by Stolz in Valencia county.

"Any money judgment rendered in the supreme or district court shall be docketed by the clerk of the court in a book kept for the purpose, and shall be a lien on the real estate of the judgment debtor from the date of the filing of a transcript of the docket of such judgment in such book in the office of the county clerk of the county in which such real estate is situate." Section 76-110, 1929 Comp.St.

The question then is, Did Stolz own the property in suit at that time? Appellees did

not learn of the change in the names of grantees in their deed to Stolz until February, 1933.

The court found that the deed from Enderlin to Stolz, in which the name of appellant was substituted as grantee, was made with the intention of deeding to Stolz; and that, without the consent of the grantors and many months after the making of the deed, appellant's name was substituted by Stolz for his name, without Enderlin's knowledge or consent. The court also found that Stolz was the equitable owner of the property. It may be assumed that this was based upon his purchase from appellee and deed from her which the court found had been altered by writing Enderlin's name in as grantee.

It has been held by this court that a deed in which the grantee's name is left blank is effective as a conveyance if and when the blank is filled in by the grantor or his authorized agent. Vosburg v. Carter, 34 N.M. 194, 279 P. 563; Jones v. Rocky Cliff Coal Mining Co., 27 N.M. 41, 198 P. 284.

It is the general rule that a deed executed with the grantee's name in blank can only be vitalized by the grantor, or some person authorized by him, writing in the grantee's name; and the writing of an unauthorized name as grantee is a material alteration and avoids the deed. 2 C.J. Title "Alterations of Instruments," § 75.

"If the name of William Steele was inserted in the deed as grantee, after its full execution and attestation, instead of the name of some other grantee, which was stricken out, no doubt, the alteration was very material, and nothing could in that case pass by the deed to William Steele." Steele's Lessee v. Spencer, 1 Pet. 552, 7 L. Ed. 259, 262.

See annotation in 32 A.L.R. 742 and 75 A. L.R. 1108; King v. De Tar et al., 112 Neb. 535, 199 N.W. 847; Pasedach et al. v. Auw et al., 364 Ill. 491, 4 N.E.(2d) 841; Sanders v. Kirk, 140 Okl. 26, 282 P. 145; Delaney v. Light (Mo.Sup.) 263 S.W. 813; Stover v. Snow, 315 Mo. 1046, 287 S.W. 1042; Thummel v. Holden, 149 Mo. 677, 51 S.W. 404.

The court found that appellant had knowledge of the alteration of the warranty deed by Stolz, who wrote his name in as grantee to defraud his creditors, so that appellant was not misled by it. If all parties had agreed to this change it would have been effective (see above authorities and Abbott v. Abbott, 189 Ill. 488, 59 N.E. 958, 82 Am.St.Rep. 470); but the change was made by Stolz with appellant's knowledge, and without the knowledge or consent of the Enderlins, long after its execution by them. By this change Enderlin and wife were caused to convey and warrant the title of the land to appellant. No such contract could be made for them. The deed was void (see authorities cited above and Goodwin v. Norton, 92 Me. 532, 43 A. 111) at least as to all persons except appellant and Stolz, and as to that we need not decide; but see Walsh v. Hunt, 120 Cal. 46, 52 P. 115, 39 L.R.A. 697.

Appellant cites the recording acts and contends that as the court foreclosed

his mortgage it necessarily follows that the mortgage was found to be valid, and therefore its record was notice to appellee. But this mortgage (if it was a mortgage) was not acknowledged, and therefore was not subject to record, and gave no constructive notice to any one. The original acknowledgement applied to a different instrument. Citizens' Bank of Moultrie et al. v. Taylor et al., 169 Ga. 203, 149 S.E. 861, 67 A.L.R. 355, and annotations in 67 A.L.R. beginning at page 364.

The court found that the change in the deed executed by Enderlin and wife was to defraud the creditors of Stolz, and "that the plaintiff Gaudalupe Atler did not discover the fraud of Victor Stolz until during the month of February, 1933." This was after her lien was recorded in Valencia county, which was on December 21, 1932. The finding we have quoted had reference to the change in the two deeds by the insertion of substitute names as grantees. Appellee's lien was on record in Valencia county before she knew of the changes in the deeds, even assuming that the mortgage in question was valid as to third parties, or at all. 1929 St. § 118-110; Fulghum v. Madrid et al., 33 N. M. 303, 265 P. 454. In any event, appellee's lien is superior to appellant's claim under the altered warranty deed.

The decree of the district court in each case will be affirmed.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

72 P.(2d) 609

STATE v. OCHOA et al.

No. 4220.

Supreme Court of New Mexico.
Aug. 25, 1937.

Rehearing Denied Oct. 15, 1937.

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John F. Simms, of Albuquerque, Wheaton Augur, of Santa Fé, Francis A. Brick, Jr., and Walter N. Thayer, 3d, both of New York City, and Hugh B. Woodward, of Albuquerque, for appellants.

Frank H. Patton, Atty. Gen., and J. R. Modrall, Asst. Atty. Gen., for the State.

SADLER, Justice.

The defendants were convicted of murder in the second degree in a trial before the district court of San Juan county on change of venue from McKinley county. They prosecute this appeal from the judgment of conviction pronounced upon them at such trial. The victim of the homicide was M. R. Carmichael, sheriff of McKinley county. He was slain while accompanying a prisoner from the office of the local justice of the peace to the county jail.

The homicide occurred about 9:30 o' clock in the forenoon of April 4, 1935. A few days previously one Esiquel Navarro, one Victor Campos, and a Mrs. Lovato had been arrested on warrants charging the unlawful breaking and entering of a certain house. Theretofore the house had been occupied by said Campos who was evicted in forcible entry and detainer proceedings. Following eviction, so the charge ran, the three persons just mentioned forcibly re-entered the house and replaced Campos' furniture therein. The preliminary hearing for Navarro, who was confined in jail, was set for 9 a. m., April 4th.

The house in question was located in a section of Gallup known locally as Chi-

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huahuita, largely occupied by former employees of a coal mining company. Considerable excitement had been engendered among them by the eviction proceedings and the approaching trial of Navarro. At a mass meeting held in Spanish-American Hall in Gallup on the afternoon of April 3d, attended by some fifty or sixty people but not shown to have been called especially for the purpose, a committee was appointed to confer with Sheriff Carmichael regarding Navarro. The committee waited upon the sheriff and demanded Navarro's release. This request was denied. Some members of the committee then asked permission to talk with Navarro. This request likewise was denied by the sheriff, who informed the committee Navarro's trial would take place at 9 a. m. the following day and that they then could see him.

The sheriff, accompanied by several deputies, left the jail with the prisoner, Navarro, shortly before 9 o'clock the morning of April 4th and proceeded to the office of Justice of the Peace William H. Bickel on Coal avenue, a distance of one and one-half blocks. Arriving there, they found the justice engaged in the hearing of another matter and were compelled to await the conclusion of that hearing. Soon after they arrived a crowd of approximately 125 people, included in which were many women and children, gathered on the sidewalk and in the street in front of the office of the justice of the peace. The crowd was made up largely of friends of the prisoner, Navarro. The officers, even before leaving the jail with the prisoner, had become apprehensive that an effort might be made to rescue him. So that, when the crowd sought admittance to the justice's chambers which had seating capacity for not more than 25 spectators, none except witnesses were permitted to enter.

The crowd in front grew threatening. They pressed against the plate glass windows to the extent that one of them was cracked; pounded on the windows with their fists; shouted, cursed; and some threatened to kick the door down if they were not admitted. After some delay incident to completion of the other hearing, and upon Navarro's objection that he had no attorney, the hearing of his case was postponed for the purpose of enabling him to secure an attorney to represent him.

Apprehensive of trouble in attempting to make their exit from the office of the justice through the crowd at the front entrance en route back to the jail, the sheriff directed that Navarro should be removed through the rear door. In an endeavor to screen as much as possible this maneuver from the crowd in front, the sheriff directed two of his deputies to stand against the front windows.

As Sheriff Carmichael reached for the prisoner's arm to begin the exit from the building, Navarro communicated with the crowd outside by a motion with his arms suggestive that he was being removed through the rear door. This door opened

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into a 16-foot paved alley extending from Third street to Second street. Third street intersects Coal avenue, upon which the justice's office is located, only a few doors west of the front entrance to said office. The jail is located on Second street at its intersection with the alley, and it was the plan of the officers to escort the prisoner through the alley to the jail, thus avoiding the crowd.

Upon discovering the maneuver of the officers, however, the crowd ran to the corner of Third street and Coal avenue, down Third to the alley, and converged eastwardly upon the rear entrance to the justice's office, forming in a semicircle around the entrance. The officers, nevertheless, succeeded in getting their prisoner into the alley, pushing their way through the crowd, and proceeded eastwardly toward the jail with the prisoner. Sheriff Carmichael was on the prisoner's right, holding him by the right arm, and Undersheriff Dee Roberts was on the prisoner's left, holding him by the left arm, walking eastwardly toward the jail. As they proceeded up the alley toward the jail they were surrounded by the crowd, some of whom were ahead of them, some on either side and some to their rear. The officers with the prisoner were followed by Deputies E. L. "Bobcat" Wilson and Hoy Boggess in the order named.

The prisoner was obstinate, holding back and forcing the officers to push or urge him on. An unidentified person in the crowd had been heard to shout: "We want Navarro." When they were about forty feet from the rear exit of the justice's office, Deputy Hoy Boggess observed someone, unknown to him, grab at the prisoner as if to take him from the custody of the officers. Thereupon, he raised his arm and hurled a tear gas bomb to the rear and westwardly into the crowd in the alley. Almost simultaneously with the detonation from explosion of the bomb, a shot was fired somewhat to the rear of the officers accompanying the prisoner. Then a second shot followed the first, apparently fired by Ignacio Velarde, a brother of the defendant Leandro Velarde, from a point at the northeast corner of the Independent Building, some fifteen feet from Sheriff Carmichael. This shot struck the sheriff in the left side of the face and passed out of his body on the right side of his neck. The first shot fired had struck the sheriff in the left side, just under the left arm, passed through his chest and out into his right shoulder. He died instantly, his undersheriff, Dee Roberts, catching hold of his right arm and lowering his body to the pavement. The latter then looking to the west observed two men firing toward him. One was on his left at the corner of the Independent Building, perhaps fifteen feet distant. This proved to be Ignacio Velarde. The other was farther down the alley about twenty feet and to his right. This was Solomon Esquibel. Their fire was returned by Undersheriff Roberts, and both Ignacio Velarde and Solomon Esquibel were killed.

In the meantime the firing had become more general, the total number of shots fired during the affray being twelve to fifteen. When the firing ceased, besides Sheriff Carmichael and the two others named being killed, Deputy Wilson had been seriously wounded by a bullet which entered his body about an inch below the armpit and was later extracted. Two other members of the crowd had received wounds, a woman by a shot through the leg. Both of these wounded, as well as Deputy Wilson, subsequently recovered.

With this general statement of events leading up to the homicide, we shall now particularize in our statement of the facts, detailing the evidence upon which the state relies to show guilty connection of defendants with the resulting homicide. This will require some recapitulation.

About the time it was appreciated by the crowd in front that the prisoner was to be removed through the rear door into the alley, the defendant Leandro Velarde was seen going through the crowd motioning toward the west, the direction to be taken to reach the alley, and he went into the alley practically at the head of the crowd.

The three defendants, Leandro Velarde, Manuel Avitia, and Juan Ochoa, along with certain other defendants acquitted at the trial, were identified as being in the crowd in front of the justice's office and also in the crowd at the rear of the office in the alley after it had hastened there upon discovering that the prisoner, Navarro, was to be removed through the rear door and thence via the alley to the jail. The present defendants, along with Ignacio Velarde and Solomon Esquibel, slain during the affray, were in the forefront of the crowd formed in a semicircle around the rear entrance as the officers prepared to emerge with their prisoner.

Just before they took the prisoner through the rear entrance, former Deputy Fred Montoya, who formed one of the sheriff's party at the justice's office, at the sheriff's request, opened the rear door. He took one step outside. There confronting him among those recognized were Ignacio Velarde, Leandro Velarde, and Solomon Esquibel. Leandro Velarde, clenching his fist and raising it in a threatening manner, said to Montoya: "Now you shall see what happens disgraced (one)." Solomon Esquibel, reaching his right hand into a partially open blue jacket worn at the time as if to draw a weapon, said: "You move back, leave them to us alone." Montoya being unarmed immediately moved back inside the office of the justice of the peace.

Contemporaneously with Montoya's return to the inside of the office, Sheriff Carmichael and Undersheriff Dee Roberts emerged therefrom with the prisoner. As they did so and started pushing their way out into the alley, the defendant Juan Ochoa, from a distance of about three feet, struck at Undersheriff Dee Roberts with a claw hammer.

When the officers had advanced a short distance up the alley with their prisoner,

the defendant Manuel Avitia drew a pistol from his pocket and rushed from the rear through the crowd toward the officers. After hurling the tear gas bomb, and just before being struck and rendered unconscious, Deputy Boggess observed the defendant Leandro Velarde only a few feet from him on the right; Solomon Esquibel, later slain, not far away; and the defendant Manuel Avitia running toward him (Boggess). When Boggess fell unconscious from a blow on the head delivered by some unidentified person in the crowd, his pistol fell from his belt to the pavement. Two members of the crowd were seen to spring toward same and to be bent over as if to recover it, but, their bodies screening it from view of the witness relating the incident, neither of these persons was seen actually to pick up the pistol.

While Deputy Boggess was down on the paving and after the firing had begun, the defendants Avitia and Ochoa, with two or three other persons, were seen beating and kicking him. When the shooting had ceased Avitia ran west out of the alley with a pistol in his hand.

Juan Ochoa was chairman of the meeting held at Spanish-American Hall the afternoon before the affray at which meeting a committee was named to interview the sheriff regarding Navarro. Leandro Velarde attended the meeting and was named a member of said committee, though it is not established that he actually went with the committee to see the sheriff. Manuel Avitia also was present at the meeting.

On March 29th, preceding the affray, at a gathering at the home of one Mrs. Conception Aurelio about 4 o'clock in the afternoon, Leandro Velarde told the group, there gathered, "to prepare for the following day at 8 o'clock in the morning; that they were to be ready at the house of Victor Campos and to be prepared—to be ready and let the officers take their weapons; that they didn't need anything else but a tooth pick." Also he said at this time that the first one they wanted to get hold of was Carmichael, "because he had a feeling against Carmichael and Carmichael had a feeling against him." He further said, "that he didn't care to die for the poor; that he had a big body and he was going to stick it out for the poor." The meeting planned evidently had to do with restoring Campos to the house from which he had been evicted.

About thirty minutes after Sheriff Carmichael was killed, Leandro Velarde returned home and withdrew from the bib of his overalls an ice pick some six inches in length and placed it in an ice chest.

When Deputy Hoy Boggess regained his feet upon a return of consciousness, he saw Deputy Wilson approaching him in a stooped posture and heard him say: "I'm shot." Finding his own pistol missing, he seized that of Wilson and still in a dazed condition fired twice at two persons he saw fleeing, one of whom he thought was

the prisoner Navarro making his escape. He could not say whether either of his shots took effect.

The pistols with which Ignacio Velarde and Solomon Esquibel were seen firing were never located after the affray. The pistol which dropped from Deputy Boggess' belt when he was knocked unconscious was never recovered. Sheriff Carmichael's pistol was removed from its scabbard on his body after his death. It had never been fired. The bullet which had entered the body of Sheriff Carmichael under the left armpit was later extracted from his right shoulder. The bullet which had wounded Deputy Wilson likewise was later extracted. The pistol which Deputy Boggess lost during the affray and which had not been fired by him when lost was a forty-five Smith and Wesson double action. The bullet removed from the body of Sheriff Carmichael and that extracted from Deputy Wilson were both fired from the same pistol and it was of the same make and caliber as that lost by Deputy Boggess, using the same type of ammunition as that then employed in the Boggess gun.

The defendants were proceeded against by information, the State electing to employ the short form authorized by Trial Court Rule 35—4407. Ten were thus accused of the murder of Sheriff Carmichael, of whom seven were acquitted by the jury. The three defendants above named having been convicted of second degree murder, they alone prosecute this appeal. The most serious claim of error is directed at the action of the trial court in submitting to the jury the issue of second degree murder. It is claimed the evidence does not warrant submission of second degree. If this claim be good as to all of the defendants it is decisive. Hence, we give it first consideration. The facts as we have recited them are within the verdicts of guilty returned against defendants. Do they support second degree? That is the issue.

Justifying the submission of both first and second degree, the Attorney General in the State's brief says: "Discarding all of the theories requiring a first degree or nothing verdict, we still have two theories presented by the evidence shown (under) which the jury might find the appellants guilty of second degree murder. First, that one of the appellants actually shot and killed Sheriff Carmichael. Second, that the appellants or any of them aided and abetted the person or persons who actually shot and killed Sheriff Carmichael. Under either of the circumstances it was mandatory on the trial judge to submit both first and second degree murder to the jury."

If there be evidence in the record sustaining a conviction of given defendants of second degree on either of the theories thus presented by the State, it will be unnecessary as to such defendants to pass upon sufficiency of the evidence to sustain the other theory. It is the jury's province to say whether the facts sustain either theory. Givens v. State, 8 Ala.App. 122, 62 So. 1020. In support of

the verdict, we must assume the jury to have adopted a theory sustained by the evidence. In this connection it should be stated that as to the defendant Leandro Velarde there is no effort in the argument before us to connect him with the slaying otherwise than as an aider and abettor. As to the other two defendants, Avitia and Ochoa, it is different. The State urges there is evidence to sustain a finding that either of them actually fired one of the shots entering the body of Sheriff Carmichael, though argued as much more likely under the proof that Ochoa did so, using the gun which fell from the waistband of deputy Boggess when he was assaulted and knocked unconscious. Of course, the theory of aider and abettor also is urged against Avitia and Ochoa.

First, we must appraise the situation resulting from the jury's verdict. The defendants assert without contradiction by the State that the trial court eliminated conspiracy by refusing to submit the issue. We shall so consider the record although it is perhaps unimportant for even if conspiracy remained in the issues as submitted it was completely put out of the case by the jury's verdict acquitting the defendants of the charge of first degree murder. First degree, and that alone, would conform to a verdict carrying a finding of conspiracy. The same may be said of the charge of murder perpetrated in the commission or attempt to commit a felony.

A careful reading of the instructions, particularly paragraphs 19 and 20 thereof, might be urged as leaving it still within the jury's province to find conspiracy based upon evidence of events transpiring between commencement of Navarro's trial before the justice of the peace and the occurrence of the homicide. But counsel have seemingly agreed, and perhaps properly, that conspiracy was not submitted. Certainly, if submitted, even within a narrow compass, as already said, the verdicts of the jury completely erased it as an issue.

The return of verdicts of second degree against defendants had the important effect of acquitting them of the charge of first degree upon the theory of a homicide committed in the perpetration of a felony, to wit, the aiding of the prisoner, Navarro, to escape. So, as the matter rests before us, the State must defend the verdict as one finding the defendants guilty of common-law murder, either as principals or as aiders and abettors. This greatly narrows the issue under defendants' contention that second degree was not properly submitted. It also differentiates this case from that of State v. Reed, 39 N.M. 44, 39 P.(2d) 1005, 102 A.L.R. 995. And there are other differences not necessary to enumerate.

We do not understand counsel to contend that the unexplained killing of Sheriff Carmichael with a deadly weapon would not warrant submission of second degree. But, rather, that there is not sufficient evi-

dence to connect them with the slaying, either as the actual slayers or as aiders and abettors. The point now argued is in effect complaint at the trial court's failure to direct a verdict of acquittal as requested.

The trial court fairly defined aiding and abetting for the jury. At least, there is before us no objection to the charge in this respect. The law upon the subject of aiding and abetting in the commission of a homicide has been declared in decisions of this court both prior and subsequent to statehood. Territory v. Lucero, 8 N.M. 543, 46 P. 18; United States v. Densmore, 12 N.M. 99, 75 P. 31; State v. Trujillo, 30 N.M. 102, 227 P. 759; State v. Wilson, 39 N.M. 284, 46 P.(2d) 57.

The distinction between an accessory before the fact and a principal and between principals in the first and second degree, in cases of felony, has been abolished in New Mexico and every person concerned in the commission thereof, whether he directly commits the offense or procures, counsels, aids, or abets in its commission, must be prosecuted, tried, and punished as a principal. Laws 1933, c. 105; Trial Court Rule 35—4439. The evidence of aiding and abetting may be as broad and varied as are the means of communicating thought from one individual to another; by acts, conduct, words, signs, or by any means sufficient to incite, encourage or instigate commission of the offense or calculated to make known that commission of an offense already undertaken has the aider's support or approval. State v. Wilson, supra. Mere presence, of course, and even mental approbation, if unaccompanied by outward manifestation or expression of such approval, is insufficient. Territory v. Lucero, supra; State v. Hernandez, 36 N.M. 35, 7 P.(2d) 930.

Before an accused may become liable as an aider and abettor, he must share the criminal intent of the principal. There must be community of purpose, partnership in the unlawful undertaking.

"To aid and abet another in a crime one must share the intent or purpose of the principal. If two or more acting independently assault another, and one of them inflicts a mortal wound, the other is not guilty as an aider and abettor. An aider and abettor is a partner in the crime, the chief ingredient of which is always intent. There can be no partnership in the act where there is no community of purpose or intent." Landrum v. Commonwealth, 123 Ky. 472, 96 S.W. 587, 588, as quoted in Gill v. Commonwealth, 235 Ky. 351, 31 S.W.(2d) 608.

"To render one an aider or abettor and, as a consequence, guilty in like degree with the principal in the commission of a crime, there should be evidence of his knowledge of the intention or purpose of the principal to commit the assault. In other words, there must have been a 'common purpose' by which is meant a like criminal intent in the minds of Mills and the appellant, to render the latter guilty as charged, and hence authorize the giving

of the instruction." State v. Porter, 276 Mo. 387, 207 S.W. 774, 776.

The accused may not be held for the independent act of another even though the same person be the victim of an assault by both. In such circumstances there is wanting that sharing of criminal intent essential to proof of aiding and abetting. Gill v. Commonwealth, supra; State v. Greer, 162 N.C. 640, 78 S.E. 310.

In what has been said concerning the law of aiding and abetting our comment is to be confined to pure instances of such. Of course, where conspiracy is established, all are equally guilty whether present or not and irrespective of physical participation, aid or encouragement extended at the time of the offense. The distinction between conspiracy and aiding and abetting is clearly developed in State v. Porter, 276 Mo. 387, 207 S.W. 774. A case where, as here, the State's attempt to establish conspiracy failed, yet the evidence was held sufficient to sustain conviction of accused as an aider and abettor, is Maloy v. State, 8 Ala.App. 73, 62 So. 961.

In many, if not most, conspiracy cases, where conviction results, the accused under the proof could as well have been convicted as an aider and abettor, without the conspiracy charge. This because nearly always he is found present actively participating in the homicide. Aiding and abetting usually accompany conspiracy, though there are frequent cases of aiding and abetting without conspiracy. Nevertheless, in the latter cases there is present something akin to conspiracy. It is the community of purpose and concert of action disclosed. These elements must emerge coincident with the affray or during its progress. If prior thereto, they strongly suggest conspiracy.

With these preliminary observations, we shall proceed to apply them to the facts of the instant case. As to the defendant Leandro Velarde there is no evidence which sufficiently connects him with the unlawful design of the slayer of Sheriff Carmichael. The last time seen prior to the hurling of the tear gas bomb and the firing of the first shot, he was in the crowd a few feet removed from Deputy Boggess. There apparently was nothing about his actions when then seen to excite suspicion. If so, it was not testified to by any witness.

Much of what he is shown to have said and done at and about the scene of the justice court trial and upon exit of the officers and their prisoner into the alley would be somewhat significant in proof of the charge of conspiracy. But of that charge he was acquitted. It would even serve to color and characterize any overt act or conduct on his part *after he became aware* that some member of his party was firing or was about to fire on the sheriff and his party. But no such act or conduct appears in the evidence. He is not shown to have taken part in the assault on Deputy Boggess, as were Avitia and Ochoa. At one stage of the proceedings,

as this defendant rested his case, the following colloquy between court and counsel occurred, to wit:

"The Court: Come up here gentlemen. (done) Prior to the opening of Court this morning I advised counsel for the defendants, I understood application would be made to replace the witness Boggess on the stand to testify as to receiving wounds with an ice pick, but no record was made of the statement. If the witness appears, I will then hear the application of the State to reopen.

"Mr. Simms: And the Court will then give us an opportunity to resist the application?

"The Court: Yes, and any further testimony you desire for Velarde."

The suggested testimony was never forthcoming. If Velarde had on his person at the affray the ice pick which he removed from the bib of his overalls and placed in an ice chest in his home half an hour later, no proof of any display of same and of an effort to use it was presented at the trial. We do not find in the record evidence supporting the conviction of this defendant as an aider and abettor. Mere suspicion does not furnish the required support. Watkins v. Commonwealth, 227 Ky. 100, 12 S.W.(2d) 329.

The defendants Avitia and Ochoa are differently situated. After Deputy Boggess hurled the tear gas bomb, he was knocked down and rendered unconscious for a time. Firing from the party of which they formed a part started almost instantly and continued until a total of as many as 12 or 15 shots had been exchanged between members of the two parties. Even if it be assumed that these two defendants were without previous knowledge of the purpose of the slayer or slayers of deceased to make an attempt on his life, the evidence abundantly supports an inference that with the firing of the first shot they became apprised of that purpose. The intent to kill, or to aid and abet in the commission thereof, may be formed at the scene of the crime, even though the accused may have gone there without such intention. People v. Will, 79 Cal.App. 101, 248 P. 1078. If, with knowledge that one of their party was using or was about to use a deadly weapon, they or either of them rendered aid or assistance to him or them engaged in the deadly assault, they are equally guilty as aiders and abettors. The aider under such circumstances adopts the criminal intent of the principal. State v. Powell, 168 N.C. 134, 83 S.E. 310. Both Avitia and Ochoa are identified in the testimony as being still engaged in an assault upon the fallen Boggess after two bullets had entered the body of the deceased. Boggess was a deputy of the slain sheriff and, of course, would be expected to come to the aid of his chief in peril. The fact that they were thus engaged in a vicious assault upon him (Boggess), after firing upon the sheriff's party commenced, left it within the jury's province to infer, if it saw fit, not alone that these defendants

shared the intent of the slayer, but also that they aided and abetted him in his unlawful undertaking.

Nor would it seem an unwarranted inference, if the jury should elect so to find, that these defendants saw the sheriff's assailant in the act of drawing or aiming his gun and commenced the assault on Deputy Boggess momentarily before or simultaneously with the first outburst of gunfire. Particularly is this true in view of the fact that the assault on Boggess did not cease when it must have become known to the defendants that a member of their party was firing on the sheriff's party. Such an inference, however, is not essential to sustain the verdicts.

The opinion of the Supreme Court of Ohio in Woolweaver v. State, 50 Ohio St. 277, 34 N.E. 352, 353, 40 Am.St.Rep. 667, points out the difficulty frequently presented where a homicide results from a clash between opposing parties and at the moment of the homicide a member of one party is engaged in a struggle with a member of the opposing party other than the deceased. For error in instructing that if what defendant did "tended" to incite the slayer (a substitution by the trial court for the language of the requested instruction that if done "with a view" of inciting him), the Supreme Court awarded a new trial. The opinion makes plain, however, that even though there be opposing parties of several members each, the controlling principles remain the same. The court said: "In the case under consideration there was evidence tending to show that the plaintiff in error and his two sons composed one party, while the deceased and Mr. Ewing, and probably Mr. Lyons, composed the other party. This difference in the circumstances in no wise affected the principles by which the criminal character of the acts of the parties should be tested. If there was a conspiracy, each conspirator was chargeable with the acts of his co-conspirators. If there was no conspiracy, then, upon the springing up of a sudden fight, each should be chargeable only with his own acts, and such acts of the others as he may purposely incite or encourage. The charge, in the form in which it was requested, correctly stated this proposition. Where satisfactory proof of a conspiracy has not been produced, it often becomes a nice and difficult matter to determine the criminal liability of each of a party of friends or kindred for the violent and unlawful acts of his fellows, committed in the course of a conflict, arising upon a sudden quarrel, with one or more antagonists; and in such case, upon the trial of one of them, it is of the first importance that the correct rule of liability should be laid down to the jury, and if the instructions should extend too far as to the liability of the one on trial for the acts of his fellows it would be, necessarily, prejudicial to his rights."

The opinion of the Court of Criminal Appeals of Texas in Bibby v. State (Tex. Cr.App.) 65 S.W. 193, 195, states clearly the rule of responsibility applicable where several members of opposing parties are

fighting apart, engaged in separate combats, when one, without previous knowledge by other members of his party of his intention to do so, suddenly begins the use of a deadly weapon on his antagonist. The court said: "If the evidence here showed that the parties had entered into a conspiracy to disturb the meeting, and thus provoke a difficulty, and to resist all opposers, even to the use of deadly weapons, then the charge of the court linking appellant and his intent irrevocably with the act of Wells in his intent would be good law as presenting that phase of the case. But we do not understand such to be the case here. * * * Here the only proof against appellant is that he, with the others, did disturb the meeting, and that he afterwards engaged in the difficulty. There is no proof that he used any weapon, nor is there any proof to show that he knew Wells or Starnes were using their pocketknives. If Wells or Starnes used a knife in the difficulty without the knowledge or consent of appellant, he is not responsible for the homicide. *Or, to put it more strongly, the proof must show beyond a reasonable doubt that he knew Wells was to use the knife beforehand, or that he had knowledge Wells was using the knife at the time he was so using it, and by some act of his aided and abetted him in the use of said knife.*" (Italics ours.)

See, also, Cecil v. State, 44 Tex.Cr. 450, 72 S.W. 197 and Lyons v. State, 30 Tex. App. 642, 18 S.W. 416, for other Texas cases affirming the same proposition.

The mere statement of the proposition, however, furnishes its own support; for, however free from felonious intent a participant in the combat of opposing parties may have been in the beginning, once it becomes known to him that another member of his party is employing a deadly weapon, he exposes himself to an inference of sharing the latter's intent if, except in necessary defense of his own person, he continues his participation. The question of whether the alleged aider and abettor did share the principal's criminal intent, and whether he knew the latter acted with criminal intent, is one of fact for the jury and may be inferred from circumstances. Wharton on Homicide (3d Ed.) § 50.

The following authorities, some of which bear resemblance to the case at bar in their facts, sustain the conclusion that there was sufficient evidence to sustain a conviction of Avitia and Ochoa as aiders and abettors if the jury saw fit to accept it, to wit: State v. Trujillo, 30 N.M. 102, 227 P. 759; State v. Hoffman, 199 N.C. 328, 154 S.E. 314; Davis v. State (Okl.Cr.App.) 57 P. (2d) 634; People v. Cione, 293 Ill. 321, 127 N.E. 646, 12 A.L.R. 267; Maloy v. State, 8 Ala.App. 73, 62 So. 961; State v. Powell, 168 N.C. 134, 83 S.E. 310; Commonwealth v. Murrano, 276 Pa. 239, 120 A. 106; State v. Kukis, 65 Utah, 362, 237 P. 476; People v. Will, 79 Cal.App. 101, 248 P. 1078.

Error is assigned upon the trial court's refusal to grant the defendants' motions

for an election and severance. The right to election was based upon the number of theories advanced in response to demands for bills of particulars in view of the fact that there were ten defendants jointly informed against. The defendants moved severally to require election at the beginning of the trial, again when the State rested its case in chief and finally at the close of the evidence. In each instance the motions were denied. The motions for severance came at the conclusion of the trial in connection with settlement of the instructions when, as defendants' counsel then conceived and now contend, the trial court eliminated the State's theory of conspiracy from its instructions. The severance motions were coupled with a prayer for an order to declare a mistrial and to grant each defendant a separate trial. The facts must be supplemented briefly to afford an intelligent understanding of this claim of error.

As already stated, the short form of information was employed in which all defendants were named and charged only with murder. A demand for a bill of particulars followed and one was filed. It presented a theory of the guilt of all defendants for the murder of M. R. Carmichael accomplished by means of a certain bullet fired from a deadly weapon, to wit a pistol, inflicting mortal wounds, etc. Approximately four months later the defendants moved for a further bill of particulars. A supplementary bill was filed in response to this motion accusing each of the defendants informed against of murder in the first degree under six different theories, in addition to the theory already set forth in the original bill, to wit:

"(a) That the defendants aided and abetted in an assault upon M. R. Carmichael, Dee Roberts, Hoy Boggess and L. E. Wilson, resulting in the killing and murdering of M. R. Carmichael.

"(b) That the defendants aided and abetted in unlawfully killing and murdering M. R. Carmichael.

"(c) That the defendants were engaged in the perpetration of a felony, to-wit: aiding and assisting Esiquiel Navarro, a prisoner, in escaping or attempting to escape from M. R. Carmichael and others, which resulted in the killing of M. R. Carmichael.

"(d) That the defendants and each of them combined and conspired to commit a felony, to-wit: aiding the prisoner Navarro to escape, the consummation of which conspiracy resulted in the killing of M. R. Carmichael.

"(e) That the defendants combined and conspired for the purpose of committing a felony, to-wit: an assault with deadly weapons, which assault resulted in the killing of M. R. Carmichael.

"(f) That the defendants combined and conspired for the purpose of committing a felony, to-wit: the killing and murdering of M. R. Carmichael."

Thus, as the matter was presented initially and as it actually went to trial, un-

der the original bill of particulars, each defendant faced a theory of firing the shot which killed the deceased. Under the supplementary bill, aiding and abetting in an assault upon Sheriff Carmichael and three of his deputies resulting in the former's death and aiding and abetting in unlawfully killing and murdering him, respectively, form the basis of the first two theories advanced; his murder perpetrated in the commission of a felony, to wit, aiding a prisoner to escape, constitutes the third theory; whereas, murder through conspiracy to do the murder itself, or to commit a felony resulting in death, constitute the basis of the fourth, fifth, and sixth theories presented.

The gist of defendants' objections to the trial court's action in this matter is contained in the following quotation from their brief, to wit: "With ten defendants to be tried jointly and with six theories against each, it is clear that the jury must have had to consider sixty separate statements of fact in order to give the defendants a fair and lawful trial. Insofar as the three specifications of conspiracy are concerned, the defendants could not at the opening of the trial say that they were entitled to a severance as to such accusations of conspiracy, because they stood informed against as conspirators under three of the State's theories, while as to the other three theories one defendant might have participated under one or more theories by his unaided action, while others of the defendants had no part therein."

The effect of Laws 1933, c. 105, and Trial Court Rule 35—4439, is that all persons concerned in the commission of a felony, whether by directly committing the act constituting the offense or by aiding and abetting in its commission, must be tried, prosecuted, and punished as principals and no additional fact need be alleged against an accessory than is required against the principal. Furthermore, the practice of pleading alternatively or disjunctively to meet varying possibilities in the proof long has been recognized in this state. Trial Court Rule 35—4434. It is to be remembered, too, that but a single offense, to wit, murder, was charged against defendants. The seven theories advanced in the bill of particulars were for the purpose of informing defendants of the different forms which the proof might take in establishing murder, a thing about which the state itself was uncertain at the time. The defendants asked for that information, and the State, which admittedly could not be confined to a single theory of guilt, furnished it. It was unknown to the State then, nor was it established with any degree of certainty thereafter, just who fired one of the shots which contributed to the death of Sheriff Carmichael. In view of this situation as presented at the opening of the trial, and to a lesser degree only at the close of the State's case in chief, it must have impressed the trial court as imposing a heavy burden on the State to compel it to elect at such times upon just which of the several theories it would stand.

We are not impressed that the trial court's action in this regard so perplexed and confused counsel or harmed defendants as to constitute its action error. At least, beyond the mere assertion that it did, counsel have not pointed out wherein it so operated. State v. Wilson, 25 N.M. 439, 184 P. 531; People v. Baldwin, 278 Ill. App. 327; King v. Commonwealth, 165 Va. 850, 183 S.E. 173; Ratliff v. Commonwealth, 182 Ky. 246, 206 S.W. 497, 499; Franklin v. State, 153 Ark. 536, 240 S.W. 708; State v. Coomer, 105 Vt. 175, 163 A. 585, 94 A.L.R. 1038; Raine v. State, 143 Tenn. 168, 226 S.W. 189; People v. Petruzo, 13 Cal.App. 569, 110 P. 324. Furst v. State, 31 Neb. 403, 47 N.W. 1116.

Meeting a similar contention in Ratliff v. Commonwealth, supra, where only one offense, murder, was charged, the Supreme Court of Kentucky said: "The motion to require the commonwealth's attorney to elect upon which count of the indictment he would rely for conviction was necessarily overruled. Such a motion could not have any merit, unless the indictment charged guilt of more than one offense. To require the prosecutor, where the modes of committing the crime alleged are set out in different counts, to rely for conviction upon the manner set out in one particular count, would defeat the very purpose for which it is permitted to set out the different modes in which the crime may have been committed in different counts."

"The court, at the conclusion of the evidence, denied a motion by defendant to compel the People to elect upon which count they would rely for a conviction. This is claimed as error.

"As previously stated, it is obvious that all of the counts related to the same transaction, but which was differently charged to meet variations of proof. Where this is true, no election will be required. People v. Dougherty, 266 Ill. 420 [107 N.E. 695]; Goodhue v. People, 94 Ill. 37. We think the motion was properly denied." People v. Baldwin, 278 Ill.App. 327.

"It is obvious that but one offense is charged in the indictment,—the murder of Pulsifer. Election is only required where separate and distinct offenses, not part of the same transaction, are charged in the same information or indictment. Bailey v. State, 4 Ohio St. [440], 442." Furst v. State, 31 Neb. 403, 47 N.W. 1116.

The trial court's ruling on the motions for severance was a matter peculiarly within its discretion and no abuse is evident in the denial thereof. Only for abuse of such discretion may this court interfere. State v. McDaniels, 27 N.M. 59, 196 P. 177; State v. Smith, 30 N.M. 364, 234 P. 467; State v. Watts, 35 N.M. 94, 290 P. 738. Because of the presence of conspiracy in the charge, defendants' counsel did not move for severance until that theory disappeared from the case.

The basis of the claimed right to severance was that testimony admitted against one defendant might prejudice the jury against another. We think the remarks

of the Court of Appeals of New York in People v. Fisher, 249 N.Y. 419, 164 N.E. 336, 338, including its quotation from People v. Snyder, 246 N.Y. 491, 159 N.E. 408, are pertinent to the contention here made. The court said: "The question always presented by such a motion [for severance] is whether a jury can properly weigh the testimony upon the various issues which may arise. 'The decision of the trial court rendered before the trial is dictated by reasonable anticipation based on the facts then disclosed. The decision of this court rendered upon a review of the trial itself rests upon determination of whether the prophecy has been realized.' People v. Snyder, 246 N.Y. 491, 497, 159 N.E. 408, 410."

Applying this test we have no hesitancy in saying that the joint trial of the defendants did not operate to their prejudice. Indeed, the jury seems to have exercised unusual discrimination in weighing the testimony as evidenced by their verdicts of acquittal returned in favor of seven of the defendants.

The defendants also complain of the action of the trial court in overruling motions to quash the information. While in the briefs their counsel invoke the same argument in support of this claim of error as that presented in challenging the trial court's rulings on their motions to elect and for severance, such does not appear to have been the objection urged against the information at the trial. There the claim was that the information as supplemented by the bill of particulars "failed to apprise the defendants, and each of them, of the exact nature of the offense with which they stand charged, * * * and in that the purported bill of particulars, as filed by the State, fails to sufficiently inform the defendants, and each of them, so that they may prepare an adequate defense at this time."

The grounds of the motions to elect being that the State had presented so many theories that it should be compelled to elect and to stand upon one alone, motions to quash upon the ground that the information and bill of particulars lacked sufficient particularity would seem to be somewhat inconsistent. We hold the information good as against the attack made upon it. We think it sufficient as supplemented by the bill of particulars fully to inform defendants of the exact nature of the offense with which they stood charged and as well of the means by which the State expected to prove its commission. Nor are defendants aided if we decide this point upon the argument submitted. The information charging but a single offense is permitted to charge its commission in different forms. Trial Court Rule 35—4434; Hill v. State, 42 Neb. 503, 60 N.W. 916; Shivley v. Commonwealth, 227 Ky. 748, 14 S.W.(2d) 205.

The two next claims of error (points 3 and 4) may be considered together. Each relates to admission over objection by defendants of certain testimony involving the defendant Leandro Velarde. A State's wit-

ness, Mrs. John Green, was permitted to testify to certain statements heretofore related as made by the defendant Leandro Velarde at the home of Mrs. Conception Aurelio, on the 29th day of March, 1935, only a few days before the homicide. In overruling a motion to strike same upon the ground among others that it prejudiced other defendants who were not present at the time and place of the alleged conversation the court remarked, "I will take care of these matters later as the occasion arises."

Again, testimony by State's witness Inez Lopez was permitted over objection that defendant Leandro Velarde, half an hour after the homicide, withdrew an ice pick from the bib of his overalls and placed it in the ice chest in his home. The court at the time also denied an application to limit the testimony to Leandro Velarde, saying: "Yes, I will attend to that at the conclusion, remind me of it."

These claims of error are without merit for two reasons. Insofar as Velarde is concerned they are immaterial since we are directing his discharge without passing upon the objections to the testimony, even as against him. In so far as the other two defendants are concerned, and contrary to the mistaken claim of defendants' counsel that the trial court never limited the testimony after making the comments indicated, it did so of its own motion at page 579 of the record in the following language, to wit: "The Court: Gentlemen of the Jury, this testimony introduced here to the effect that the defendant Velarde made certain statements regarding the officers at the home of this Mrs. Aurelio, this testimony is to be considered by you only as against Velarde and not as against any of the other defendants; likewise you will not consider the testimony regarding the ice pick, which it is claimed the defendant Velarde took from the bib of his overalls or from his person, at his home after the trouble, except as against the defendant Velarde. You will not consider that as against the other defendants as this occurred after the crowd had dispersed and Velarde had gone to his home."

We have carefully examined the claims of error predicated upon the giving and refusal of instructions and find them not well taken. The contention that the jury was not sufficiently instructed that a given defendant could not be convicted upon evidence which showed that some other defendant aided and abetted is without warrant. Untenable, also, is the claim that under the instructions as given the jury might convict *all* defendants upon proof that any one of them killed or aided and abetted in killing the deceased. The instructions may not reasonably be subjected to such a construction and that the jury did not so understand them is demonstrated by their verdicts—seven were acquitted and three convicted.

Nor is error present in instruction No. 17 as given by the court in its relation to the defendant Ochoa. The objection is that it submitted the issue whether

Ochoa, himself, *killed* the deceased. It is claimed Ochoa was prejudiced in submission of this issue in this—that there was no evidence whatever that he did so. Of course, the issue of his aiding and abetting in the killing also was submitted.

We heretofore have pointed out the uncertainty in the evidence as to who fired at least one of the shots contributing to the death of Sheriff Carmichael. It was unnecessary for the State to show who actually fired the fatal shot if the proof was sufficient to warrant the inference as to a given defendant that, if he did not fire it, he aided and abetted him who did. Ratliff v. Commonwealth, 182 Ky. 246, 206 S.W. 497; State v. Kukis, 65 Utah 362, 237 P. 476, 477; People v. Petruzo, 13 Cal.App. 569, 110 P. 324; State v. Capaci, 179 La. 462, 154 So. 419; State v. Luster, 178 S.C. 199, 182 S.E. 427; State v. Allison, 200 N.C. 190, 156 S.E. 547; People v. Udwin, 254 N.Y. 255, 172 N.E. 489; Maloy v. State, 8 Ala.App. 73, 62 So. 961; Commonwealth v. Murrano, 276 Pa. 239, 120 A. 106.

We are unable to see error as to the defendant Ochoa in submission of the issue whether he actually killed the deceased in view of our conclusion that the evidence supports an inference that he aided and abetted in such killing. Morally, there never has been a distinction in the degree of culpability. The law long since has ceased to recognize any. All are subject to prosecution, trial, and punishment as principals. Laws 1933, c. 105; Trial Court Rule 35—4439. The aider and abettor may be tried and convicted even though the actual slayer is never apprehended or has been tried and acquitted. Cf. Rule 35—4426. "If A be indicted as having given the mortal stroke, and B and C as present, aiding and assisting, and upon the evidence it appears that B gave the stroke and A and C were only aiding and assisting, the evidence will maintain the indictment, and judgment be given against all the defendants, for it is only a circumstantial variance, as, in law, the mortal blow is the act of all that are present aiding and abetting." 1 Chitty's Crim.Law (5th Ed.) 259. See, also, 1 Wharton's Crim. Law. (12th Ed.) 345-347, §§ 259, 260.

The law having so completely abolished the distinction between principals in the first and second degree and the law being that, even though another fired the fatal shot, it is in contemplation of law Ochoa's act if he aided and abetted, we can see no prejudice in the instruction complained of.

It is next claimed the trial judge exceeded the limits of fair comment in his statement to the jury touching the testimony of certain witnesses. Trial Court Rule 70—106 provides: "Sec. 70—106. The Judge, in so instructing the jury, may make such fair comment on the evidence and the testimony and credibility of any witness as in his opinion is necessary for proper determination of the cause."

In pursuance of the permission granted by said rule, the court made the following comment, to wit: "As I have heretofore

told you in these instructions, you are the sole judges of the credibility of the witnesses who have testified in this case, and of the weight to be given to their testimony. Without expressing any opinion as to the other witnesses who have testified, I feel it proper to call your attention to what I considered the fair and frank testimony of Dee Roberts, Sherman Porter and Hoy Boggess. It seemed to me that these witnesses were endeavoring to tell only what they saw and heard, and I was strongly impressed by their testimony."

The defendants severally objected to this comment as unfair and prejudicial and as taking from the jury a matter within their province to determine, to wit, the credibility of the witnesses. We cannot agree with this contention. The right of the trial judge to indulge in fair comment on the evidence and the testimony and credibility of *any* witness is conferred by Trial Court Rule 70—106, effective July 1, 1934. Prior to that date the action here complained of would have been considered improper. Comp.St.1929, § 70-104; State v. Chavez, 19 N.M. 325, 142 P. 922, Ann. Cas.1917B, 127.

This privilege long has obtained in favor of trial judges in the federal courts. The comment should be neither intemperate nor argumentative. Starr v. United States, 153 U.S. 614, 14 S.Ct. 919, 38 L.Ed. 841. And as a natural corollary, it must be judicial and dispassionate. Quercia v. United States, 289 U.S. 466, 53 S.Ct. 698, 77 L. Ed. 1321; Rudd v. United States (C.C. A.) 173 F. 912. But within the field defined by these admonitions it has been held no abuse of the judge's privilege to express an opinion as to the guilt or innocence of an accused. However, the highest federal court admonishes that comment should be carried to such extent only in exceptional cases. Dunbar v. United States, 156 U.S. 185, 15 S.Ct. 325, 39 L.Ed. 390; United States v. Murdock, 290 U.S. 389, 54 S.Ct. 223, 78 L.Ed. 381. Of course, the jury should always be left with the understanding that it is the sole trier of the facts. In the case at bar the trial judge made this plain to the jury.

We approve the following excellent statement of the true rule to be applied as nearly as may be by the trial judge to individual cases from an opinion by Judge Kenyon in Cook v. United States (C.C.A., 8th Ct.) 18 F.(2d) 50, 52, to wit: "These cases cannot all be harmonized, but we think the line of demarcation between what a court may say to the jury in a criminal case in expressing his opinion on the facts, and what he may not say, is to be drawn between mere expression of opinion not partaking of such argumentative nature as to amount to advocacy, leaving to the jury absolute freedom to determine the facts, and such discussion as amounts to an argument and makes the court in fact an advocate against the defendant. A trial judge is not merely a moderator or umpire; neither is he an advocate."

In the cases of Weiderman v. United States (C.C.A.) 10 F.(2d) 745 and Egan v.

United States (C.C.A.) 22 F.(2d) 776, the comment of the court was much more susceptible to criticism than that here involved and yet in each instance the Circuit Court of Appeals for the Eighth Circuit held it within the limits of permissible comment. See also exhaustive annotation of the whole subject appearing in 78 L.Ed. 387 in connection with the reported case of United States v. Murdock, supra.

Counsel for defendants, citing Hunter v. United States (C.C.A.5th Ct.) 62 F.(2d) 217, also argue that "where the trial court proposes to comment upon credibility of witnesses the rule of fairness requires that such comment should not be limited to one side of the case only." We understand the federal rule to be only that, "if the court feels that it is under duty to review the facts for the purpose of aiding the jury in a correct understanding of them, it must do so in fairness to both litigants, and not state only the facts on one side of the issue." Cline v. United States (C.C.A.,8th Ct.) 20 F.(2d) 494, 496. See, also, O'Shaughnessy v. United States (C.C.A., 5th Ct.) 17 F.(2d) 225; Minner v. United States (C.C.A.,10th Ct.) 57 F.(2d) 506. Here no summation of the evidence was attempted by the trial judge. Our governing rule expressly authorizes the trial judge to make "such fair comment * * * on the testimony of *any* witness as in his opinion is necessary for proper determination of the cause."

The wisdom of fair and judicious comment on the evidence and the testimony of witnesses by the trial judge was a mooted question before annual meetings of the bar association of this state for many years. Finally, following the enactment of Laws 1933, c. 184, concerning adoption by this court of rules relating to pleading, practice, and procedure, upon the recommendation of our advisory committee on rules, composed of eminent members of the bar of this state, and after mature deliberation, we adopted Trial Court Rule 70—106, permitting fair comment on the evidence and the testimony of witnesses. This is the first case challenging fairness of the comment of the trial judge that has come before us since its adoption. If the rule is to have any vitality whatever, comment of the kind here complained of is permissible.

It follows from what has been said that the judgment of the district court must stand affirmed as to the defendants Avitia and Ochoa. As to the defendant Velarde, it is reversed, with a direction to the trial court to set aside the judgment of conviction pronounced upon him and to discharge the prisoner.

It is so ordered.

HUDSPETH, C. J., BICKLEY and BRICE, JJ., and IRWIN S. MOISE, District Judge, concur.

72 P.(2d) 623

PUCKETT v. WALZ.

No. 4245.

Supreme Court of New Mexico.
Sept. 4, 1937.

Rehearing Denied.
Oct. 11, 1937.

William A. Gillenwater, of Hot Springs, for appellant.

Edward D. Tittmann, of Hillsboro, for appellee.

SADLER, Justice.

This appeal is prosecuted from a final judgment of the district court of Sierra county permanently enjoining the appellant (defendant below) as justice of the peace for precinct No. 6 of Sierra county from "issuing any writ of forcible entry and detainer or any writ of possession or any other writ designed to remove" from certain premises the defendant in a proceeding in forcible entry and detainer theretofore pending before said justice of the peace "or to enforce in any way whatever the judgment heretofore in said cause entered." A statement of the other proceeding before appellant as justice of the peace aforesaid is necessary to an understanding of the issues here involved.

On February 17, 1936, one Ada A. Wolf, as owner of said premises, sued in forcible entry and detainer before appellant as justice of the peace aforesaid for possession of the premises mentioned, naming as defendant Mrs. J. H. Puckett, wife of the appellee here. At the trial of this proceeding a judgment was entered in favor of plaintiff in such proceeding for possession of the premises and for damages in the sum of $100. The defendant in said proceeding, Mrs. Puckett, gave notice of appeal and had the justice court fix the amount of the appeal bond. The appeal was never perfected, but before the time therefor had expired the appellee herein, J. H. Puckett, had instituted the present suit and secured a temporary injunction restraining enforcement of said judgment, which temporary injunction was subsequently made permanent as aforesaid.

The grounds of attack on the judgment of the justice of the peace were two: First, the absence of a verification to the complaint as prescribed by 1929 Comp., § 54-104; and, second, that the complaint filed with the justice of the peace failed to state a cause of action in forcible entry and detainer. No objection was taken to the complaint on these grounds at the trial before the justice of the peace. Apparently, the defect relied on in the complaint was a failure to aver an unlawful entry and that plaintiff was entitled to possession. It does allege that plaintiff is owner of the prem-

ises, describing them, and that the defendant in such action unlawfully and wrongfully withholds and detains possession thereof to plaintiff's damage, etc.

It is from the decree permanently enjoining the enforcement of said judgment of the justice of the peace that this appeal is prosecuted. The appellee's attorney has now filed his affidavit in this court reciting that Mrs. Ada Wolf, who was plaintiff in the forcible entry and detainer suit and who is claimed to be the real party in interest in this suit, took forcible possession of the premises in question after the injunction against the justice of the peace was made permanent, and is now in possession; that aside from the question of costs the only effect of setting aside the judgment appealed from would be to authorize enforcement of the justice's judgment restoring Mrs. Wolf to possession of the premises, which possession she already has; and as to costs in this suit, the appellee through her said attorney expressly remits all claim thereto in said affidavit. Accordingly, a motion to dismiss this appeal as presenting only moot questions accompanies the affidavit with a brief in support thereof.

The motion to dismiss will be denied. It is to be recalled that the judgment in forcible entry and detainer, aside from adjudging plaintiff in that suit entitled to immediate possession of the premises and directing removal of defendant therefrom, also awarded plaintiff damages in the sum of $100. A mere waiver of costs in the present suit and the becoming moot of the question of possession through a transfer thereof to plaintiff in the forcible entry and detainer suit, pendente lite, would not render moot the question of damages awarded by the justice of the peace judgment. This conclusion is reached without determining whether the appeal presents moot questions in the respects asserted.

Of course, if the justice's judgment be void for either of the reasons urged against it, the permanent injunction against its enforcement may be sustained. A settlement of that question takes us to the merits and may not be resolved on a motion to dismiss the appeal as presenting only moot issues.

The judgment of the justice of the peace was not void because the complaint was not verified in compliance with Comp. 1929, § 54-104. Sanchez v. Luna, 1 N.M. 238. Cf. State v. Trujillo, 33 N.M. 370, 266 P. 922; State v. Martinez, 34 N.M. 112, 278 P. 210. See, also, Rourke v. Culbertson, 78 Okl. 185, 189 P. 533; Security Trust & Savings Bank v. Fidelity & Deposit Co., 184 Cal. 173, 193 P. 102.

Had the defendant in the justice court objected to the complaint because not verified, the justice of the peace would have been compelled to dismiss same in the absence of leave to amend. But she made no such objection. Sanchez v. Luna, supra, was a case where leave to amend by supplying an oath to the petition in the district

court was had after it was removed there on appeal. It was a forcible entry and detainer proceeding. The transcript showed no oath to the petition before the justice of the peace. The territorial Supreme Court in upholding power of the district court to allow the amendment said: "We are of the opinion that the power of the district court to exercise its discretion in giving leave to amend should not be withheld in cases of appeals, when it shall appear that the justice of the peace had jurisdiction of the subject-matter in controversy, and of the parties in the case. Should these two facts not exist, the proceedings would be a nullity."

The territorial court thus did not regard absence of the oath in the justice court as rendering its judgment void. The action of the court in sustaining the amendment presupposed jurisdiction in the justice of the peace both of the subject-matter and of the parties, notwithstanding absence of the oath. We are not unmindful of the rule that the jurisdiction of the justice of the peace cannot be presumed and must appear affirmatively from the record. Territory v. Valencia, 2 N.M. 108; Tietjen v. McCoy, 24 N.M. 164, 172 P. 1144. This doctrine does not carry us to the extent of holding, however, that absence of an oath to a complaint in forcible entry and detainer is fatal to jurisdiction where the party entitled to complain does not object but, on the contrary, proceeds to trial as though the complaint were duly verified. Had the defendant in the justice court seen fit to prosecute her appeal instead of enjoining enforcement of the judgment, the plaintiff in such proceeding unquestionably would have had the right to amend the complaint by verifying same. Comp.1929, § 79-512. It would be a harsh rule to hold that by pursuing the extraordinary remedy of injunction by separate suit as against an appeal in the same proceeding the plaintiff could be defeated in the right to amend.

Nor do we think there is merit in the contention that the complaint fails to state a cause of action, through failure to allege an unlawful entry, or specifically that plaintiff in such suit was entitled to possession. The defendant in the justice court was in under a lease. Her original entry was in all respects lawful. The case is, in reality, one for unlawful detainer after notice to quit for alleged violation of the terms of the lease. The allegation of unlawful entry, under such circumstances, would have been a pure legal fiction, although permissible. As already disclosed, the complaint alleged ownership of the premises, describing them, and, further: "That the defendant wrongfully and unlawfully withholds possession of the said premises from the plaintiff and wrongfully and unlawfully detains the same after due and legal notice to quit and give up peaceful possession thereof, to the plaintiff's damage in the sum of One Hundred Dollars. Wherefore plaintiff prays judgment for the immediate possession of the said

premises, her costs and the damages in the said sum of One Hundred Dollars."

While there is no specific allegation that the plaintiff in the detainer suit was entitled to possession, we think the allegation that defendant wrongfully and unlawfully detains and withholds possession from plaintiff implies an allegation that plaintiff is entitled to possession and, even though a conclusion, is sufficient after judgment. Lampman v. Lamping, 70 Colo. 167, 199 P. 418. Objection was not taken to the complaint at the trial on either of the grounds now urged against it. Had there been an objection, an amendment would have cured any technical insufficiency. While Comp. 1929, § 79-1201, prescribes a form of complaint in forcible entry and detainer suits in justice courts and a compliance therewith is sufficient (Springer v. Wasson, 23 N.M. 277, 167 P. 712), this does not mean that a departure from the prescribed form is fatal, if in substance a cause of action in forcible entry and detainer or in unlawful detainer is set forth in the complaint filed. We hold the complaint good against the objections now urged.

It follows that the judgment of the district court must be reversed with a direction to vacate same and dismiss the complaint in the cause in which this appeal originates. The appellant will recover his costs. It is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

72 P.(2d) 1087

STATE v. TAPIA.

No. 4318.

Supreme Court of New Mexico.

Oct. 19, 1937.

[redacted]

H. E. Blattman, of Las Vegas, for appellant.

Frank H. Patton, Atty. Gen., and Richard E. Manson, Asst. Atty. Gen., for the State.

BICKLEY, Justice.

The appellant was convicted of robbery with a dangerous weapon, contrary to the provisions of section 35-701, N. M. S. A. 1929. Errors relied upon for reversal are as follows:

"That the verdict of the case is against the law and the evidence and that the evidence preponderates in the favor of the appellant, Max Tapia.

"That the Court erred in refusing to permit appellant's counsel to ask the appellant, Max Tapia, on direct examination, how much land he owned on the 7th day of November, 1936; whether he was the owner of several hundred acres of land in San Miguel County; whether he was the owner of sheep, fifty head of cattle, horses and that he had money in the bank and in denying the tender of such proof."

A careful examination of the record shows that the evidence, though conflicting, is ample to support a conviction.

We also find appellant's second point to be without merit. The purpose of appellant in seeking to elicit his ownership of land and personal property was to show that he had no motive for the robbery. In the first place, proof of a motive is not indispensable to a conviction of crime. See Reynolds v. State, 147 Ind. 3, 46 N.E. 31, 33 and cases cited. Among the motives recognized as impelling men to commit crimes of this sort is the desire for gain.

"This motive, however, has influenced the conduct of rich persons as well as poor persons. Men do not rob or steal except as they have a desire to do so, but such desire does not come so much from poverty of the individual, as from the absence of a moral sense, and from the desire to possess at all hazards something that does not belong to him." Reynolds v. State, supra.

That in such trials evidence of pecuniary condition of the defendant may be excluded from the jury, see, also, State v. Gulliver, 163 Iowa 123, 142 N.W. 948; Craig v. State, 171 Ind. 317, 86 N.E. 397; State v. Lazzaro, 100 Wash. 562, 171 P. 536; State v. Allen, 23 Idaho 772, 131 P. 1112. In the last-cited case the Idaho Supreme Court answered the persuasive argument of the defendant that the case of Jacob v. Esau, 25 Genesis 29-33, was a recognition of what hunger will drive men to do. The court went on to say that it would be a very dangerous rule to adopt and an erroneous conclusion to reach to suppose that those who are hungry or "broke" are the only ones who commit crimes—even the crime of robbery. We do not consider the decision in Dimmick v. U. S. (C.C.A.) 135 F. 257, relied upon by appellant, as an authority to the contrary. Furthermore, it is difficult to see how the appellant was prejudiced by the rejection of the proffered testimony. A witness was permitted to testify without objection that appellant had $200 on the date of the robbery. Also it is to be noted that this is not a circumstantial evidence case, and it is inconceivable that the testimony offered to show that appellant had additional property would have been help-

ful to him in the face of positive testimony by eyewitnesses to the robbery.

Finding no reversible error in the record, the judgment is affirmed and the cause remanded, and it is so ordered.

HUDSPETH, C. J., and SADLER, BRICE, and ZINN, JJ., concur.

72 P.(2d) 1088

STATE v. MILLER.

No. 4297.

Supreme Court of New Mexico.

Oct. 6, 1937.

Rehearing Denied Nov. 12, 1937.

E. M. Grantham, of Clovis, for appellant.

Frank H. Patton, Atty. Gen., and A. M. Fernandez, Asst. Atty. Gen., for the State.

HUDSPETH, Chief Justice.

The defendant was convicted of horse stealing and appeals. The subject of the larceny was last seen by his owner in the summer of 1935 on the open range 15 miles south of Vaughn in Guadalupe county—18 miles from the De Baca county line. In December, 1935, he was ranging on the ranch of Walter Overton, near Yeso, in

De Baca county, 35 miles from his usual range. The defendant is charged with stealing the horse in De Baca county. Walter Overton, defendant's witness, testified as follows: "Well, sir, the first time I noticed that horse he was there at my place. * * *"

On cross-examination he testified:

"Q. Do you know how it came there? A. No sir.

"Q. It was ranging there? A. Yes sir.

"Q. You do know that John Riley took the horse up, rode it a few days, and fed it? A. Yes sir.

"Q. Over how long a period? A. I could not say; he was there most of the winter.

"Q. You knew at the time he was not John's horse? A. Yes sir.

"Q. He never made any claim to the horse? A. No sir.

"Q. And he took the horse away? A. Yes sir.

"Q. About when was that, would you say, In the Spring of this year? A. Yes sir.

"Recross-Examination

"* * * Q. Had you seen the horse on your premises before John had ridden him? A. Yes, there were a few stray horses on my place; I could not say about this one, but there were a few stray horses on my place.

"Q. Then you saw John riding this horse and you knew it was a stray horse? A. Yes sir, he told me it was a stray horse."

The defendant, in a voluntary statement made to the sheriff, said they had accused him of stealing a slash J horse and they were calling it a slash U; that the slash J brand belonged to a relative of his in Arizona; and that the relative would appear at the trial. Cage Riley, father-in-law of the defendant, was placed on the stand by the State and he also maintained that the brand on the horse was a slash J. He testified that he had seen his son, John Riley, with the horse, and that the defendant had the horse and a dozen or more other horses at his place in July; that after stayinqg all night he departed with the horses in the direction of Portales. Shortly thereafter the defendant sold the horse near Portales in Roosevelt county, and when the scrivener, who was preparing the bill of sale for defendant's signature, asked him, "What brand?" he replied, "V bar," and that brand was placed in the bill of sale which the defendant executed and delivered with the horse.

The points relied upon for reversal are all based upon alleged error in the overruling of a motion for an instructed verdict, on the grounds of total failure of proof of venue, and that there was no substantial evidence that the defendant committed the larceny. Appellant made no objection to the court's instructions to the jury. There is no dispute as to the ownership of the horse nor that it was stolen, nor is there serious question as to the identity of the animal which the appellant had at the Cage Riley ranch in July with the

subject of the larceny. Cage Riley described the brand as a slash J, as did the appellant in his conversation with the sheriff, but Riley had talked with the owner after the horse was recovered and testified that he knew the horse. The dispute was as to the brand the horse bore and not as to the identity of the animal.

The Attorney General suggests that the horse strayed from his range in Guadalupe county into De Baca county. It is a well-known fact that in that open range country cattle and horses will stray or drift many miles. James F. Hinkle, in "Early Days of a Cowboy on the Pecos," states: "We would send men out on the outside work and they would often be away for six months. They would work with the outside wagons and throw the cattle back towards the headquarters ranch. Often they would work as far south as Pecos town on the Pecos, and sometimes below that, and as far north as old Fort Sumner, a distance up and down the river of two hundred and fifty miles. * * * Some winters the cattle would drift south very much. I call to mind one roundup on both sides of the Pecos from Seven Rivers to the Berrendos, just north of Roswell, when there had been a great drift of cattle from as far north as the Canadian. Our outfit was on the west side of the river and was one of twenty-two wagons on that work. It took about thirty days to do that work for we would have large numbers of cattle in each roundup. The cattle were largely on out waters, that is, surface water holes and lakes, and the drive would have to go out each morning twenty miles or more to get around the cattle. At the clean up at Roswell there were fifty thousand cattle under herd to be taken back to the various ranches."

However, the method of the animal's escape or removal seems immaterial (3 C.J. S., Animals, 1200; 2 Am.Jur. 795), since, according to the defendant's witness, the horse was ranging for months in De Baca county before he was sold by the defendant on the 17th day of July, 1936. The horse was referred to by the witnesses as an estray on the Overton range. We have a statute defining an estray, 1929 Comp. St. § 4-1501, which provides: "Any bovine animal, horse, mule or ass, found running at large upon public or private lands, either fenced or unfenced, in the state of New Mexico, whose owner is unknown in the section where found, or which shall be fifty miles or more from the limits of its usual range or pasture, or that is branded with a brand which is not on record in the office of the cattle sanitary board of New Mexico, shall be known as an 'estray.'"

The slash U brand was duly recorded and the Overton ranch was not 50 miles from the usual range of the horse, hence he was not an estray under the provisions of our statute. Although if he were an estray in the physical possession of a taker up the property in the horse under such circumstances might be laid in the true owner. Quinn v. People, 123 Ill. 333,

15 N.E. 46; Palmer v. State, 70 Neb. 136, 97 N.W. 235; Moore v. State, 8 Tex.App. 496.

Appellant's attorney in an able brief strenuously argues that the testimony fails to prove the taking of the horse by the defendant in De Baca county beyond a reasonable doubt; and lays particular emphasis upon the use of the horse by John Riley, a brother-in-law of defendant and son of Cage Riley. John Riley rode the horse from time to time, but he made no claim of ownership and repeatedly stated that the horse was a stray. So far as the record shows, the horse was never out of De Baca county from the time he entered it in the year 1935 until in July, 1936, when the defendant had possession of him in Roosevelt county. This, in connection with the Cage Riley testimony, was sufficient evidence to justify the jury in finding that the horse was in De Baca county when taken.

The appellant's subsequent conduct and dealing with the horse may be looked to to show with what intent he first took possession of him. Shortly after leaving the Cage Riley ranch he sold the animal under a false brand and claimed in his statement to the sheriff that it bore another. The possibility of mistake is eliminated by the defendant's statements. This, with his unexplained possession of the stolen horse, is sufficient to make a prima facie case of guilt and establish the corpus delicti. State v. Lott, 40 N.M. 147, 56 P.(2d) 1029; State v. Ortega, 36 N.M. 57, 7 P.(2d) 943; State v. Hussey, 188 Wash. 454, 62 P.(2d) 1350; Note, 19 Ann. Cas. 527; Levering v. Commonwealth, 132 Ky. 666, 117 S.W. 253, 136 Am.St.Rep. 192, 19 Ann.Cas. 140.

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

SADLER, BRICE, and ZINN, JJ., concur.

BICKLEY, Justice (dissenting).

I am unable to concur in the foregoing decision.

The court instructed the jury as follows: "The Court instructs you further, Gentlemen, that if you do not believe from the evidence that the said horse was taken, led or driven away from the County of De Baca, and the said owner of said horse deprived his possession in the County of De Baca, as alleged in the information, still, the Court instructs you that if you believe from the evidence beyond a reasonable doubt that the Defendant Cliff Miller, at some other county in the State of New Mexico, on the 21st day of June, 1935, or at some other time within three years prior to the date of the filing of the information herein in this court, to-wit, on the 12th day of October, 1936, did, knowingly and intentionally, deprive the said owner, W. S. Parker, without his consent, of the immediate possession thereof, and after so taking, leading and driving away of said horse, did immediately bring the same into the County of De Baca, in the State of

New Mexico, and that the taking, leading and driving away of said horse from the place where it had been left by the owner, and the bringing of the same into the County of De Baca was one continuous act and transaction, and with the continuous intent to deprive the owner of the immediate posssession thereof, then the Court instructs you that you may find the Defendant Cliff Miller guilty in manner and form as charged in the information."

The giving of this instruction indicates a doubt in the court's mind that the evidence showed that the horse was taken, led, or driven away from the county of De Baca.

There is no evidence to connect the defendant with the taking of the horse from the place where it had been left by the owner in Guadalupe county in the summer of 1935; there is no evidence that the defendant brought the same into De Baca county; the person next seen with the horse after the owner lost it in Guadalupe county was John Riley, who had it in his possession as a stray horse for weeks before any connection of defendant is shown with it. It appears that the possession of the horse by John Riley intervened between the owner's immediate possession and any connection by defendant with it. John Riley apparently rode the horse away from De Baca county into Roosevelt county and defendant became possessed thereof in Roosevelt county. How then can it be said that defendant deprived the owner, Parker, "of the immediate possession thereof"?

The guilty connection of defendant with the horse in Roosevelt county, which was substantially a year later, rests solely upon his unexplained possession of it there and does not raise a presumption that the horse was stolen, much less did it raise a presumption that defendant had stolen it from Parker, the owner, in Guadalupe county, or that he had at some time or other taken it into De Baca county or had taken it therefrom.

Particularly is such presumption unreliable since the jury were not instructed as to the probative force of the unexplained possession of stolen property, if it had been stolen, and as to the necessary elements of the recency of the possession as related to the time of the theft and other elements necessary to be shown to exist before such presumption may be said to arise. It is true the appellant did not request such an instruction, but it appears to me that where the State must rely solely, as in the case at bar, upon circumstantial evidence for conviction, the court should instruct as to the qualities of effective circumstantial evidence whether requested to do so or not. See Territory v. Lermo, 8 N.M. 566, 46 P. 16, cited by the Wyoming Supreme Court in Gardner v. State, 27 Wyo. 316, 196 P. 750, 15 A.L.R. 1040, where the court decided: "The court should instruct on law of circumstantial evidence where such evidence is alone relied on for conviction, although the instruction requested by accused is erroneous, and he requests no other instruction on the subject, and takes no ex-

ception to the court's failure to give one where the statute requires the court to charge the jury."

In the course of the opinion the Wyoming court cited many cases to support that view, and quoted from a note in 97 Am. St.Rep. p. 790, as follows: "In order to secure justice, it is the duty of the trial judge, even without request, to instruct the jury as to this kind of evidence, where the case is based solely thereon. * * * Territory v. Lermo, 8 N.M. 566, 46 P. 16. * * *"

It would be putting too heavy a burden on the defendant to require him to ask the court to instruct the jury of the existence of a presumption available to the prosecution arising from the evidence in order to demand that the cautionary elements usually accompanying such instruction should be included in order to make the presumption effective. In other words, the presumption is one which has been formulated out of experience for use in convicting those charged with theft and is a part of the State's case. Why should the accused be required to help the prosecutor make a case against him in order to insist that the case be not improperly made? In State v. Diaz, 36 N.M. 284, 286, 13 P.(2d) 883, the conclusion was reached that there are exceptions to the rule that nondirection is no cause for reversal unless the accused had invoked such nondirection as an error at the trial. In that case it is suggested that there are situations in which it would embarrass the defendant and demand too much of him to require that he point out to the court the only legal principles and facts upon which the jury can convict him. Under the principles announced in State v. Reed, 39 N.M. 44, 39 P.(2d) 1005, 102 A. L.R. 995, it is extremely doubtful if the jury had a right to take into consideration the presumption or inference of guilt arising from possession of stolen property in the absence of a guiding instruction from the court as to the legal effect of such possession.

That the unexplained possession by one of property belonging to another does not raise the presumption that a larceny has been committed, and that the possessor is a thief, and that additional evidence is necessary to establish the corpus delicti is established law. See State v. White, 37 N. M. 121, 19 P.(2d) 192.

In my opinion, the administration of justice should require the reversal of the judgment. I therefore dissent.

73 P.2d 312

RIO GRANDE LUMBER & FUEL CO. v. BUERGO.

No. 4242.

Supreme Court of New Mexico.

Nov. 5, 1937.

W. C. Whatley, of Las Cruces, for appellant.

R. R. Posey, of Las Cruces, for appellee.

SADLER, Justice.

The defendant (appellant) appeals from a judgment foreclosing a mechanic's lien on certain real estate owned by him in the village of Organ, Dona Ana county, N. M.

The improvements for which the lien was claimed consisted of repairs to the roof and putting in windows and doors in a building already constructed. Certain materials were furnished by the plaintiff to the amount of approximately $100 upon order of the lessee of the premises and used in the building. It is for the contract price of said materials that the lien was established and foreclosed against the fee interest in said real estate.

The owner of the fee-simple estate in said premises, as defendant, objected to the establishment of any lien against his interest upon the ground that, within three days after obtaining knowledge that the repairs in question were in progress, he posted the property in compliance with 1929 Comp. § 82-210. The court so found. The theory upon which the trial court apparently fixed liability of defendant's premises to the lien asserted was that in making the repairs indicated the lessee was "agent of the owner" within the meaning of 1929 Comp. § 82-202, and that an owner may not, under the posting statute, relieve himself of liability for improvements which in legal contemplation he himself has ordered.

The claimed support for the trial court's theory rests on the fact that the lessee was in under a written lease in the form of a letter demising the premises for three years, the lessee to have rent free for the first year in exchange for his promise to repair the roof and put in windows and doors and to pay $20 per month for the remaining two years of the term. The defendant disputes the contention that the lessee was his agent within contemplation of that term as found in section 82-202, and, as already indicated, claims exemption from liability under the posting statute. The posting statute is unimportant if plaintiff's theory of agency in the lessee be correct. But, contingent on this court ruling against him on that theory, he asserts the posting statute is ineffective to aid defendant because he knew of the "intended construction, alteration or repair" from the time he signed the lease, and hence was required to post within three days thereafter which admittedly he did not do.

The two pertinent statutes read:

"82-202. *Mechanics and materialmen—Lien.* 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, sub-contractor, 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. L. '80, Ch. 16, § 2; C.L. '97, § 2217; Code '15, § 3319."

"82-210. *Land subject to lien—Notices to be posted.* Every building or other improvement mentioned in the second section of this article, 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, or the intended 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 improvement situated thereon. L. '80, Ch. 16, § 11; C.L. '97, § 2226; Code '15, § 3327."

The question before us is a troublesome one as indicated by the contrariety of view reflected in the decisions from other jurisdictions. See annotations in 23 L.R.A.(N.S.) 601, 609, supplemented in L.R.A.1917D 577, 580, and 79 A.L.R. 962.

As pointed out in the opinion in Stewart v. Talbott, 58 Colo. 563, 146 P. 771, Ann. Cas.1916C, 1116, where is to be found an exhaustive review of the authorities, the question is so controlled by the language of the particular statute that decisions from other jurisdictions are of little value unless the statutes are similar. Indeed, as there stated, there is grave danger of confusion in employing the reasoning of decisions from jurisdictions based on statutes of different language and import.

A careful review of our own decisions and some from other jurisdictions with similar statutes constrains us to hold that there is present in the instant lease no such language as warranted the trial court in declaring as a matter of law that the lessee was "agent" of the fee owner within the meaning of that term as employed in 1929 Comp. § 82-202. Mitchell v. McCutcheon, 33 N.M. 78, 260 P. 1086, 1087; McDowell v. Perry, 9 Cal.App.(2d) 555, 51 P.(2d) 117; Stetson-Post Mill Co. v. Brown, 21 Wash. 619, 59 P. 507, 75 Am.St.Rep. 862.

In Mitchell v. McCutcheon, supra, we observed that "inherently the relations of lessor and lessee, and of vendor and vendee, involve no agency." We there said:

"We think, therefore, that we must consider it as the established law in this state that section 3319 [now 1929 Comp., § 82-202] is not to be interpreted by itself, but as modified by sections 3321 [now 1929 Comp., § 82-204] and 3327 [now 1929 Comp., § 82-210], not only when we have in question useful improvements placed upon lands, but when we are considering ordinary labor in the operation of a mine. So, in the case at bar, the liability of the lessor's interest was not established solely by a showing that appellees were employed by one in charge of mining operations for the lessee. It was to be inquired, further, whether the

lessor had knowledge of the mining operations, and, if so, whether he posted the property for the protection of his interest."

"Appellant requested the trial court to conclude, as a matter of law, 'that the lessee and the agent of the lessee are not the agents of the lessor either at common law, or by statute, without more, so as to bring their employees within the lien statute of the state of New Mexico.' This conclusion the trial court refused to make; and if it were clear that the judgment rested upon the converse of this proposition, error would be apparent."

The converse of the proposition stated in the language last quoted from the Mitchell Case as applied to the lessee in the main is affirmed by appellee in the case before us. We there held that, if it were clear the judgment rested on the converse of the proposition stated, "error would be apparent." There is here something more than the mere relationship of lessor and lessee from which to argue agency, in that the lease itself authorized the lessee to make the improvements in the nature of repairs and gave a rent adjustment in connection therewith. But this seems to represent no such active control and participation by the owner (lessor) in the improvement as to constitute the lessee his agent and bind the lessor's estate. Stetson-Post Mill Co. v. Brown, supra. Similarity between the language of the Washington statute and our own will be noted from a reading of the Stetson Case, supra.

The case most nearly in point coming to our attention is McDowell v. Perry, a recent decision of the District Court of Appeal of California, reported at 9 Cal.App. (2d) 555, 51 P.(2d) 117, 121. As pointed out in Ackerson v. Albuquerque Lumber Co., 38 N.M. 191, 29 P.(2d) 714, and again adverted to in Albuquerque Lumber Co. v. Montevista Co., 39 N.M. 6, 38 P.(2d) 77, we adopted the California Act of 1872 (Code Civ.Proc. § 1192), as amended in 1873–74 (page 410). And, while the California act has passed through various amendments since that time not adopted here, the controlling language so far as applicable to the case before us remains substantially the same. In the McDowell Case, a land purchase contract which obligated the vendee to drill an artesian well was involved. The vendee was to drill and construct an adequate irrigation system to irrigate forty acres of land and to plant said forty acres to avocados. The vendee contracted with the well driller to do the work, and an effort was made to subject the vendor's interest. The latter had duly posted a notice of nonresponsibility. The court rejected the claim of mechanic's lien, and among other things said:

"It must be apparent, we think, that so far as this particular statute is concerned the only language thereof which lends any support to the possibility of the existence of the statutory agency contended for by appellant is the following: 'Whether at the instance of the owner, or of any other person acting by his authority or under him, as contractor or otherwise.' The language

which declares that 'every contractor * * * or other person having charge of the construction * * * shall be held to be the agent of the owner' obviously refers to a definite class of persons who are engaged in the actual performance of the specified work. It could hardly be contended that a vendee of land under a contract of sale which specifically provided that he was required to make a designated improvement on the land and who thereupon entered into a contract with a third person for the doing of the work is a contractor in the sense in which the term is there used.

"The language 'whether at the instance of the owner, or of any other person acting by his authority, or under him, as contractor or otherwise' is manifestly not so restricted as the language last considered. However, it is obvious that the question of whether or not a person who orders work to be done and materials furnished is acting by authority of the landowner is a question of fact to be determined by the trier of facts from the evidence adduced. The trial court has found, impliedly at least, that the vendee who was obligated by his contract to drill a well on the land was not acting by the authority of the vendor in making the particular contract which constitutes the basis of appellant's claim to a lien upon the land. This finding has ample evidentiary support. The contention that the vendee in contracting with appellant for the drilling of the well was acting by the authority of the vendor depends solely on the fact that the contract between respondent and France obligated the latter to drill a well. It is our conclusion that the basis for the contention does not fulfill the statutory requirement, and that the burden rested upon appellant to show that the person to whom he furnished labor and materials for the drilling of the well was authorized by the landowner to contract for the furnishing of the very labor and materials that were used in the drilling of the particular well for which appellant claims a lien. The circumstances of the case indicate the reasonableness of this construction. The evidence showed that appellant was fully familiar with the provisions of the contract between respondent and the defendant, France, prior to the time he did any work on the well. He was acquainted with respondent and had talked with him. He could easily have discovered whether or not France was authorized by respondent to contract for the furnishing of the labor and materials which he proposed to furnish and at the price which he proposed to charge therefor. Furthermore, the evidence showed that on the day following the arrival of appellant's well-drilling equipment on the land seven notices signed by respondent were posted at various conspicuous places on the land. These notices stated that respondent was the owner in fee of the ranch which was legally described; that he had entered into an agreement with France on July 11, 1930, whereby France agreed to purchase portions of the ranch and to drill wells thereon and otherwise to improve the property. The notices concluded with a statement that the signer would not be responsible for the drilling of any

wells or for any materials or labor of any kind furnished to France. It is neither disputed that these notices were posted on the land nor did appellant deny that he had seen them. Appellant was therefore fully apprised that France was not in fact authorized by the owner of the property to act for him in the well-drilling operations, and that the owner disclaimed responsibility for any materials furnished or work performed in the drilling of any wells. This evidence negatives appellant's contention of statutory agency by the showing that no actual agency existed and that appellant was fully advised thereof."

We think there is, in the case before us, an insufficient showing to warrant the declaration as a matter of law that the lessee was agent of the owner within the language of section 82-202. Certainly a "lessee" is not per se a "contractor, sub-contractor, architect (or) builder," as those terms are employed in said section in connection with the declaration that they "shall be held to be the agent of the owner" for the purposes of said article. Whether any one of the class enumerated is so in fact in any given case must depend on circumstances stronger than those here shown to warrant such a holding. Of course, if the relationship of lessor and lessee or vendor and vendee represents a mere artifice or scheme resorted to by a fee owner to secure the placing of valuable improvements on his property without liability of his estate therefor (Western Lumber & Mill Co. v. Merchants' Amusement Co., 13 Cal.App. 4, 108 P. 891), a different case would be presented. But we have no such case before us. Many of the cases holding the lessee or vendee agent of the owner for purpose of binding the latter's estate are of that kind; or they show such an active participation by the fee owner in the construction of the building or other improvement as to warrant a finding that, although the lessee or vendee is such in name, he is in truth a "contractor, sub-contractor, architect (or) builder," and hence the "agent" contemplated by the statute.

Our conclusion is that only the lessee's interest was subject to the lien asserted (see 1929 Comp. § 82-204) unless the defendant (the fee owner) permitted his interest to become subject to the lien through failure to post a notice of nonresponsibility as provided by 1929 Comp. § 82-210. It is undisputed that the materials on account of which the lien is claimed were sold and charged to the lessee. This brings us to a consideration of the second point in the case.

The lease was dated February 3, 1931. No materials were furnished by plaintiff until the early part of April, 1931. Within three days after learning the improvement was under way defendant posted notice of nonresponsibility. The court so found. The nice question presented is whether in view of the language of section 82-210 he should have posted within three days after execution of the lease. In order to claim immunity from liability for his property under the circumstances here

shown, the fee owner must, "within three days after he shall obtain knowledge of the construction, alteration or repair, or the *intended construction, alteration or repair*" (italics ours), post notice of nonresponsibility in some conspicuous place on the land or improvement located thereon. Arguing that the defendant obtained knowledge of the intended repairs from the lease itself, plaintiff contends the notice posted some sixty days thereafter is too late to satisfy the statute.

The California statute prior to 1911 was in the exact language of our own in the particular just italicized (St.Cal.1907, p. 577). Indeed, as above said, our statute was adopted from California. Several California decisions have commented upon the peculiar language of the statute and its effect. Santa Monica Lbr. & Mill Co. v. Hege, 119 Cal. 376, 51 P. 555; Evans v. Judson, 120 Cal. 282, 52 P. 585; Hines v. Miller, 122 Cal. 517, 55 P. 401; Wm. H. Birch & Co. v. Magic Transit Co., 139 Cal. 496, 73 P. 238; Western Lbr. & Mill Co. v. Merchants' Amusement Co., 13 Cal.App. 4, 108 P. 891; S. H. Harmon Lbr. Co. v. Brown, 165 Cal. 193, 131 P. 368.

In only one of the California cases cited is the precise point here presented decided. It is the case of Wm. H. Birch & Co. v. Magic Transit Co., 139 Cal. 496, 73 P. 238, 240. The lease involved called upon the lessee to erect a scenic railway upon the demised premises to be completed within fifty days from date of the lease. The contention was made that the lessor, apprised by the terms of the lease that the improvement mentioned was contemplated, should have posted within three days from date of the lease in order to relieve his estate from liability for the lien. The lessor posted five days after the knowledge furnished by the lease of the intended construction and within one day after the actual construction was commenced. The trial court, having held such posting effective to relieve the owner, was affirmed in its conclusion by the decision of the Supreme Court adopting the opinion of the Supreme Court commissioners. The situation there existing is very similar to the one presented to us. The court said: "Whether a notice posted within three days after knowledge of the intended construction would in all cases be sufficient to protect the owner is a question not before us. We think, however, a failure to give such a notice by the owner, who does in fact give the notice within three days after he shall have obtained knowledge of the actual commencement of the work, does not deprive him of the protection given him by the statute."

So, in the instant case, we are not called upon to decide whether a notice posted within three days after knowledge of the intended construction furnished by the lease would be sufficient. That question is not before us, as it was not before the Supreme Court of California. What we do hold is that a notice posted within three days after the owner obtains knowledge of actual construction affords the protection contemplated by the statute.

In every one of the other California cases cited to this point the holding is simply to

the effect that where no notice at all was posted the provision for the improvement contained in the lease with other facts in the case was sufficient to put the owner on inquiry and charge him with constructive notice of the contemplated improvement so as to bind his estate. Thus, in each of the other cases, there was left open the question decided in the Birch Case just quoted from, as well as the question whether posting within three days from execution of the lease would be sufficient.

In a later case by the District Court of Appeal of California, Whiting-Mead Commercial Co. v. Brown, 44 Cal.App. 371, 186 P. 386, an amendment of the statute is noted by dropping the language "or intended construction," etc. Of course, after the amendment, a posting "within the time limited after knowledge of the actual improvements" would be sufficient, as it was held to be in that case.

The trial court having found that the defendant posted the statutory notice within three days after obtaining knowledge of actual work on the improvements mentioned in the lease, his estate must be held relieved of liability for the lien asserted against it. The judgment of the district court will be reversed and the cause remanded to the district court of Dona Ana county, with instructions to set same aside and to dismiss the complaint. The appellant will recover his costs.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

73 P.2d 316

In re WHITE'S ESTATE.

No. 4265.

Supreme Court of New Mexico.

Sept. 28, 1937.

Rehearing Denied Nov. 13, 1937.

Douglass K. Fitzhugh, of Hot Springs, for appellants.

J. L. Lawson, of Alamogordo, for appellee.

BRICE, Justice.

This appeal is from a decree in the district court settling the property rights and distributing the assets of an estate. The facts, as found by the court, are substantially as follows:

Morris Downey White died intestate on the 13th day of February, 1920, leaving as heirs and next of kin Mildred Byron White, his wife, and William C. White, a son by a former marriage. Thereafter Mildred Byron White married Douglass K. Fitzhugh, to which union there was born Collene Mildred Fitzhugh and Bonnie Lee Fitzhugh, both minors. Mildred Byron Fitzhugh died intestate on the 2d day of November, 1934, leaving as her heirs at law her husband, Douglas K. Fitzhugh, and the two minor children just mentioned. The only property left by the decedent, Morris Downey White, was cash derived from the unpaid balance of installments of

a life insurance policy on his life, amounting to $3,104.67; presumably payable to his estate.

The court held as a conclusion of law that William C. White was entitled to three-fourths of the insurance money and the Fitzhughs one-fourth; that the heirs of Mrs. Fitzhugh were not entitled to a widow's allowance of $500 which they claim Mrs. Fitzhugh was entitled to receive from the estate and to which they had succeeded as her heirs.

If the insurance money was community property then five-eighths thereof was the property of Mrs. Fitzhugh and three-eighths that of William C. White (N.M.Comp.St.1929, § 38-105); but, if it was the separate property of the husband, then Mrs. Fitzhugh was entitled to one-fourth thereof and William C. White to the remainder (section 38-106, N.M.Comp.St. 1929). The court failed to find whether the property was community, or the separate property of the husband, and it may have been either. It has been generally held in community property states that a life insurance policy payable to the estate of a person is his separate property if the policy was obtained before his marriage, McKay on Community Property (2d Ed.) § 479, and community property if the policy was obtained subsequent to marriage, McKay on Community Property (2d Ed.) § 480.

The court, in Succession of Le Blanc, 142 La. 27, 76 So. 223, 225, L.R.A.1917F, 1137, said on the subject: "Life insurance in favor of the estate, the executors or administrators, of the person insured, forms a part of his estate at his death; and the status of the proceeds or avails of such life insurance—that is, whether it is community property or property of the separate estate of the insured—depends upon whether the contract of insurance was made during the marital community or when the insured was single. The status of the proceeds or avails of such insurance, whether community property or the separate property of the insured, is not governed by the marital status of the insured at the time of his death. See Succession of Buddig, 108 La. 406, 32 So. 361; Succession of Verneuille, 120 La. 605, 45 So. 520; Succession of Roder, 121 La. 692, 46 So. 697, 15 Ann.Cas. 526."

There is no finding of fact on this question. This court has decided in many cases that property acquired during marriage is presumed to be community property in absence of proof on the question, Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601; Carron v. Abounador, 28 N.M. 491, 214 P. 772; Roberts v. Roberts, 35 N.M. 593, 4 P.(2d) 920; and, in the absence of any evidence of whether property belongs to the separate or community estate, it is presumed to be community property, but this presumption may be overcome by proof that it is separate property. Strong, Trustee, v. Eakin et al., 11 N.M. 107, 66 P. 539. We then can add to the findings of the court the presumption that the property in question was the community property of Morris Downey White and his wife.

It follows that she was entitled to five-eighths thereof at the death of White.

The next question is whether the wife was entitled to $500 allowance, under section 38-107, N.M.Comp.St.1929, which is as follows: "When the decedent leaves a widow, all personal property which in his hands as head of a family would be exempt from execution, after being inventoried and appraised, shall be set apart to her as her property in her own right, and shall be exempt in her hands as in the hands of the decedent." Amended chapter 90, N.M. Laws, 1937.

Section 48-117, N.M.St.1929, 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."

The claim is that as the decedent was entitled to claim $500 exemption under section 48-117 N.M.Comp.St.1929, above set out, that his wife was entitled to this amount of money by virtue of that statute and section 38-107, which we have quoted. In construing said section 38-107, we stated in White v. Mayo, 35 N.M. 430, 299 P. 1068, that this statute vested in the widow an unqualified right to that property immediately upon the husband's death. This being true, then the only question is whether the proceeds of the insurance policy comes within these two statutes; for, according to the findings of the district court, the decedent had no property except the life insurance policy, and this was in effect a finding that he did not have a homestead. As he had a wife and child, he was the head of a family.

It was intended by section 38-107, N.M. Comp.St.1929, supra, that after the personal property of an estate has been inventoried and appraised, any thereof which would have been exempt from execution sale, etc., in the hands of the deceased, if he was alive, should be set apart to the widow as her property. The insurance policy was the only property owned by the estate. It in time would be paid in cash. The widow was entitled to have paid to her out of the proceeds of the policy the sum of $500. It was personal property of a value exceeding that sum.

As it is necessary to reverse the case, we have concluded that, in the interest of its correct determination, the question of whether the insurance policy was community or separate property should be determined by the district court.

The cause will be reversed and remanded to the district court, with instructions to allow the heirs of Mrs. Fitzhugh the sum of $500 out of the proceeds of the insurance policy; determine from the evidence introduced, or further evidence if necessary, whether such policy was the separate property of White or the community property of him and his wife; and apportion the balance of the proceeds of

the policy (after deducting the $500) among the heirs at law of the decedent in accordance with the statutes of descent and distribution of estates of decedents.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

On Motion for Rehearing

BRICE, Justice.

It is urged on rehearing that appellant did not properly argue his assignment of errors, and therefore they were abandoned. It must be admitted that his argument is meager, states but little except conclusions, and might well have been treated as abandoned. However, this question was not raised originally by appellee, and it will not be considered on motion for rehearing.

Appellee asks if the district court was required to make specific findings on the question of whether the property was community or separate, in view of the fact he had concluded that three-fourths of the property belonged to appellee and one-fourth to appellant, and states, "This was necessarily a finding and conclusion that the property was separate estate." This seems to be incorrect. It is a conclusion of law that the property should be thus divided; whereas the facts found, supplemented by presumptions of fact not controverted, establish that it was community property; therefore the district court's conclusion was erroneous.

It is remarkable that the only testimony introduced at the trial of this case was that by appellee to establish that he was the son and heir of Morris Downey White. This the court found. No testimony was introduced to support any other finding of the trial court. We will assume that the findings of fact were agreed to by the parties, as exceptions were taken only to the court's conclusions of law. Under a well-established rule findings of the court not objected to are the facts upon which the case must rest in this court.

Appellant cites Singleton et al. v. Cheek et al., 284 U.S. 493, 52 S.Ct. 257, 76 L.Ed. 419, 81 A.L.R. 923, to the effect that under the federal statute the present value of installments of soldiers war risk insurance not due at the time of the death of the designated beneficiary must be paid to the estate of the insured; and descends to his heirs at law as of the time of his death. But there is no finding of the court as to the source of the insurance, and we cannot assume, in the absence of a finding, that it was "war risk insurance."

We are admonished by appellee that we are casting upon the trial judge the responsibility for the error; that we should not presume or infer "that a judge of such well-known integrity and legal ability did not investigate and obtain the facts as to the date of marriage of deceased White, and of the policy and to

know and have the law before him as to whether the proceeds of the insurance were separate or community property." What right have we to presume that the district court went outside the record and made such investigation? He is presumed to decide the case upon the law, and the evidence as presented by the respective parties. We will therefore not infer or presume that the district judge, though he may be well known for integrity and legal ability (a matter not in dispute), did, or had the right to, make an independent investigation and obtain facts upon which to decide the case in his court. We would much prefer to, and do, hold that the case was tried orderly and properly. Nor do we believe that our decision is a reflection on the "integrity and ability of the trial judge," as appellee suggests. It has been the history of all appellate courts that the judgments of trial judges, some well known for integrity and legal ability, are at times reversed.

It is stated in appellee's brief: "Is it not also to be presumed that the attorney for Appellants would have furnished the court, and made a record of the date when the policy was taken out, and of the second marriage; if he contends that the money was community property? Also that the attorney for Appellee had the information and the law to show the Court that the money was separate property for the Court to have used his method of distribution to the heirs?"

The appellant could rely on the presumption that the insurance money was community property. This placed the burden upon appellee to rebut this presumption, which he failed to do.

We are not authorized to presume that "the attorney for appellee had the information and the law" to show that the money was separate property. If he did possess the information, it should have been introduced in evidence. The certificate of the district judge states that the bill of exceptions contained all the evidence introduced at the trial; so there can be no presumption that there was evidence to support the judgment of the court.

Other questions are raised but, like those answered, are without merit. Ordinarily the case would be reversed and rendered here; but some suggestions in the record, outside the findings, indicate the policy may have been separate property; in deference to which, we reversed the case for a new trial on that question.

The motion for a rehearing is denied.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and ZINN, JJ., concur.

73 P.2d 321

ROBERSON v. BONDURANT.

No. 4202.

Supreme Court of New Mexico.

Sept. 7, 1937.

Rehearing Denied Nov. 13, 1937.

J. D. Atwood, of Roswell, for appellant.

J. C. Gilbert, of Roswell, and Kiker & Sanchez, of Santa Fe, for appellee.

HUDSPETH, Chief Justice.

This is an appeal from a judgment rendered in favor of the plaintiff, appellee here, for the sum of $703.52, balance found to be due under a written contract for the sale of cotton during the year 1930. Pleadings consist of an amended complaint, to which is attached a copy of the written contract sued upon, answer, and reply. Both parties submitted proposed findings of fact. The court later made up his own findings.

Under the issues made by the pleadings, there is only one item in dispute as to the cotton delivered under the contract. That is a bale of cotton, No. 2315, sold by Moon to Smith for $76.56. There is a difference of $567.49 between the credits allowed appellant by the court and the amount claimed by appellant to have been advanced and paid by him to Z. B. Moon for the account of appellee. Material parts of the court's findings and conclusions follow:

"VIII. All money advanced to Roberson was first delivered by Bondurant to Moon as Bondurant's disbursing agent and thereafter by Moon delivered to Roberson, by checks on the bank account in an Artesia bank, in the name of Z. B. Moon, in which account the Bondurant money was deposit-

ed and through which account Moon transacted his individual and personal business.

"IX. The transactions between Brainard Corbin Hardware Company, Moon and the plaintiff should not be taken into consideration as the defendant was in no manner a party thereto. Roberson gave Moon a note which Moon discounted at the Artesia bank and placed in said bank account the funds obtained therefor, which were more than sufficient to cover the amount paid by Moon to Brainard Corbin Hardware Company, and the note was given for such purpose.

"X. The plaintiff is not entitled to any payment for the cotton raised by Troutman and Whitely and that is excluded from consideration.

"XI. There was no valid settlement entered into between the plaintiff and the defendant at Artesia, about which testimony was introduced. The defendant's claim therein was based on a forged instrument and the defendant relied upon certain false statements made by Moon, if it could be said any final agreement was reached, in which case it would have been void. But the Court finds that no settlement was ever reached. The evidence introduced by the defendant to the effect that the contract to pay 15¢ a pound, basis middling, for the cotton was reduced to 12½¢ a pound, was based on a forged instrument and the Court finds that no such amendment to the contract was ever made or consented to by the plaintiff.

"XII. All transactions between Moon, one Coats and the plaintiff were entirely between them, the defendant was in no manner connected therewith and such transactions should not be and are not, taken into consideration in determining this suit. But assuming that they should be, Roberson's discounted note, mentioned in the last preceding Finding, produced more than sufficient money to return to Moon the advances made to Coats for teams, besides paying all advances made to the Brainard Corbin Hardware Company.

"XIII. The defendant disbursed such monies to Roberson through Z. B. Moon and received all cotton through Z. B. Moon, from Roberson, without Roberson furnishing bills of lading, as provided by the terms of the contract."

Conclusions of Law

"I. Under the evidence in this case, Z. B. Moon was the agent of the defendant for the delivery of money to the plaintiff, and to receive cotton from the plaintiff under the contract sued on, and the plaintiff was not responsible for any money given by the defendant to Moon which plaintiff did not receive, and the plaintiff was responsible for all cotton delivered to Moon under the contract for him, whether the same was received by him or not, and, therefore, defendant is responsible to plaintiff for the bale of cotton Moon sold to Smith.

"II. By a course of dealing the cotton in the suit was delivered by Roberson to

Moon and by Moon to Bondurant, Bondurant thus recognizing Moon's authority to receive the cotton for him, and he became liable to the plaintiff for all cotton the plaintiff delivered to Moon on said contract, thus modifying the terms of the written contract providing for the delivery of the bill of lading of the cotton."

Appellant concedes that the case is one largely of fact, and that, if the court's findings of fact are based upon substantial evidence, they will not be disturbed under the long-established rule of this court. The question of agency is the important one in the case. Appellant argues that Moon became the exclusive agent of the appellee in receiving the money paid by appellant to him and in disbursing the same, and also in shipping the cotton, while appellee contends that appellant made Moon his agent for the disbursement of advances, which under the written contract he was obligated to pay to appellee; that instead of delivering the money directly to appellee, it was delivered to Moon to be delivered to appellee, and the fact that the appellee agreed or did not object to the agency is immaterial. The written contract sued upon called for the delivery of twenty bales of cotton, and the appellee obligated himself to furnish bills of lading, but instead he turned over the warehouse receipts to Moon, who shipped nineteen bales to appellant and appropriated one bale to his own use and sold it to one Smith for $76.56. Appellant points to the fact that Moon indorsed appellee's note and guaranteed the performance of the contract sued upon as evidence of the fact that his interest lies with appellee. On the other hand, counsel for appellee rely upon the testimony of appellee and his witnesses, admissions by appellant, as well as the circumstances and the close relationship between appellant and Moon for support of the court's findings. Appellant testified, "I made this contract through Senator Moon." While there is no intimation that appellant had a part in or knowledge of the forgery referred to in the trial court's findings quoted above, it is admitted that appellant prepared and sent the document to Moon in the month of June for the purpose of having Moon procure the signature of the appellee thereto. A continuing agency may be proved by facts and circumstances showing the existence of such an agency, both prior and subsequent to the date of the transaction, although there be direct testimony denying the existence of the agency. Jameson v. First Savings Bank & Trust Co., 40 N.M. 133, 55 P.(2d) 743, 103 A.L.R. 1492; Hartman v. Elias, 41 N.M. 392, 69 P.(2d) 929; Alles & Boon v. Grubbs, 148 Okl. 301, 298 P. 1049; 21 R.C.L. 820. The law as to implied agency and estoppel by a course of dealings is well stated in 1 Mechem on Agency (2d Ed.) § 271, as follows:

"By proof of an established course of dealing.—Equally so, is the rule that proof of authority to do the act in question may be made by showing that it is one of a class concerning which the parties had established a course of dealing which recog-

nized its validity, whether it would otherwise have been so or not; or concerning which there was such a general course of dealing as would justify the conclusion that this authority had in fact been conferred. The doctrine of estoppel would often enter into the first; the latter would usually rest wholly upon inference of fact. Evidence of an established course of dealing may also, as be more fully seen hereafter, be admissible in many cases for the purpose of showing how the parties had interpreted an authority undoubtedly conferred."

See, also, Restatement of the Law of Agency, §§ 23, 24, and 27; Ubaldini v. C. I. T. Corp., 122 Pa.Super. 428, 186 A. 198; Hansche v. A. J. Conroy, Inc., 222 Wis. 553, 269 N.W. 309; Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp. (C. C.A.) 49 F.(2d) 146.

The 480 pages in the record render any detailed discussion of the evidence impractical, and we are not disposed to discuss the matter further on this point, except to say that we have carefully examined the record cited by appellant, and while the evidence of appellee—an illiterate man—might have been more satisfactory, we are constrained to hold that the fact as to whose agent Moon was is in serious dispute—and in such case it is a question for the trier of the facts. It is only in a case where the facts are not in dispute that it becomes a question for the court. Collins v. Ames, 98 N.J.Law, 828, 121 A. 710. The record is such that we could have sustained a finding by the trial court in accord with appellant's contention, but we are unable to say that there is not substantial evidence to support the findings made. Every presumption favors the correctness of the decision. Mitchell v. McCutcheon, 33 N.M. 78, 260 P. 1086; James v. Anderson, 39 N.M. 535, 51 P.(2d) 601.

Another assignment of error is that the court erred in refusing to allow appellant credit for $161.79, which was paid to Moon upon the execution and delivery by appellee to appellant of a contract for the sale of six bales of cotton, dated June 16, 1930. The learned counsel of appellant states in his brief with reference to this item:

"The second contract, calling for the delivery of six bales of cotton, was made the basis of the second cause of action in the original complaint. The proof at the trial showed that no cotton was delivered under this contract and the second cause of action was eliminated from the suit by the filing of the amended complaint, which confined the action to a suit on the first contract which called for the delivery by plaintiff to defendant of twenty bales of cotton of the grade of strict low middling and better."

Appellant argues that, notwithstanding the elimination of the second count, the appellant should be given credit for the item under the terms of the first contract, which provides:

"Advances. It is especially agreed and understood that any and all moneys ad-

vanced by second party to first party, at the time of and after the execution of this contract, whether evidenced by note or not, represent money advanced as part payment of the cotton herein mentioned, sold by first party to second party. * * *"

This payment was not made on the twenty bales of cotton mentioned in the contract sued upon, but was a payment on six bales of cotton under an entirely different written contract also containing the above-quoted clause as to advances, and, since the second count was eliminated without objection, as far as the record shows, the matter is no longer an issue in the case, we can afford appellant no relief.

The next assignment argued is that the court erred in disallowing items which appellant claims that Moon paid at the instance of appellee. The difficulty with appellant's position on these items generally is that Moon testified in justification of his taking from appellee the note referred to in the court's findings that appellant advanced a little over $900 and that he advanced some $800. It is admitted that the funds sent to Moon by appellant were deposited in Moon's bank account, as found by the trial court. It is only on the testimony of Moon that appellant relies for proof that these disbursements were made from the funds of appellant. The court was at liberty to disbelieve Moon. Walker v. Smith, 39 N.M. 148, 42 P.(2d) 768. Appellant further maintains that the appellee should be charged with all funds sent to Moon by appellant, but we are unable to agree with that proposition in view of the fact that the trial court found that Moon was appellant's agent rather than the agent of appellee. The same applies as to the one bale of cotton sold by Moon to Smith.

However, there is one item of $50 paid to Middleton for corn which the trial court evidently overlooked. Appellee, in testimony, and his counsel, in requested findings, admit this item was paid for the benefit of appellant. The failure to give credit for this item is reversible error. Bentley v. Kasiska, 49 Idaho, 416, 288 P. 897; Associated Oil Co. v. La Branch, 139 Or. 410, 10 P.(2d) 597; Thomas v. Clayton Piano Co., 47 Utah, 91, 151 P. 543; 64 C.J. p. 1233, § 1077.

For the reasons stated, the cause should be remanded to the district court with directions to grant appellant a new trial unless the appellee files a remittitur of $50.

It is so ordered.

SADLER, BICKLEY, and ZINN, JJ., concur.

BRICE, J., did not participate.

On Rehearing.

HUDSPETH, Chief Justice.

The opinion in this case has drawn two motions. Appellant has filed a motion for rehearing and reargues assignments of error heretofore considered. We have again carefully reviewed the record and find the motion without merit, and accordingly it is denied. Appellee has filed a remittitur of

$50 and asks that the costs be taxed against the appellant.

The statute formerly left the court no discretion in the assessment of costs. Childers v. Hubbell, 15 N.M. 450, 454, 110 P. 1051; King v. Tabor, 15 N.M. 488, 110 P. 601. The statute was amended in 1917 so as to vest discretion in this court. 1929 N.M.Comp.St. § 105-1301 (as to district courts see amendment, Laws 1933, c. 16). Our territorial court in cases of this sort seemed to favor the division of the costs of appeals between the parties. That rule prevails in several other jurisdictions. Peninsula Terminal Co. v. Sterling, 113 Fla. 103, 151 So. 520; Cobb v. McCall, 116 Fla. 308, 156 So. 705; Tyler v. Walt, 184 La. 659, 167 So. 182; Weatherspoon v. Stackland, 127 Or. 450, 271 P. 741; Williams v. Gray, 62 Mont. 1, 203 P. 524; Brotherhood Acc. Ass'n v. Jennings, 44 Colo. 144, 96 P. 985. It appears that justice would be done in the case at bar if the cost of the appeal should be borne equally by the respective parties.

The cause will be remanded to the district court, with directions to reform its judgment by reduction of said judgment in the sum of $50. The costs of this appeal will be taxed one-half to appellant and one-half to appellee. It is so ordered.

SADLER, BICKLEY, and ZINN, JJ., concur.

BRICE, J., being disqualified, did not participate.

73 P.2d 325

HOBBS v. MORRISON SUPPLY CO.

No. 4218.

Supreme Court of New Mexico.

Sept. 8, 1937.

Rehearing Denied Nov. 13, 1937.

E. D. Tittmann, of Hillsboro, for appellant.

J. C. Gilbert, C. J. Neis, and H. C. Buchly, all of Roswell, for appellee.

BRICE, Justice.

This suit was brought by the appellee against Ira A. Jones and J. H. Brizendine to foreclose a mechanic's lien against certain property in Hot Springs, N. M. After the filing of this suit, appellant acquired the interests of the defendants in the property involved, and intervened in the case. The court found in favor of appellee against the defendants and assessed its damages at $1,829.08, and interest; and as against defendants and intervener decreed a foreclosure of the mechanic's lien and ordered a sale of the property, the proceeds to be applied to the damages found. From this decree, the intervener appealed.

The following facts, essential to a determination of this case, are taken from the findings of the court:

The appellee sold and delivered to Ira Jones and J. H. Brizendine plumbing materials of the value of $1,876.35, to be used in constructing a building on certain lots in Hot Springs, N. M., and all was so used except material of the value of $42. That the materials mentioned were furnished on a running account, from and including the 26th day of December, 1931, to and including the 5th day of April, 1932, during which time the building and lots in question belonged to the defendants Ira Jones and J. H. Brizendine. To secure the debt for the materials furnished the plaintiff, on the 26th day of July, 1932, filed in the office of the county clerk of Sierra county, N. M., its claim of lien against the building and lots mentioned. The building and lots in question were conveyed by the defendants to intervener on the 12th day of September, 1932, subject to, and with knowledge of, the claim of lien of the plaintiff. The appellee took security from the defendant Jones in the amount of $676.41 to protect its account, at or immediately prior to the time it commenced to furnish such material.

It was adjudged that plaintiff should recover as against the defendants $1,876.35 for material furnished, $5 for preparing note and mortgage, $328 interest, $250 attorney's fees, and $219.34 costs in the district court; a total of $2,678.69.

That of this sum a mechanic's lien was adjudged to exist against the lots and building in question to secure the following items: $1,876.35 for materials furnished, less $42 not used in the building, and less $676.41 for which appellee had taken security, making $1,157.94; to which was added $201.80 interest; $250 attorney's fees and $219.34 costs of court, a total of $1,829.08, for the payment of which the lots and buildings were decreed to be sold and proceeds of sale applied thereon.

The claim of lien filed stated the terms to be "2%—2—10—32, net 2—29—32 . 60 days." The complaint stated that the recorded lien as filed contained the terms and conditions thereof. The appellant contends that the evidence establishes that the account was to be paid when the building was finished, or a loan had been obtained.

Appellee's witnesses are quoted as stating that the account was to be paid when "the building was finished," and defendant Jones as stating that the material was to be paid for "when the loan was executed on the building, or the property sold, whichever came first; whenever we got the building completed and the loan." The appellant requested the following finding of fact:

"The material and supplies for which this lien is claimed were sold to defendants Ira Jones and J. H. Brizendine by plaintiff on the understanding that they would be paid for when the building was finished or a loan had been obtained."

The court refused the requested finding, and correctly so, as no witness so testified. According to the weight of the testimony, the material was to be paid for when the

building was completed; but no specific request was made of the court to find on the particular point; and no point is made of the fact that no finding was made thereon. The refused requested finding of fact quoted is the basis for appellant's first point, which is as follows:

"The proof of the terms and conditions of the contract disclosed a fatal variance with the terms and conditions of the contract as stated in the recorded lien claim and in the complaint."

There being no findings of fact from which we could determine the question, it must be ruled against appellant.

Before appellee furnished any materials for the building in question, defendant Jones, on its demand, executed a note payable to it in the sum of $1,200, secured by a mortgage on real estate other than that in suit. The note was partly for an old debt due appellee by Jones, and the balance of $676.41 was security to protect the material account in suit.

The court found:

"That when the plaintiff commenced to furnish the said goods, wares, merchandise and materials aforesaid, or immediately prior thereto, the plaintiff took and received of and from the defendant, Ira Jones, certain security in the amount of $676.41 to protect itself in the furnishing of said goods, wares, merchandise and materials."

Taking security for a portion of the material bill did not invalidate the lien as to the balance because of section 82-409, N.M.Comp.St.1929, which is as follows:

"No person shall be entitled to a lien under this article who has taken collateral security for the payment of the sum due him."

This statute does not apply to materialmen's liens. It was enacted originally in 1852 and appears under "Mechanics' Liens" as section 5 of chapter 77 (page 560) of the Compiled Laws of 1865, and reads:

"No person shall be entitled to a lien under this act who has taken collateral security for the payment of the sum due him."

It is in these exact words in the compilation of 1884 (section 1538), and of 1897 (section 2235). The original act provided for liens in favor of those furnishing material for buildings, hence the collateral security statute applied to such liens.

But, in the New Mexico Code of 1915, the lien statutes (section 3318 et seq.) were divided into articles; the first having reference to those of mechanics and materialmen, and the second to artisans, mechanics, landlords, innkeepers, etc., and the collateral security statute was included in article 2 only and changed to read: "No person shall be entitled to a lien under this article, who has taken collateral security for the payment of the sum due him." Section 3335. This has been followed in amendments of article 2 by chapter 65 of N.M. Laws of 1917 and the amendment to the 1917 act by chapter 24 of N. M. Laws of 1923.

The Code of 1915 was a single act entitled, "An Act to Codify the Laws of the

State of New Mexico" and the enacting clause reads: "Be It Enacted by the Legislature of the State of New Mexico:" and there followed the 5,901 sections of the Code. We stated in Ex parte Bustillos, 26 N.M. 449, 450, 194 P. 886, 890, with reference to the 1915 Code:

"There is the general enacting clause at the beginning of the act, and, under all rules of construction and interpretation, every section from the first to the last is to be held to be enacted by the act. It will be immaterial as to the source of the matter included in the act, whether coming from old statutes, decisions of the court, or whether the matter be entirely new."

Among the provisions of the repealing and saving clause of the N.M. Code of 1915 (page 1665) are the following:

"The provisions of the foregoing sections, taken or adopted from existing statutes shall be construed as continuations thereof, and not as new enactments."

"All acts and parts of acts of a general and permanent nature not contained in this codification, are hereby repealed."

Upon enactment of the N.M. Code of 1915, the wording of the statute was changed so that it applied only to statutory liens in favor of artisans, landlords, innkeepers. etc., and not to those furnishing material for buildings; that is, it applied only to those statutory liens created by the several sections of the statute under article 2 of chapter 67, Code 1915, entitled "Liens" and to none other. This excludes the liens of materialmen from the application of the statute, as they are provided for by article 1 of the chapter.

Subsequent legislation, as we have heretofore stated, continued to apply the statute in question to those liens created by article 2 of chapter 67 Code 1915. The title of chapter 65, Laws 1917, reads: "An Act to Amend Article II of Chapter LXVII of the Statutes of 1915 Relating to Liens of Artisans, Landlords and Others." And the statute in question is section 24 of that act. Only article 2 is amended.

The title to chapter 24, N.M. Laws 1923, is as follows:

"An Act to Amend Chapter 65 of the Session Laws of New Mexico of the Year 1917, Being An Act to Amend Article Two of Chapter LXVII of the Statutes of 1915 Relating to Liens of Artisans, Landlords and Others."

In this act only article 2 of the chapter on liens is amended, and no reference is made to article 1. The provision in question, with reference to collateral security, is re-enacted as section 24 of that act.

Clearly the present statute with reference to the taking of collateral security by those entitled to liens does not apply to materialmen's liens. In the compilation of 1929 (which was not a re-enactment), the lien laws were subdivided into articles and those with reference to mechanics, landlords, innkeepers, etc., appear under article 4 of chapter 82, and the collateral security statute is in the same words as in the Code of

1915 and subsequent enactments. But the Code of 1915 fixed the limits of its application, as we have stated.

The district court did not err as against appellant in holding that the appellee's lien was not waived by reason of its taking collateral security; but did err in holding that appellee had waived its lien to the extent of the collateral security taken.

The appellant's third point is as follows:

"The facts disclosed at the trial show that the plaintiff, Morrison Supply Company, filed a lien claim which it knew to be excessive and that the entire conduct of the plaintiff in connection with the attempt to make the intervenor pay the lien claim was tainted with fraud, by reason of which, this being a suit in equity, plaintiff is not entitled to relief from the court against the intervenor."

We find nothing in the facts found by the court, upon which to base such a conclusion. But appellant contends that the court erred in his refusal to adopt his requested findings of fact Nos. 7 and 8, and but for such error the point would be supported by the necessary facts. These requests are as follows:

"At no time did plaintiff credit defendants on the lien claim or in the judgment taken against defendants personally with any portion of the amount plaintiff received from the foreclosure sale.

"Intervenors became owners of the property against which the lien is sought to be foreclosed after the lien claim was filed and this action was brought and one of the considerations for the transfer from Jones and Brizendine was the release of a note and mortgage by Jones to intervenors which mortgage antedated the contract between plaintiff and Jones & Brizendine."

The court found at appellant's request that the mortgage securing the $1,200 note mentioned was foreclosed; that the appellee did not disclose the fact that the mortgage was taken, foreclosed, and the mortgaged property sold, until brought out on cross-examination of appellee's witnesses at the trial.

But if the court had adopted appellant's requested findings, these facts with those found by the court would not necessarily establish that the appellee filed a claim of lien that it knew was excessive. It was entitled to a lien for the full amount of its debt, notwithstanding it took collateral security, and it does not appear that the mortgage had been foreclosed prior to the filing of appellee's lien.

Appellant requested as a conclusion of law the following: "The failure of plaintiff to deduct from his lien claim the amount actually received on foreclosure sale of the Jones mortgage and its failure to disclose to defendants and intervener or either of them, the fact that such foreclosure proceedure produced a credit towards the payment of the lien claim, and the taking by plaintiff of a judgment against defendants personally for the entire amount claimed without deducting the proceeds of

the foreclosure sale constitutes a fraud in law and defeats the lien."

There are findings to the effect that the mortgage securing the $1,200 note had been foreclosed and the property sold, but no finding as to the amount realized therefrom. We know from a stipulation in the record that it was $400 and that this was not allowed defendants in the collection of the amount due by them to appellees, though agreed to by the parties. But appellant was allowed as a credit $676.41, the face amount of the collateral in. .ad of the amount realized therefrom.

The fact that the appellee took judgment against defendants for their debt without crediting the $400 proceeds of foreclosure sale constituted no fraud on appellant, as more than that amount was wrongfully deducted by the district court from appellee's lien claim. The appellee, it is true, did not disclose to defendants and intervener, or either of them, the fact that they were entitled to a credit on the account resulting from such foreclosure proceedings. But there is nothing to show, nor any finding or conclusion of the court, that such failure was due to fraud on the part of appellee. It could have been an oversight. The court having refused to adopt the proffered conclusion of law No. 6, requested by appellant, it in effect was a holding that the acts of appellee stated therein did not constitute fraud. Plaintiff did take judgment against the defendants for the amount of its claim without deducting the $400 proceeds of the foreclosure sale. This was apparently an error of all the parties and the court, as appellee stipulated that defendants were entitled to the credit, and they should have called the court's attention to the fact that the credit was not allowed. They are not complaining here, and appellant was not affected by it.

The appellant lost the case in the district court and that court did not err in awarding costs against him. District courts are given discretion in the matter of assessing costs, but ordinarily they are assessed against the losing party.

The appellee, by a cross-appeal, presents two points:

The court allowed appellee $50 attorney's fees for preparing and filing a lien and $200 for its foreclosure. It is claimed that as there was testimony of several attorneys to the effect that such services were of the value of $500 or $600 and no contradictory testimony, that the finding was not supported by substantial evidence, should be set aside, and one conforming to the evidence of witnesses substituted. We think, considering the amount involved, any such claim of attorney's fees is excessive. We would not disturb the judgment of the district court on the question of attorney's fees unless clearly erroneous, and we do not find it so.

Appellee claims that $676.41 should not have been deducted from the bill for material in determining the amount secured by the lien. It is stated:

"The court erred in allowing a credit in favor of the interveners of $676.41. The

interveners should have been allowed approximately $400.00 credit on this account for the testimony shows that $361.78 was received from the sale of the DeBaca County land, and credited to the account of Jones and Brizendine."

The record shows the following stipulation of parties:

"Mr. Tittman: We will agree that since this suit was filed that $400.00 should have been credited on the account. Is that satisfactory to you?

"Mr. Gilbert: Counsel agrees that $400.-00 since the filing of this suit, and when this is cleared up it should be credited on this lien. * * *

"The Court: As I understand it it is stipulated that there is a credit due under this account to the extent of $400.00 on account of collections made subsequent to the filing of this suit.

"Mr. Gilbert: Yes."

This $400 was the excess over the old debt due appellee for which the mortgaged security was sold. The court allowed the $400 in favor of defendant, but as he had reduced appellee's claim by $676.41 because it took collateral security for that amount, the credit was in excess of the $400.

The contention of appellee is correct. The district court should not have deducted $676.41 from appellee's claim of lien, but should have allowed the credit for $400 on its account, as the parties stipulated.

The judgment of the district court will be reversed upon appellee's cross-appeal, with instructions to deduct $400 from appellee's total claim and foreclose its materialman's lien for the balance.

It is so ordered.

HUDSPETH, C. J., and BICKLEY and SADLER, JJ., concur.

ZINN, J., did not participate.

On Rehearing.

BRICE, Justice.

We inadvertently stated in our original opinion regarding appellants' requested finding No. 1, "The court refused the finding, and correctly so, as no witness so testified." Appellant points out that the defendant Jones, as a witness for appellee, did so testify. The opinion, however, shows that two witnesses testified to the contrary. The court's refusal of the requested finding was warranted.

There is no merit in the motion for rehearing, and it is overruled.

It is so ordered.

HUDSPETH, C. J., and SADLER and BICKLEY, JJ., concur.

ZINN, J., did not participate.

73 P.2d 329

STATE ex rel. CHESHER v. BEALL, Chief Tax Com'r, et al.

No. 4281.

Supreme Court of New Mexico.

Nov. 5, 1937.

George L. Reese, Jr., of Carlsbad, and W. H. Patten, of Hobbs, for appellants.

John R. Brand, of Hobbs, and Kiker & Sanchez, of Santa Fé, for appellee.

SADLER, Justice.

The appellant, A. C. Chesher, as relator, sued in the district court of Santa Fé county seeking relief in mandamus to compel a levy to satisfy a judgment against the town of New Hobbs in Lea county. He joined as respondents to his action Byron O. Beall, Donaciano Rodriguez, and John S. Clark, as members of the state tax commission; E. N. Evans, Malcolm Madera, and M. C. Sweatt, as members of the board of county commissioners of Lea county; James M. Murray, Jr., mayor of the town of New Hobbs, and James Robinett, A. G. Swanson, and J. B. Maxwell, as members of the board of trustees of the town of New Hobbs; Mrs. Zaidy Fandy, treasurer of New Hobbs; John Love, as county assessor; and D. C. Berry as county treasurer of Lea county, N. M.

Upon filing of the petition the court ordered, and there was issued, an alternative writ of mandamus commanding the respondents to take appropriate action for budgeting, certifying, and levying a tax for the year 1936 on all taxable property within said town of New Hobbs, sufficient to satisfy the balance due on said judgment, interest, and costs and to pay over the proceeds of the taxes collected under said levy to relator until his judgment was fully satisfied; or, that respondents show cause before the court on a day named why they should not take the action ordered and why said alternative writ should not be made peremptory.

The respondents Beall, Rodriguez, and Clark, composing state tax commission, appeared and filed an answer constituting a written consent that the alternative writ might be made peremptory at any time. The mayor and members of the board of trustees of the town of New Hobbs, hereinabove named, appeared by W. H. Patten, city attorney, secured an extension of time within which to show cause why the alternative writ should not be made peremptory, and thereafter defaulted, taking no further notice of the proceedings.

The remaining respondents, the members of the board of county commissioners, of Lea county, the county assessor, and the county treasurer, all heretofore named, appeared by their attorney and filed a demurrer, as follows:

"(a) In said alternative writ, it is alleged that the relator, A. C. Chesher is the owner and holder of a certain judgment rendered against the town of New Hobbs, New Mexico, and from the copy of said judgment included in said writ, it appears that it was based upon certain certificates of indebtedness executed by the said town of

New Hobbs, bearing interest at the rate of six per cent from the date of January 6, 1931, until paid.

"(b) There is no finding in said judgment that said certificates of indebtedness were not issued for current indebtedness of said town, or that said town misappropriated any funds which it was required to apply in satisfaction of said certificates.

"(c) Under the Statutes of New Mexico in force at the time said certificates were issued, the town of New Hobbs had no authority to issue certificates of indebtedness and constitute the same a charge upon any revenues of said town arising after the current year of 1931, and there was no authority in said town to obligate itself to pay any indebtedness incurred by it in excess of the revenues derived from tax levies for the current year.

"II. That under the Statutes of the State of New Mexico, commonly known as 'The Bateman Act', all indebtedness incurred by the town of New Hobbs in excess of the revenues for the current year in which the indebtedness was incurred is void, except as to delinquent taxes for said year.

"III. That the alternative writ of mandamus shows on its face that the judgment upon which it is sought to require a levy to enforce payment was based upon illegal and unauthorized obligations of the town of New Hobbs insofar as said obligations undertook to bind said town to make payment out of revenues derived from tax levies subsequent to the year in which the indebtedness was incurred."

The matter came on for final hearing upon the alternative writ, answer of the members of the state tax commission, and the demurrer filed on behalf of the board of county commissioners, county assessor, and county treasurer, as aforesaid. The demurrer was argued by counsel for the respective parties and overruled. Apparently the demurrants elected to stand upon the ruling on their demurrer. The record discloses no answer or further pleading filed by them. Thereupon the court proceeded to hear evidence as recited in the order and made a general finding "that petitioner is entitled to issuance of a peremptory writ of mandamus as against the said respondents herein named, commanding and directing said respondents and each of them to do as prayed for in petition for alternative writ of mandamus." Issuance of peremptory writ accordingly was ordered. It is from the order directing issuance of same that this appeal is prosecuted by the officials of Lea county above named who filed said demurrer. They will be referred to hereinafter as respondents.

They assign a single error, to wit, that the trial court erred in overruling their demurrer. In arguing said assignment, however, they state the several grounds of the demurrer and insist they are decisive of their claim of error. Reference to said grounds discloses that each in one way or another invokes the Bateman Act. The relator replies that the questions sought to be raised by demurrer should have been raised by answer and that respondents having stood upon the court's ruling on the

demurrer are in the position of having rested their case on a false issue or upon no issue at all. In other words, relator insists that a defense under the Bateman Act (1929 Comp. § 33-4241 et seq.) is a matter for affirmative allegation by way of answer and is not properly presented by demurrer. In this connection reference is made to the statutory direction that pleadings in a mandamus suit shall be limited to the alternative writ and answer. 1929 Comp. § 86-110.

The heart of the demurrer is embraced in paragraph (b) thereof, reading: "(b) There is no finding in said judgment that said certificates of indebtedness were not issued for current indebtedness of said town, or that said town misappropriated any funds which it was required to apply in satisfaction of said certificates."

If we treat the demurrer as an answer interposing legal objections to issuance of the writ (and such an answer is itself the equivalent of a demurrer, State ex rel. Garcia v. Board of Commissioners, 21 N.M. 632, 157 P. 656), still the question arises whether this ground of demurrer does not attempt to present defensive matter requiring allegations of fact to support the issue. If so, the demurrer was properly overruled.

The purpose and the validity of the Bateman Act have been too often discussed by this court to call for any new declaration upon the subject. Territory ex rel. Adair v. Board of County Commissioners, 12 N.M. 131, 75 P. 38; Johnston v. Board of County Commissioners, 12 N.M. 237, 78 P. 43; James v. Board of Commissioners, 24 N.M. 509, 174 P. 1001; Optic Publishing Co. v. Board of Commissioners, 27 N.M. 371, 202 P. 124; Sena v. Board of Commissioners, 27 N.M. 461, 202 P. 984; Santa Fé Water & Light Co. v. Santa Fé County, 29 N.M. 538, 224 P. 402; Baca v. Board of Commissioners, 30 N.M. 163, 231 P. 637. See, also, Barker v. State ex rel. Napoleon, 39 N.M. 434, 49 P.(2d) 246 and In re Atchison, T. & S. F. Ry. Co.'s Taxes, 41 N.M. 9, 63 P.(2d) 345.

So far as disclosed by the alternative writ, the indebtedness merged in relator's judgment was created in January, 1931. Judgment was rendered for the amount of said indebtedness (which was evidenced by four certain certificates of indebtedness of the town of New Hobbs) on June 29, 1931, in the sum of $3489.50 with interest at 6 per cent. per annum from January 6, 1931. The mayor and board of trustees of New Hobbs, as recited in the judgment, filed a written stipulation admitting the correctness of all allegations in the complaint in said suit and that said town was indebted to relator in the amount prayed for. Beyond these facts, there was nothing to disclose the nature of the indebtedness. Certainly, it does not affirmatively appear from the writ that the certificates placed in judgment were issued for current indebtedness of said town. If they were, and that fact was to be relied upon in bar of the action, an answer raising the issue should have been filed. It was not incumbent on relator in pleading his judg-

ment to state the cause of action which resulted in its procural.

"Why a plaintiff who sues on a judgment to compel a board to levy a tax should state the cause of action which has resulted in his judgment, is not clear to our apprehension. Since the court did not put its reversal on that ground, we are not compelled to do otherwise than express our want of assent to the proposition. We can quite readily see that there may be a suggestion of legal accuracy in the discussion, and that it may contain the germ of a defensible legal proposition. Where we should differ respects the statement as to the party on whom is properly cast the burden of the plea." People ex rel. Rollins v. Board of Com'rs., 7 Colo.App. 229, 42 P. 1032, 1035.

"Relator's petition alleges that in the settlement evidenced by the decree supra, the municipal authorities, in order to provide funds to meet the bonds and interest as they should fall due, agreed that an annual tax should be levied sufficient for the purpose, and that the town council would annually include such amount in its appropriation ordinance, that the town was insolvent, and that prior recorded judgments were a superior lien upon all its leviable property. In view of these averments of the petition, respondents took the point by demurrer that, for aught appearing, the municipal authorities may have levied taxes to the limit of their authority under the Constitution and law of the state, and the town's entire income may be necessary to meet its legitimate current expenditures for governmental purposes; but this answer to the petition (good, if proved, White v. Decatur, 119 Ala. 476, 23 So. 999; Mayor, etc., of Anniston v. Hurt, 140 Ala. 394, 37 So. 220 [103 Am.St.Rep. 45]) we think should be brought forward in the way of affirmative defense and was not properly presented by demurrer against the petition as framed." J. B. McCrary Co. v. Brunson, Mayor, 204 Ala. 85, 85 So. 396, 397.

We do not question the proposition advanced by respondents that the court may go behind the judgment for the purpose of determining on what account it was rendered. Atchison, T. & S. F. Ry. Co. v. Territory, 11 N.M. 669, 72 P. 14; Territory ex rel. Adair v. Board of County Commissioners, supra; In re Atchison, T. & S. F. Ry. Co. Taxes, supra. The fault with their position is that, erroneously conceiving the duty to rest upon relator to allege the judgment was not for current expense, they failed to file an answer alleging that it was.

If the complaint upon which relator's judgment was based disclosed an allowed claim for current expense upon which payment was refused for want of funds to pay same, it failed to state a cause of action and no judgment properly could have been rendered thereon. James v. Board of Commissioners, supra; Optic Publishing Co. v. Board of Commissioners, supra. The complaint in said suit does not appear in the alternative writ, only the judgment, but it does appear therefrom that

the claim sued upon was approved by the town of New Hobbs, through its mayor and board of trustees, that its amount was conceded, that it was unpaid, and that judgment for the amount thereof was rendered.

This alone appearing, the trial judge in the mandamus action out of which this appeal arises, mindful of the presumptions of correctness attaching in favor of judgments, may very well have concluded that the district court of Lea county would not have placed relator's claim in judgment at all except upon a showing that it was not for current expense or otherwise within inhibitions of the Bateman Act.

But this is not all that supports the correctness of the trial court's action in ordering peremptory mandamus. It appears from the alternative writ that relator's judgment was originally entered for $3,489.50; that, by virtue of writs of mandamus issued by the district court of Lea county on account of said judgment, payments thereon in the sum of $1,529.40 had previously been made, leaving a balance due on July 6, 1936, of $2,606.94; that said tax levies were no longer in effect and would produce no more funds for application on said judgment.

If the previous special levies produced a sufficient amount to satisfy this judgment and portions thereof were unlawfully diverted to other purposes by town officials, then the Bateman Act would offer no bar to an application for mandamus to compel a new levy. Capital City Bank v. Board of Commissioners, 27 N.M. 541, 203 P. 535; Las Vegas Independent Publishing Co. v. Board of County Commissioners, 35 N. M. 486, 1 P.(2d) 564. Whether there was evidence adduced before the trial court in the mandamus action that such unlawful diversion occurred, we do not know. The evidence is not before us. But that evidence was heard is declared by the court in its order. It reads: "* * * and the Court having heard the argument of the Counsel of said demurrer, and having overruled the same in all matters and things by said demurrer raised, and the evidence having been introduced, and the Court being advised in the premises, finds that petitioner herein is entitled to issuance of a peremptory writ of mandamus as against the respondents herein named, commanding and directing said respondents and each of them to do as prayed for in petition for alternative writ of mandamus."

In such circumstances, it must be presumed in support of the judgment rendered that "the judge * * * was given evidence to support the judgment he rendered." In re Blatt, 41 N.M. 269, 67 P.(2d) 293, 304, 110 A.L.R. 656. See, also, In re Atchison, T. & S. F. Ry. Co.'s Taxes, 41 N.M. 9, 63 P.(2d) 345.

Finding no error, the judgment appealed from must be affirmed.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

73 P.2d 333

STATE ex rel. LYNCH et al. v. DISTRICT COURT OF McKINLEY COUNTY et al.

No. 4319.

Supreme Court of New Mexico.

Sept. 28, 1937.

Rehearing Denied Nov. 22, 1937.

H. W. Atkins, of Gallup, and W. A. Keleher and Theo E. Jones, both of Albuquerque, for petitioners.

H. C. Denny and H. S. Glascock, both of Gallup, and Gilbert & Hamilton, of Santa Fé, for respondents.

SADLER, Justice.

Relators, as holders of certain bonds issued by Paving District No. 2 of the town of Gallup, invoke the original jurisdiction of this court to restrain by prohibition the district court of McKinley county and the Honorable David Chavez, Jr., as judge thereof, from further proceeding in a certain cause pending before said court wherein a receiver was appointed to take over the duties of the town of Gallup, acting through its mayor and board of trustees, in the collection and distribution of the proceeds of the assignable lien certificates securing said bond issue.

The bond issue in question arose out of a paving program initiated and conducted pursuant to Laws 1903, c. 42 (Code 1915, §§ 3665 to 3671), as amended by Laws 1919, c. 152. The proceedings were had in 1921. The provisional order plan was used, and it resulted in the construction of the paving and assessments against abutting property to pay the cost thereof. Assignable certificates were at first issued to the contractor to meet the cost of the improvement. Then, an agreement was made between town of Gallup and the contractor, incorporated in an ordinance whose preamble recited proceedings theretofore had in connection with the paving program, and had further pertinent provisions as follows:

"Section 1. That all the proceedings heretofore had, taken, done or performed in connection with the street improvements described and ordered by resolution adopted on the 13th day of December 1921 and the 15th day of December A. D. 1921, be and the same hereby are in all respects ratified, approved and confirmed.

"Section 2. That the Town of Gallup be and it is hereby authorized and empowered to receive, collect and enforce the payment of all the assessments made for the said improvements and all installments thereof and all interest thereon, in the same manner and at the same time or times as the owner or owners of the assignable certificates issued to pay the cost of said improvements might receive, collect or enforce the said payments, and to pay and disburse such payments, the installments thereof and the interest thereon, to any person or persons lawfully entitled thereto.

"Section 3. That the Treasurer of the Town of Gallup be and he is hereby authorized and empowered, and it shall be his duty to receive and collect all assessments levied to pay the costs of said improvements, the installments thereof and the interest thereon, at the times and in the manner heretofore specified, and to pay and disburse such payments to the person or persons lawfully entitled to receive the same

in accordance with the laws of the State of New Mexico and all ordinances and resolutions of said town heretofore or hereinafter to be adopted. All moneys received shall be placed in a separate fund to be designated "Paving Fund" and shall be used for the purpose of paying the principal and interest on the paving bonds hereinafter mentioned, and for no other purpose whatsoever.

"Section 4. That if the owner of any parcel of land assessed for the said improvements shall be delinquent in the payment of any assessment, installment or interest due, it shall be the duty of the town treasurer to notify such owner in writing that such delinquency exists, and that, if the amount due is not paid within 30 days after the date of the said notice, the matter will be referred to the town attorney for collection and foreclosure.

"Section 5. If the payment or payments due as specified in the next preceding section is or are not paid within the stated time, it shall be the duty of the town treasurer to refer the matter to the town attorney, whose immediate duty it shall be to enforce and collect the amount due, together with all costs and penalties, by foreclosure, or in any manner which is now or may be provided by law.

"Section 6. If any property shall be offered for sale for the non-payment of any assessment, installment thereof or interest thereon, and no person or persons shall bid for said property, then the Town of Gallup shall have the power, and it shall be its duty to bid for said property and to take and receive in its corporate name any certificates or deeds to said property, and to sell or dispose of said property for the benefit of the owner or owners of the paving bonds hereinafter specified.

"Section 7. That the Town of Gallup be, and it is hereby authorized and empowered to issue in the name of the town, paving bonds payable on or before eleven years from the date thereof, the principal and interest of which shall be paid solely and exclusively from the revenues derived from the assessments made for the improvements herein specified. The said paving bonds shall bear interest at the rate of seven per centum per annum, payable semi-annually, and shall be in the denomination of five hundred dollars each, and the principal thereof and the interest thereon shall be payable in lawful money of the United States of America, with New York exchange, at the office of the treasurer. Said bonds shall be signed by the mayor of the Town of Gallup, shall be countersigned by the town treasurer, sealed with the seal of the town and attested by the town clerk. The said bonds shall have attached thereto twenty-two coupons evidencing the semi-annual interest thereon, which coupons shall be signed by the facsimile signatures of the town treasurer, and when so executed shall represent the semi-annual interest on the bonds to which they are attached.

"Section 8. The said paving bonds and the coupons to be attached thereto, shall be in substantially, the following form, to-wit: (Here follows the form of bond prescribed.)

"Section 9. That when the said paving bonds are prepared and executed, they shall be exchanged for a like amount of assignable certificates which have been or will be issued to the contractor constructing said improvements, and the said paving bonds and the interest thereon shall be paid and discharged in the manner and at the times specified herein. The assignable certificates received in exchange for said paving bonds shall be retained by the town treasurer for the purpose of endorsing payments thereon; and when said assignable certificates have been paid in full, the proper officers of said town shall discharge and release the liens and liability created by the issuance of said assignable certificates.

"Section 10. The said paving bonds shall be paid and discharged in numerical order, commencing with number One, and when the town treasurer has funds on hand in said Paving Fund sufficient to pay the principal of any of said paving bonds, shall notify the firm of Sidlo, Simons, Fels and Company of Denver, Colorado, by written notice through the United States Mails, postage prepaid, designating the bonds to be paid, and thirty days after said notice is given the interest on said paving bonds shall cease.

"Section 11. All ordinances or resolutions or parts thereof in conflict with the provisions of this ordinance, are hereby repealed. After said paving bonds are issued, this ordinance shall be and remain irrepealable until said bonds and the interest thereon shall be fully paid, satisfied and discharged as herein provided."

A copy of the material provisions of bond No. 139, held by one of the plaintiffs in said receivership suit, is as follows:

"No. 139 $500.00

"The Town of Gallup, in the County of McKinley, and State of New Mexico, for value received, hereby promises to pay to the bearer hereof, the sum of Five Hundred Dollars, on the First day of June, A. D. 1933, with interest thereon from date until payment at the rate of Seven Per Centum Per annum, payable semi-annually on the First Days of June and December in each year; both principal and interest being payable in lawful money of the United States of America, with New York exchange, at the Office of the Town Treasurer, upon presentation and surrender of this bond, or of the annexed coupons, as they severally become due.

"The said Town reserves the option to redeem this bond at any time before maturity, by paying therefor its par value and accrued interest.

"This bond is issued in exchange for a like amount of assignable certificates representing the cost of paving and improving certain streets and alleys in said Town, in full conformity with the Constitution and laws of the State of New Mexico and the ordinances and resolutions of said Town duly adopted and approved prior to the issue hereof.

"This bond is payable solely out of a special fund designated the Gallup Paving Fund, containing the receipts derived by the Town from special assessments levied to pay for said improvements. And it is hereby certified and recited that for the payment of this bond the Town of Gallup assumes no obligation whatsoever, except for the creation of said Paving Fund, the collection and enforcement of all special assessments levied to pay for said improvements, the deposit in said fund of all receipts derived from said special assessments, and the payment of this bond out of such receipts in the manner provided by the ordinance under which this bond is issued. And it is further certified and recited that all requirements of law have been fully complied with by the officers of said Town in the issue of this bond and the assignable certificates for which it was exchanged, and that all proceedings and things with reference to making said improvements, to the fixing of the assessment lien against the property improved, and the personal liability against the owner thereof, have been lawfully taken and performed, and that for the payment of this bond and the interest thereon, the Town pledges all of its lawful corporate powers."

The bonds issued were numbered from one to two hundred, inclusive, each in the amount of $500, each having attached 22 interest coupons, evidencing semiannual interest at the rate of 7 per cent. per annum.

The issuance of the bonds to be secured by the lien of the assignable certificates did not at that time have statutory sanction. Later, however, and by Laws 1923, c. 133 (1929 Comp. § 90-1701), statutory authority for issuance of bonds under the plan adopted was granted and bonds theretofore so issued were ratified as valid obligations to the same extent as issued thereunder.

The town of Gallup entered into the performance of its duties under the plan to collect the special assessments and distribute the proceeds thereof to the bondholders. In May, 1937, the outstanding bonds exceeded the amount of the outstanding assessments, and W. Gordon Ward, a bondholder, holding three bonds last in numerical order, instituted in the district court of McKinley county a suit to have a receiver appointed to perform the duties otherwise imposed on the town of Gallup by the provisions of said ordinance. He alleged that he acted for himself and all other bondholders. All of the paving certificates, as well as the bonds, matured in 1933. An accounting was also prayed for, and the said town and its board of trustees were named as defendants. They had answered within four days after filing of the complaint; whereupon judgment was entered appointing a receiver as prayed. Alternative writ of prohibition was granted to stay further proceedings in said cause, and the matter is now before us on the writ and answer.

The grounds advanced in the complaint for appointment of a receiver, briefly, are:

(1) The continued failure, neglect and refusal of the town to collect the liens in the face of insolvency of the trust.

(2) The fact that the town would thereafter continue in such neglect and refusal.

(3) That the town had not fully accounted for and paid over the trust moneys received by it.

After careful consideration of the authorities and argument of the respective parties, we feel constrained to hold that the respondent exceeded his jurisdiction in the appointment of a receiver to take over and administer the assets of said Paving District No. 2 of the town of Gallup. The parties agree, and hence we do not question, that the holders of bonds in said paving district possess all the rights conferred by Laws 1923, c. 133 (1929 Comp. § 90-1701); being the statute authorizing the plan here followed in issuing bonds and ratifying bonds theretofore issued under such a plan. Nor is there disagreement on the proposition that in initiating the paving program, appraising benefits, and levying the assessments against abutting property, the town of Gallup was acting in a governmental capacity. We have held that the power to levy a special or local assessment is essentially a branch of the taxing power. City of Albuquerque v. City Electric Co., 32 N.M. 401, 258 P. 574; City of Roswell v. Batemen, 20 N.M. 77, 146 P. 950, L.R.A.1917D, 365, Ann.Cas. 1918D, 426; City of Roswell v. Levers, 38 N.M. 419, 34 P.(2d) 865. See State ex rel. Ackerman v. City of Carlsbad, 39 N.M. 352, 47 P.(2d) 865 and Gray v. City of Santa Fé (C.C.A. 10th) 89 F.(2d) 406, where similar plans of financing were before the courts.

The authorities hold without a dissenting voice that equity is without power to appoint a receiver to levy and collect taxes. 1 Jones on Bonds and Bond Securities (4th Ed.) § 489; 1 Quindry on Bonds and Bondholders, § 423; Rees v. City of Watertown, 19 Wall. 107, 22 L.Ed. 72; Meriwether v. Garrett, 102 U.S. 472, 515, 26 L.Ed. 197; Thompson v. Allen County, 115 U.S. 550, 6 S.Ct. 140, 144, 29 L.Ed. 472; Yost v. Dallas County, 236 U.S. 50, 35 S.Ct. 235, 59 L.Ed. 460; Depew v. Venice Drainage District, 158 La. 1099, 105 So. 78.

Counsel for respondent, conceding the force of the rule as exemplified by these authorities, insist such authorities are clearly distinguishable from the present case, in that the cases cited represent instances of the appointment of a receiver of a municipal corporation or some other political subdivision with power to perform some essential attribute of government itself, such as exercising the sovereign power of taxation; that in the present case every governmental function imposed on the town or its governing body in connection with said paving program already had been fully performed and that what remains to be done can as well be

performed by a private trustee as the town trustees; that in the collection and distribution of said tax the governing body of said town are in fact and in law nothing more than private trustees, subject to removal for cause as are other private trustees; and, finally, that the paving district itself is without political or legal entity, having geographical limits solely for the purpose of defining the extent of the improvements.

These arguments are persuasive, but we do not fully agree with them. In the first place, though true as respondent contends, the cases cited represent applications for receivers of municipal corporations or other political subdivisions, nevertheless they affirm the rule that a receiver to collect taxes is as improper as one to levy same. In Meriwether v. Garrett, supra, the plaintiff filed suit asking appointment of a receiver to take charge of all the property of the city, collect all delinquent taxes, and distribute the proceeds to the city's creditors. Equity's jurisdiction was denied by the United States Supreme Court. Speaking generally on the subject, Mr. Justice Field, writing for himself and two other justices concurring in the judgment, said: "In the distribution of the powers of government in this country into three departments, the power of taxation falls to the legislative. It belongs to that department to determine what measures shall be taken for the public welfare, and to provide the revenues for the support and due administration of the government throughout the State and in all its subdivisions. *Having the sole power to authorize the tax, it must equally possess the sole power to prescribe the means by which the tax shall be collected, and to designate the officers through whom its will shall be enforced.*" (Italics ours.)

In Thompson v. Allen County, supra, the majority opinion written by Mr. Justice Miller quoted from conclusions of the court as announced by Chief Justice Waite in the Meriwether Case, as follows: "'Whether taxes levied in obedience to contract obligations, or under judicial direction, can be collected through a receiver appointed by a court of chancery, if there be no public officer charged with authority from the legislature to perform that duty, is not decided, as the case does not require it.'"

He then added for the court: "But though the question was not then decided, and it is urged upon us now, we see no more reason to hold that the collection of taxes already assessed is a function of a court of equity than the levy or assessment of such taxes. * * * The appointment of its own officer to collect taxes levied by order of a common-law court is as much without authority as to appoint the same officer to levy and collect the tax. They are parts of the same proceeding, and relate to the same matter. If the common law court can compel the assessment of a tax, it is quite as competent to enforce its collection as a court of chancery. Having jurisdiction to com-

pel the assessment, there is no reason why it should stop short, if any further judicial power exists under the law, and turn the case over to a court of equity. Its sheriff or marshal is as well qualified to collect the tax as a receiver appointed by the court of chancery."

The cases cited and quoted from represent instances where effort was made to have a receiver named with respect to levy or collection of taxes for municipalities or counties. Street Grading District No. 60 of Little Rock v. Hagadorn (C.C.A. 8th) 186 F. 451, 456, certiorari denied 223 U.S. 721, 32 S.Ct. 524, 56 L.Ed. 630 and Road Improvement District No. 7 v. Guardian Savings & Trust Co. (C.C.A. 8th) 298 F. 272, reversed on certiorari 267 U.S. 1, 45 S.Ct. 201, 202, 69 L.Ed. 487, are more closely in point by reason of the fact that the effort at receivership related to improvement districts as in the case at bar. In the Hagadorn Case, the only relief sought by the bill or granted by the decree was the appointment of a receiver to collect the annual installments of an assessment theretofore duly made and pledged by the defendant grading district as security for complainant's bond. After citing and quoting from Rees v. City of Watertown and Thompson v. Allen County, supra, and holding them decisive, the court added: "There is another reason also why complainants cannot invoke the equitable remedy sought in this case. The statutes creating improvement districts in Arkansas (section 5664 et seq., Kirby's Digest) disclose that the Legislature provided a complete scheme not only for their creation, but for raising money to defray the cost and expense of the improvements. Property was to be taxed, and a specific provision was made (section 5686) for the collection of the tax by the city collector upon warrants issued to him by the city clerk commanding him to make the collections according to the assessments as made. This mode of collecting the taxes for the payment of complainants' bonds constituted a part of the contract under and subject to which they were purchased. The enforcement of this provision, namely, enforcement of collection in the mode and through the officers named in the law, is all complainants are entitled to under their contract, and, accordingly, is the only remedy known to the law in case of nonpayment of the bonds."

The holding embraced in the foregoing quotation is peculiarly applicable here. The ordinance under which the bonds were issued prescribed the mode for collecting the assessments designed to meet principal and interest accruing thereon. The statute ratifying the plan adopted, in addition to providing for sale at regular tax sales for delinquency in payments, gave the holder of any bond the right of foreclosure if the governing body of the municipality should fail or refuse to cause any lot to be sold for delinquency in payment of any installment. This twofold remedy was held in Gray v. City of Santa Fe (C.C.A. 10th) 89 F.(2d) 406, 410, to afford a bondholder relief in mandamus against the governing body to compel it to enforce collection.

The court said: "It is the duty of the City under the provisions of section 90-1701 and under its contract to collect such assessments and enforce such liens and it may be compelled by mandamus to perform that duty."

Respondents' counsel seeks to distinguish the Hagadorn Case by pointing out that the "uncollected assessments" there involved, and which the statute authorized the board of improvement to "pledge * * * for the payment of the money borrowed," were of a different character from those represented by assignable certificates; that the assignable certificates evidence a specific lien and are capable of delivery and the transfer of ownership of the lien evidenced. While these differences are adverted to in the opinion in meeting one of the contentions urged upon the court, that is hardly to say that had the lien there involved possessed more nearly the characteristics of this one the court would have felt warranted in justifying receivership. The matter quoted from that opinion, supra, is conclusive that it would not.

The question was again before the federal courts in Road Improvement District v. Guardian Savings & Trust Co., supra. The court here dealt with an act of the Arkansas Legislature authorizing the creation of road improvement districts with provision for assessing the cost of the road in the form of special benefit assessments upon lands in the district. The uncollected assessments became the security for a bond issue under a so-called mortgage, and suit was brought to obtain appointment of a receiver to collect the assessments to pay past-due bonds and interest coupons. Here, the statute creating the district provided for the appointment of a receiver by the state chancery court in case of default. The trial court appointed the receiver. The Circuit Court of Appeals, under the view that the remedial right to proceed in a federal court could not be enlarged or diminished by a state statute, set aside the appointment. On certiorari, the United States Supreme Court held the Circuit Court of Appeals erred in concluding that the chancery power was confined to the state court named in the statute, and, inasmuch as the statute itself authorized appointment of a receiver, the court's jurisdiction to appoint one was not lacking. Among other things, the court said: "The ground on which jurisdiction was denied by the Circuit Court of Appeals was that the power to levy and collect taxes was a legislative function of the state which could not be usurped by a federal court. But while that may be true as a general doctrine it cannot apply when a state has authorized and confirmed an assessment and a mortgage of it as security for bonds that the public is invited to buy, *and has provided in terms for a collection by a receiver appointed in equity if there should be a default.* There is no longer any legislative act to be done, and there is no usurpation of powers in following the course provided by state law. It seems to be recognized in Meriwether v. Garrett, 102 U.S. 472, 26 L.Ed. 197, that a receiver might be appointed by a Court

of Chancery when that remedy was contemplated by the contract, as it fairly may be said to have been contemplated here. The subject-matter of the mortgage and the possible foreclosure of the lien require the intervention of such a court if right is to be done. In the argument before us there was some suggestion that the chancery power was confined to the state court named in the statute. But the decisions have done away with such a limitation and it was not relied upon by the Circuit Court of Appeals." (Italics ours.)

Unquestionably, it seems to us, but for the statutory authorization for appointment of a receiver, the Supreme Court, in line with its previous decisions cited and relied on in the opinion of the Circuit Court of Appeals, would have held equity without jurisdiction to make the appointment. Absent statutory authorization, the rule seems to be that equity is without jurisdiction to appoint a receiver under circumstances such as those here shown. 1 Quindry, Bonds and Bondholders, § 423. Despite the distinctions sought to be drawn between the cases so affirming and the facts of the present case, we have been unable to find a single precedent sustaining jurisdiction to appoint in the circumstances here shown. Supervisors of Lee County v. Rogers, 7 Wall. 175, 177, 19 L. Ed. 162, the authority most relied upon by respondent, discloses express statutory authority for designation of the United States Marshal to levy and collect taxes which the supervisors under writ of mandamus had failed to do. The statute read: "The court may, upon application of the plaintiff (besides or instead of proceeding against the defendant by attachment) direct that the act required to be done may be done by the plaintiff, *or some other person appointed by the court,* at the expense of the defendant."

It was solely by virtue of this express statutory authorization that the court sustained the marshal's appointment.

Equity is as much wanting in jurisdiction to appoint a receiver to perform the duties of the governing body in collecting the tax as to assess the same. Thompson v. Allen, supra; Preston v. Sturgis Mill Co. (C.C.A. 6th) 183 F. 1, 3, 32 L.R.A.(N. S.) 1020. The controlling ordinance and statute having provided a complete scheme for initiating the paving program and for raising the money to defray the cost thereof, the mode of enforcement therein prescribed affords the only remedy. Street Grading District v. Hagadorn and Rees v. Watertown, supra. It is a remedy which may be enforced in mandamus. Gray v. City of Santa Fé, supra.

"The scope of the principle is that each step in the process of taxation from beginning to end can be taken only as the Legislature may prescribe. * * * It is not, however, within the scope of this principle that the judiciary shall in no event exercise this power of taxation. Its scope is that it shall not exercise it *unless the Legislature shall so provide.* If the Legislature does so provide, *it may exercise it*

to the extent provided." Preston v. Sturgis Milling Co., supra (Italics ours.)

We recently have held that an agreement by the city to become primarily liable on the bonds would violate section 12 of article 9 of the State Constitution, and would be invalid. City of Santa Fe v. First National Bank, 41 N.M. 130, 65 P. (2d) 857.

While it is true under the statute that upon failure or refusal of the governing body to sell property for default in the payment of an assessment the holder of any bond may sue to enforce the lien, this does not detract from the governmental nature of the duty performed by the governing body when it moves to collect. It is a receiver to perform the duty of the town as trustee, not to exercise the privilege conferred by the statute on a bondholder, that is sought by plaintiff in the suit below.

Another consideration emphasizes the correctness of our conclusion. The governing body conceivably may yet have a governmental function to perform in the matter of an assessment. In City of Clovis v. Scheurich, 34 N.M. 227, 279 P. 876, 877, we sustained action of the trial court in setting aside an assessment under this statute as confiscatory. We there observed that: "No statute limits the attack upon the validity of the assessment." The limitation involved in Oliver v. Town of Alamogordo, 35 N.M. 477, 1 P.(2d) 116, had not then been enacted. If, by reason of the setting aside of an assessment for invalidity, the occasion for reassessment should arise, the receiver acting as substitute trustee for the town would be wholly without authority to act in the premises, if reassessment be available, as seems likely. No good reason suggests that the district court would have any more jurisdiction to assess in case of a special tax such as this, where power to do so is not expressly granted, than in the case of general taxes. We have held it without such jurisdiction in the case of general taxes. In re Blatt, 41 N.M. 269, 67 P.(2d) 293, 110 A.L.R. 656. There being no one with authority to reassess, the property would escape the tax, though enjoying the benefit.

It is also urged upon us that prohibition should be denied because there is an adequate remedy by appeal; citing Board of County Commissioners of Guadalupe County v. District Court of Fourth Judicial District, 29 N.M. 244, 260, 223 P. 516. But, considering the fact that all acts of the receiver would be absolutely void, the expense to be incurred incident to receivership, the complications arising from unauthorized sales by him in an effort to enforce collection of the assessments, the inadequacy of the remedy by appeal at once suggests itself. If appeal afford an inadequate remedy, prohibition, otherwise proper, will not be denied by reason of the remedy by appeal. Crist v. Abbott, 22 N. M. 417, 163 P. 1085; Hammond v. District Court of Eighth Judicial District, 30 N. M. 130, 228 P. 758, 39 A.L.R. 1490.

It follows from the conclusions announced that the district court exceeded

its jurisdiction in appointing a receiver. The writ, so far as it relates to further proceeding with the receivership, will be made permanent. There can be no question of the court's jurisdiction to entertain the suit for purposes of an accounting; relief prayed in the complaint. In so far as the alternative writ operates as a restraint on further proceeding with the suit as one for an accounting, it will be dissolved.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, and BRICE, JJ., concur.

FRENGER, District Judge, did not participate.

73 P.2d 532

In re CUELLAR'S ESTATE.

No. 4284.

Supreme Court of New Mexico.

Nov. 8, 1937.

Wm. J. Eaton, of Socorro, for appellant.

Botts & Botts, of Albuquerque, for appellee.

HUDSPETH, Chief Justice.

Appellant was appointed guardian of the estate of Domingo Cuellar, incompetent, by the probate court of Socorro county, and ordered to give bond in the sum of $20,000. He filed a surety company bond on which he paid premiums in the sum of $164.74. After the appointment of appellant by the probate court, Frank T. Hines, Administrator of Veterans' Affairs, filed a motion to vacate the appointment, and upon the denial of the motion by the probate court he filed a petition under N.M. 1929 Comp.St. §§ 34-422 and 34-423, for the removal of the administration of the estate, which had been pending in the probate court for several years, to the district court, and for a trial de novo of the "issues in this cause." The order of removal was entered as prayed on the 20th day of July, 1933, without notice to appellant. Five days later appellant moved to vacate the order of removal and to remand the proceedings to the probate court. On October 3d an order overruling appellant's motion was entered. An appeal was taken by appellant, and this court affirmed the lower court's judgment. In re Cuellar's Estate, 38 N.M. 518, 36 P.(2d) 526. In denying the motion of appellant to remand, the court entered a stay order restraining appellant from acting as guardian "until certain de novo hearings can be had, or until further order of the court." The appointment of appellant as guardian was not vacated until after the decision of this court on appellant's appeal and the remand of the cause (In re Cuellar's Estate, supra), when Frank T. Hines, Administrator of Veterans' Affairs, took the position for the first time that the probate court was without jurisdiction to appoint a guardian for the reason that Domingo

Cuellar had not been adjudged incompetent. He also filed on the 14th day of February, 1935, with a petition for the appointment of appellee guardian of the estate of Domingo Cuellar, an exemplified order of the probate court of Pulaski county, Ark., adjudging said Domingo Cuellar incompetent, which reads as follows:

"Now on this day there is presented to the Court a charge of insanity executed by Chas. O. Burkett setting forth that Domingo Cuellar has been a patient in Veterans' Administration Facility, North Little Rock, Arkansas, from December 6, 1924, and that the aforesaid Domingo Cuellar is afflicted with a mental disorder and this Court is petitioned to institute inquiry into his sanity in the manner provided by law.

"There is also presented to the Court a certificate executed by Cleveland Cabler as Chief Attorney for the Veterans' Administration certifying that the aforesaid Domingo Cuellar is a veteran of the World War, that he is afflicted with a mental disorder which renders him incompetent, and further that the appointment of a guardian is a condition precedent to the payment of any funds by the aforesaid Veterans' Administration, and further that it is necessary for this Court to adjudge the aforesaid Domingo Cuellar incompetent in order that a legal guardianship may be established in the State of New Mexico.

"There is also presented to the Court an affidavit executed by Doctor E. K. Allis and Doctor W. A. Jolley, practicing physicians of the State of Arkansas and members of the Medical Staff of Veterans' Administration Facility, North Little Rock, Arkansas, certifying that the aforesaid Domingo Cuellar has had a continuous residence in said institution since December 6, 1924, and that said physicians have given him an examination and have diagnosed his mental condition as Dementia Praecox, Hebephrenic type, and further express the opinion that said Domingo Cuellar is mentally incompetent and incapable of caring for himself or his affairs.

"After hearing the testimony and having been fully advised pertaining to the law and evidence, and after examining the aforesaid Domingo Cuellar, the Court finds that he is afflicted with a major mental disorder, that he is a citizen of Pulaski County, Arkansas, and further that the facts are not doubtful and that trial by jury is unnecessary. The Court is of the opinion that the said Domingo Cuellar should be adjudged incompetent.

"It is therefore ordered and adjudged by the Court that the aforesaid Domingo Cuellar should be and he is hereby adjudged mentally incompetent, and he is committed to the Veterans' Administration Facility, North Little Rock, Arkansas, pursuant to the provisions of Act No. 36 of the 1929 General Assembly of Arkansas."

After the appointment of appellee guardian appellant filed in the district court a claim for the premium paid on the guardian's bond and for several hundred dol-

lars additional expenditures, attorneys' fees, and compensation as guardian. The court allowed $18.34 of the money paid for bond premium and certain other items, in all $103.34, and disallowed the attorneys' fees and expenditures incurred in the appeal resulting in the decision of this court in Re Cuellar's Estate, supra. Both parties appealed. Appellee maintains that appellant has never been appointed guardian of the estate of Domingo Cuellar, in that the purported appointment by the probate court was superseded by the appeal to the district court, and also that the probate court had no power to make the order appointing appellee as guardian because Domingo Cuellar had not at that time been lawfully adjudged insane or incompetent; hence it was error to allow any part of appellant's claim. It is not questioned that prior to the enactment of Laws 1933, c. 76, probate courts had jurisdiction of the guardianship of incompetents and their estates. In re Miera's Guardianship, 38 N.M. 377, 34 P.(2d) 299.

The removal statute, N.M.1929 Comp.St. § 34-422, authorizes removal to the district court of the administration of estates without notice or hearing, and section 34-423 provides: "and thereupon such administration shall be docketed as other causes in the district court and said court shall proceed with the administration of said estate and upon the request of any interested person shall try de novo any issue upon which the probate court may have rendered a decision within ninety days prior to the filing of said petition in the district court."

Prior to the enactment of this statute N.M.1929 Comp.St. § 34-412, provided for appeals from the probate court to the district court and a hearing de novo, but it apparently was not the intention of the Legislature that by the mere taking of an appeal the judgment of the probate court would be vacated and set aside. In First Nat. Bank v. Dunbar, 32 N.M. 419, 258 P. 817, 818, we said: "A trial de novo could have been had in the district court, and the correctness of the judgment * * * could have been there reviewed."

If the effect contended for by appellee be given an ex parte order of removal to the district court of the administration of estates, in many cases it would leave the property of the estate without a conservator, and seriously complicate the responsibility of bondsmen of guardians and administrators. The bondsmen should be held even though the will under which the executor purports to act is fabricated. Miera v. Akers, 25 N.M. 508, 184 P. 817. There is no question of the jurisdiction of the district court to remove a guardian upon notice. Of course the court would appoint some one to receive the property of the estate. Appellee cites McMahan v. Trautvetter, 305 Ill. 395, 137 N.E. 230; Moberly v. Powell, 229 Mo.App. 857, 86 S.W.(2d) 383; Wright v. Boswell's Guardian, 103 S.W. 314, 31 Ky.Law Rep. 700, in support of his contention that the general order of the court for trial de novo

superseded the appointment of appellant as guardian by the probate court. In the last case cited, Wright v. Boswell's Guardian, the court said that the meaning of trial de novo depended upon the wording of the statute. The Kentucky statute (Civ. Code Prac.Ky. § 726) provides for trials "anew, as if no such judgment had been rendered." Our removal statute is somewhat unusual in its provisions. No notice is required and, while it authorizes trial de novo of any issue upon which the probate court may have rendered a decision within 90 days upon the request of any interested person, we hold that that request must be specific and that a mere general order for a trial de novo on all issues is not sufficient to cancel or supersede the appointment of a guardian.

The next point relied upon by appellee is that the court was without jurisdiction because Domingo Cuellar had not been at that time lawfully adjudged insane or incompetent, and appellant cites Damron v. Rankin (Tex.Civ.App.) 34 S.W.(2d) 360; Pan-American Life Ins. Co. v. Crymes, 169 Miss. 701, 153 So. 803, 806; and other cases. In the Crymes Case, Mr. Justice Griffith, in a specially concurring opinion, states the reason for the rule as follows:

"Since the decision of this court in Baum v. Greenwald, 95 Miss. 765, 49 So. 836, it has been the general understanding that it is not within the allowance of the law to appoint a guardian of the property of an adult person upon the ground of insanity except and until that adult person has been adjudged insane under a writ de lunatico inquirendo by a jury of six freeholders. This requirement of the law rests upon a fundamental guaranty and is established, moreover, to prevent oppression and the seizure of property by the designs of greed or hatred or other such motives. And being fundamental, the result is that until so adjudged by a jury, a citizen of this state remains in the eyes of the law as if sane so far as guardianship for insanity is concerned. In Ames v. Williams, 72 Miss. 760, 772, 774, 17 So. 762, this state was definitely aligned with those authorities which hold that the appointment of an administrator upon the estate of a living person is void, for there an indispensable or fundamental element of jurisdiction is absent. Upon like principle the appointment of a guardian for a person on the allegation that he is a minor when in fact he was then an adult, would be void for there was no minor before the court, an indispensable element of jurisdiction was absent. Likewise the appointment of a guardian for an adult person upon the allegation that he was a lunatic would be void, if in fact the person had not been so adjudged by a jury, for until so adjudged he is not a lunatic in the law so far as concerns a guardianship of his property on that ground.

"The majority has rested its decision, however, on the concluding clause of section 1896, Code 1930, which provides that the chancery court may appoint a guardian of the estate "of a citizen of this state of

unsound mind who may be confined out of this state in an asylum for the insane," and has in effect said that it is immaterial how he happened to be so confined, and that while as a citizen of this state he has thrown about him the inviolable guaranties herein above mentioned, he loses the right immediately upon his crossing the state line whether he go voluntarily or is carried against his will or is enticed to go. It was a privilege, valued above all others, of the Roman citizen—and one remarked upon throughout all times since that day—that wherever he went he was still a Roman citizen; and a citizen of this state, wherever he may be, should still be invested, so far as the laws of this state are concerned, with all the rights and immunities of a citizen of this state. It seems to me, therefore, that unless the confinement in another state has been upon an inquiry and adjudication substantially the equivalent of a proceeding under a writ de lunatico inquirendo in this state, such a confinement should not be considered sufficient so far as property in this state is concerned. Otherwise it would allow guardianship and the seizure of the property here of some citizen who for some mental trouble, actual or asserted, has sought treatment in another state, or who has been taken or enticed there and confined on false allegations of persons designing through that means to seize the property. The arguments of convenience that a guardian is necessary to an absent and confined patient, are more than displaced by the consideration of the possibilities of what by oppression, enticement, the designs of greed, or of the passions of family disruptions and disputes, and the like, could be brought about by resort to this statute as the majority has construed it."

This certainly should be the rule whether there is a statutory declaration on the subject or not in ordinary cases, but the question here is whether this rule has application where one entered the army of the United States, became insane while in the service, has since been cared for in the asylums of the government as a ward, and his only estate consists of the war risk insurance and pension paid to him by a generous government.

It was early held by our territorial courts that to constitute duress an imprisonment must be tortious, and without lawful authority, or by an abuse of lawful authority. McDonald v. Carlton, 1 N.M. 172. This was a habeas corpus proceeding brought by an enlisted soldier in the United States Army. Domingo Cuellar occupied a similar position in so far as unlawful restraint is concerned. If there had been occasion for a judicial ascertainment of his state of mind by a court, the proceeding in the probate court of Pulaski county, Ark., would have been farcical. There was no service upon Cuellar nor upon his guardian, relative, or friend. He was not represented by counsel; no witnesses appeared before the court. The decision was made upon affidavits of government physicians who no doubt stated

the facts, but facts upon which the government had been acting for a matter of fifteen years, both in the care of the veteran and in the disbursement of funds. Under the statute upon which the Arkansas court acted such an investigation was not necessary if the soldier was a citizen of Arkansas. Section 6 of the act (Act No. 36, p. 62, Acts Ark.1929) provides: "Where a petition is filed for the appointment of a guardian of a mentally incompetent ward a certificate of the director or his representative, setting forth the fact that such person has been rated incompetent by the Bureau on examination in accordance with the laws and regulations governing such Bureau; and that the appointment of a guardian is a condition precedent to the payment of any moneys due such person by the Bureau, shall be prima facie evidence of the necessity for such appointment."

The Supreme Court of Appeals of Virginia, in United States Veterans' Bureau v. Thomas, 156 Va. 902, 159 S.E. 159, 161, stated: "The federal government has adopted our state courts as the means whereby the compensation of incompetent veterans of the World War may be administered and used for their benefit. The Veterans' Bureau, constituted and created for the purpose of paying the compensation to a committee of an incompetent, is further directed, by the act creating it and defining its powers and duties, to cooperate with the state courts in the matter of appointing committees for insane veterans."

There was no statute of this state at the time of the appointment of appellant requiring the adjudication of incompetency before the appointment of a guardian of the estate, of an insane soldier in the custody of the government. See chapter 60, Laws 1935, amending chapter 76, Laws 1933, providing for the adjudication and custody of incompetent persons; also trial court rules 85—101 et seq., including rule 85—105, as amended.

There appears in the record a letter from the Bureau of War Risk Insurance, bearing the date of February 21, 1921, addressed to a brother of Domingo Cuellar, as follows:

"This is to advise you that your brother, the above named discharged soldier, has been rated as permanent and total from March 15, 1919. Therefore he is entitled to payments of insurance in the sum of $57.50 a month from that date, and accordingly an award of insurance in the sum of $57.50 a month effective March 15, 1919 was approved in your favor as guardian of the above ex-soldier on Feb. 18, 1921.

"You are further advised that inasmuch as the rating is permanent and total his award of compensation has been amended so that he will receive $100.00 a month from the date of his discharge instead of $80.00 a month heretofore.

"A check for the accrued amount due to him under the above award will be forwarded to you as guardian as soon as possible. * * *"

[redacted]

[redacted] It appears that the entire estate of Domingo Cuellar, amounting to some $14,000, consists of the proceeds of these government payments. From the date of his discharge from the Army, having been previously found to be totally incompetent as of March 15, 1919, he was cared for by the government and moved from place to place without regard to state boundaries. The finding by the probate court of Pulaski county, Ark., that Cuellar was a citizen of that state, if binding upon New Mexico courts, should result in the sending of the estate of Cuellar, all of which is movable property, to the state of Arkansas for administration. Chapter 60, Laws 1935, and trial court rule 85—105 as amended.

[redacted] The funds of Cuellar, who, it is admitted, was a resident and citizen of Socorro county, N. M., at the time he entered the Army, had been in the custody of the court for many years. We are constrained to hold that the probate court had authority to appoint the appellant guardian without an adjudication of incompetency. His estate consisted solely of the funds paid to him by the government, and he was in the care and under the control of the federal government and had been since his enlistment in the Army. There was no reason whatsoever to surmise that any one in the service of the United States is interested in unlawfully confining Domingo Cuellar in an asylum. They are not interested in his estate. It is not from the officers of the government, medical or otherwise, that duress, undue restraint, or other abuses of this unfortunate man might be expected, and there is no reason for the application in this case of the salutary rule which first requires an adjudication of incompetency before the appointment of a guardian of an adult's estate. We therefore hold that there is no merit in appellee's assignments of error; that the district court did not err in allowing appellant the small items of expense and compensation, aggregating $103.34. We further hold that the court erred in disallowing a part of the premium on the guardian's bond paid by appellant. As to the other items claimed by appellant, consisting of the expenses of the litigation instituted by him in an effort to prevent the appointment of his successor, we are constrained to hold that he made improper opposition to the petition for the appointment of a new guardian, and that he will have to bear the costs of that litigation. It follows that the court did not err in disallowing those items. In re Wiseman, 18 Wkly.Rep. 574.

For the reasons stated, the judgment of the district court in denying a part of the premium paid by the appellant on his guardian's bond should be reversed and the cause remanded to the district court, with directions to enter judgment in favor of appellant for the sum of $146.40, the difference between the sum allowed for premium on the guardian's bond and the

amount paid by appellant, and for his costs. It is so ordered.

SADLER and BRICE, JJ., concur.

BICKLEY and ZINN, JJ., did not participate.

73 P.2d 805

STATE v. EYCHANER.

No. 4278.

Supreme Court of New Mexico.

Nov. 15, 1937.

George A. Shipley, of Alamogordo, for appellant.

Frank H. Patton, Atty. Gen., and Fred J. Federici, Asst. Atty. Gen., for the State.

SADLER, Justice.

The defendant was convicted before the juvenile court of Otero county, under 1929 Comp. § 35-4110, of committing certain acts tending to cause or encourage juvenile delinquency of two minor females under the ages of eighteen years, to wit, of the ages of eight and six years, respectively. The acts were shown to have been committed on or about March 7, 1936. The defendant prosecutes this appeal for a review of the sentence pronounced upon him.

Although not raised by the parties, a question of our jurisdiction to entertain this appeal has suggested itself. Of course, when a question involving jurisdiction of the subject-matter arises, whether raised by the parties or sensed by the court, the first duty is to pause, consider, and determine the matter before approaching the merits. Davidson v. Enfield, 35 N.M. 580, 3 P.2d 979. Entertaining doubt and being without assistance from counsel on the question, it was presented to them with a request that each file a brief presenting his views and argument thereon. Such briefs were duly filed and the point is now before us for decision.

Briefly put, the question is: The juvenile court being a court inferior to the district court, does an appeal lie directly from that court to the supreme court? The considerations prompting the inquiry will be presently stated. Both counsel seem to agree that if the 1921 amendment (L. 1921, c. 87) to the juvenile court act is constitutional, there is no right of appeal in this case. The defendant, however, challenges constitutionality of the 1921 act on several grounds.

Now, as to the jurisdictional question: Article 6, § 1, of our Constitution provides: "The judicial power of the state shall be vested in the senate, * * * a supreme court, district courts, probate courts, justices of the peace, and such courts inferior to the district courts as may be established by law from time to time * * * including juvenile courts."

Section 2 of said article provides: "The appellate jurisdiction of the supreme court shall be coextensive with the state, and shall extend to all final judgments and decisions of the district courts, and said court shall have such appellate jurisdiction of interlocutory orders and decisions of the *district courts* as may be conferred by law." (Italics ours.)

If the doctrine found in the old Latin maxim, expressio unius est exclusio alterius, be applicable, and we think it is, the Legislature could not in the face of article 6, § 2, provide for an appeal directly to the Supreme Court from judgments of the probate court and justices of the peace. The

correctness of this conclusion is supported by the provisions of article 6, § 13, reading: "The *district court* shall have * * * appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts." (Italics ours.)

Any effort by the Legislature to provide for appeals directly to the Supreme Court from judgments of courts inferior to the district court would seem to circumvent the provisions of article 6, § 13. In enacting the juvenile court act, the Legislature has purported to proceed in accordance with article 6, § 1, by establishing "courts inferior to the district court * * * *including juvenile courts.*" (Italics ours.)

In State v. Florez, 36 N.M. 80, 8 P.2d 786, we held that section 35-4114, here relied on as conferring a right of appeal, applied only to persons convicted of contributing to juvenile delinquency. The constitutionality of the statute as authorizing an appeal directly to this court was not involved or considered.

Our conclusion is that in so far as section 35-4114 applied to the juvenile court act (Laws 1917, c. 4) as amended by L.1921, c. 87, purports to confer a right of appeal directly from the juvenile court to this court, if it does, it violates the provisions of the Constitution hereinabove mentioned and is accordingly invalid.

In this connection it should be said that, when enacted, 1929 Comp. § 35-4114 (L.1917, c. 4, § 14), did not purport to grant an appeal directly to the Supreme Court from an inferior court. Both parties agree in the correct conclusion that L.1917, c. 4, does not create nor intend to create the juvenile court as a separate tribunal inferior to the district court. Instead it expressly gave to the district court in each county exclusive original jurisdiction over juvenile delinquents and over those contributing to juvenile delinquency as well as over all matters arising under said act. L.1917, c. 4, § 2. An appeal was then authorized from all final judgments rendered under the provisions of section 10 of the act (convictions of contributing to juvenile delinquency) "in the same manner as *other final judgments from the district court.*" (Italics ours.) L.1917, c. 4, § 14; (§ 35-4114.)

Clearly this provided for an appeal from a judgment of the district court. It is only in an attempted application of the appeal section of the 1917 act to the situation appearing after the amendment of 1921 that defendant finds any basis for even claiming that a right of appeal exists or was intended. Perhaps the Legislature, forgetful for the moment that it was creating the juvenile court as a court inferior to the district court, thought the appeal section might still serve its original purpose. If so, the conclusion was erroneous for the reasons above stated. On the other hand, it may deliberately have chosen to provide no appeal, merely failing through inadvertence to repeal the appeal section in clarification of such intention. Whatever the fact, the legal effect is that no appeal exists from the judgment complained of. Hence, we are

without right to grant the review here sought unless error in such conclusion is established by consideration of the constitutional questions raised, if we have any right to consider them.

Defendant's counsel challenges the correctness of such conclusion by questioning on various grounds the constitutionality of L.1921, c. 87. We are asked so to declare; find the amendment of 1921 creating the juvenile court invalid; then indulge the assumption that, being without power to sit as a juvenile court, the proceeding must have been conducted under L.1917, c. 4, by the district court, juvenile division. Thus, having been brought by a devious route into the district court, an appeal lies under the express language of section 35-4114 (L. 1917, c. 4, § 14).

In his first approach to the subject, defendant's counsel suggests, if he does not seriously argue, that this prosecution was actually tried by the district court of Otero county rather than by the juvenile court of said county. The suggestion rests on the fact that in some instances in the transcript the term "district court" instead of "juvenile court" is employed, as where the court reporter certified the bill of exceptions as reporter of the district court, the signature of the judge to bill of exceptions as district judge, etc. This inadvertent use of an improper title cannot overcome the obvious fact that the case was tried before the juvenile court. The complaint was so captioned and the judgment was signed by the judge of the juvenile court as such. Under the express terms of the 1921 act, the district court had no jurisdiction to try the case, whereas the juvenile court had exclusive jurisdiction so to do. The record abounds with proof that the case was being tried by the juvenile, and not by the district, court.

The effort to characterize this trial as one occurring before the district court of Otero county rests upon the fortuitous circumstance that the district judges are made judges of the juvenile courts. The weakness of the contention is exposed when we suppose someone other than the district judge to be sitting as judge of the juvenile court. No one would contend in such circumstances that, because of some agreed invalidity denying even the existence of the juvenile court, the case must be deemed to have been tried by the district court whose jurisdiction had never been invoked. If it be kept clearly in mind that officially the district judge and the juvenile judge are as separate and distinct in capacity and identity as if the two offices were filled by different individuals, the fallacy of an attempt to place this trial and judgment in the district court at once appears.

The Attorney General plausibly argues that this is not a proper proceeding in which to raise or pass upon the constitutional questions presented by defendant's counsel. Planting himself on the safe premise that the Legislature has an express grant of authority under the Constitution to create the juvenile court as a court inferior to the district court, he argues that

the first part of the 1921 act (Comp.Laws 1929, § 35-4102) providing that "there is hereby established in each county of this state a court to be known as the 'juvenile court of ——— county, New Mexico,'" is not open to successful constitutional challenge; that there is thus created a de jure court, certainly a de facto court, with a judge presiding who possesses at least de facto status; and that the mere fact that the statute is unconstitutional, if it is, because (as contended) of the selection of the district judge as ex officio incumbent of the office of juvenile judge, or because (as contended) of the salary attached to such office amounting to increased emoluments for his services as district judge, or because (as contended) of incompatibility between the duties of the two offices, gives unto defendant no right in this proceeding to a hearing on such matters.

The position of the state on this phase of the case is reflected by the following excerpt from its supplemental brief submitted at oral argument, to wit:

"This brief is supplemental to appellee's Special Brief heretofore filed at the request of the court and will merely stress further the proposition presented at page 10 of said Special Brief dealing with the matter of de facto courts and de facto judges, and is being prepared in anticipation that the court will grant leave that the same be filed at the time of oral argument.

"A de facto judge is defined to be as follows: 'A judge de facto is one acting with *color of right* and who is regarded as, and has the reputation of, exercising the judicial function he assumes.' 33 C.J. 925, citing cases in footnote 51.

"An unconstitutional statute is sufficient to give color of right.

"'An unconstitutional statute is sufficient to give color of right or authority to elect or appoint a judicial officer, and a person elected or appointed by authority of such a statute is a de facto judge.' 33 C.J. 925, citing cases in footnote 59.

"The following statements of law are also found in Corpus Juris:

"'A judge de facto is a judge de jure as to all parties except the state, and his official acts, before he is ousted from office, are binding on third persons and the public. His right to hold his office can be questioned only in proceedings, regularly instituted for that purpose, *to which he is a party,* in the form provided by law; it cannot be attacked in a collateral proceeding. Nor can his title be determined in an action tried before him; nor in certiorari proceedings; *nor on an appeal.* The rules apply, although the person acting as judge is incapable of holding the office, and irrespective of the question whether he was properly elected, or whether he is holding two incompatible offices.' 33 C.J. 933.

"'A judge de facto, as against all parties but the commonwealth, is a judge de jure; and he is competent to do whatever may be done by a judge de jure. In passing upon the validity of official acts, inquiry into the title to the office of the party acting

therein may be pursued far enough to show whether he is a de facto officer. The official acts of a de facto judge, before he is ousted from office, are valid and binding at least, as far as the public and third persons are concerned, they are not ipso facto void, or open to question upon jurisdictional grounds, or subject to collateral attack.' 33 C.J. 971.

"That portion of Section 1, Chapter 87, Laws of 1921, establishing and creating juvenile courts, is clearly in accord with Article VI, Section 1 of the New Mexico Constitution, irrespective of whether or not the latter part thereof, designating the judge and allowing the salary, be unconstitutional as insisted by appellant. We submit we have here an act creating a de jure court. It is at least a court 'recognized by law.' State v. Blancett, 24 N.M. 433, 174 P. 207. Juvenile courts have been consistently 'recognized' by this court. See Stout v. City of Clovis, 37 N.M. 30, 33, 16 P.2d 936, where this court said: '* * * we do find the Legislature pursuant to its constitutional power has established "juvenile courts."'

"Even if it be assumed, without conceding, that the invalidity of the last portion invalidates the whole of Section 1, Chapter 87, on the theory that the section is inseparable and that the Legislature would not have enacted the first part without enacting the second part, even so, the first portion has as least created a de facto juvenile court or at least one 'recognized by law', and the last part thereof has created a de facto judge of the juvenile court under color of right."

The proposition is then advanced that the legality of a de facto court can only be challenged in a direct proceeding by the state for that purpose, citing Burt v. Winona R. Co., 31 Minn. 472, 18 N.W. 285, 289; Leach v. People, 122 Ill. 420, 12 N.E. 726; Donough v. Dewey, 82 Mich. 309, 46 N.W. 782; Com. v. McCombs, 56 Pa. 436; Gardner v. Springfield Gas Co., 154 Mo.App. 666, 135 S.W. 1023.

It is then asserted that: "Even if the office of judge of the district court and judge of the juvenile court be incompatible, the district judge acting in both capacities is at least the de facto judge of the juvenile court as such, and the validity of the law designating the district judge as judge of the juvenile court cannot be questioned in a proceeding such as this wherein such a judge is not a party. Commonwealth v. Taber, 123 Mass. 253, and State v. Blancett, 24 N.M. 433, 124 P. 207. See also in this connection Haymaker v. State ex rel. McCain, 22 N.M. 400, 163 P. 248, L.R.A. 1917D, 210."

And, finally, this court is quoted from the opinion in State v. Blancett, 24 N.M. 433, 174 P. 207, 209, as supporting authority as follows: "That the title of the officer de facto, and the validity of his acts, cannot be collaterally questioned in proceedings to which he is not a party, or which were not instituted to determine their validity."

This argument is intriguing. However, we find it unnecessary to pursue it or to write dicta thereon. The sole question now before us is one of our jurisdiction to entertain this appeal. Appeals are statutory. The constitutional provision which confers appellate jurisdiction on the Supreme Court does not purport to grant a litigant a right of appeal. State v. Chacon, 19 N.M. 456, 145 P. 125; Jordan v. Jordan, 29 N.M. 95, 218 P. 1035; Los Alamos Ranch School v. State, 35 N.M. 122, 290 P. 1019. Hence, unless we can point to a valid statute conferring the right of appeal, we are without jurisdiction to review this judgment on appeal. This is true irrespective of whether L. 1921, c. 87, is vulnerable to the constitutional assaults directed against it.

We already have held that the statute relied upon as giving the right of appeal is unconstitutional if so construed. No other statute purporting to authorize an appeal existing, no right thereto exists. The mere injection of constitutional questions into a proceeding, either in the lower court or, as here, for the first time in the Supreme Court, cannot afford a review by appeal where none otherwise exists.

Finding ourselves without jurisdiction to entertain the appeal, it will be dismissed; and it is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

73 P.2d 809

STATE of New Mexico, Appellee, v. W. H. EYCHANER, Appellant.

No. 4279.

Supreme Court of New Mexico.

Nov. 15, 1937.

George A. Shipley, of Alamogordo, for appellant.

Frank H. Patton, Atty. Gen., and Fred J. Federici, Asst. Atty. Gen., for the State.

SADLER, Justice.

This is a companion case to State v. Eychaner, 41 N.M. 677, 73 P.2d 805, this day decided. The defendant was convicted of committing acts tending to cause or encourage juvenile delinquency in a minor female under the age of 18 years, to wit, of the age of 12 years. The evidence showed the acts complained of were committed on or about June 5, 1936. The same question of our jurisdiction to entertain the appeal present in the cited case appears in this one. For the reasons given in the opinion in the Eychaner Case, just decided, this appeal will stand dismissed.

It is so ordered.

HUDSPETH, C. J., and BICKLEY, BRICE, and ZINN, JJ., concur.

73 P.2d 810

BUNTON v. ABERNATHY et al.

No. 4302.

Supreme Court of New Mexico.

Nov. 15, 1937.

H. B. Hamilton, of Santa Rosa, for appellants.

Charles H. Fowler, of Socorro, for appellee.

SADLER, Justice.

The judgment appealed from was entered in plaintiff's favor against defendants on a promissory note for its principal amount, interest, and attorney's fees. The Bank of Magdalena in Socorro county was named as payee in the note and in connection with the liquidation of the assets of said bank it passed to plaintiff's intestate under a blank indorsement by the receiver thereof.

Action on the note was barred by limitations unless the statute was tolled by admitted facts. The defendants were nonresidents when the note was executed and have continued so ever since, being residents of Monterey in the republic of Mexico.

The applicable section of the limitations statute (1929 Comp., § 83-103) having been invoked by defendants, the plaintiff disputed its effect by reason of the provisions of section 83-107, tolling the statute during the period a debtor is absent or out of the state. The plaintiff insists this section is confined in its operation to resident debtors and is without application to one who was a nonresident when the debt was created and has remained so ever since. Thus arises the decisive question.

The defendants cite the case of Lindauer Mercantile Co. v. Boyd, 11 N.M. 464, 70 P. 568, 570, and insist it resolves the question in their favor. The plaintiff places reliance upon the later case of Orman v. Van Arsdell, 12 N.M. 344, 78 P. 48, 67 L.R.A. 438. The controlling statute was amended between the dates of the two decisions. It is argued by plaintiff that the amendment effected such a change in the law as, had it been in effect at the time of the Lindauer decision, would have compelled an opposite result; whereas the defendants insist the amend-

ment wrought no change in the law material to the issue presented.

In the Lindauer Case the territorial Supreme Court was construing Laws 1880, c. 5, § 9 (C.L. 1897, § 2921), reading as follows: "If, after a cause of action accrues, a defendant removes from the territory, the time during which he shall be a non-resident of the territory shall not be included in computing any of the periods of limitation above provided."

The plaintiff sued comakers upon a promissory note. When they excuted the note, and at all times thereafter, the defendants were nonresidents, one being a resident of the republic of Mexico and the other a resident of the state of Texas. They were present in Deming, N. M. however, when the note was executed. More than six years having elapsed after maturity of the note, the defendants interposed the statute of limitations as a bar. The plaintiff relied upon their absence from the state and invoked section 2921, C.L. 1897, quoted supra. The court correctly held that in order to come within the statute as it then read and prevent the running of limitations the defendant must have been a resident of the territory at the time the cause of action accrued and depart thereafter. Among other things, the court said: "There is no ambiguity in the language used in section 2921 of our statutes. The language is in common words, clear and explicit. Whether or not it is a just or wise law, it is not for us to say. It is not for the court to legislate, nor is it for the court to repeal legislative enactments."

This opinion was handed down on August 28, 1902. At the first session of the Legislature thereafter, the 35th session of the territorial Legislature, convening in Santa Fe on January 19, 1903, C.L. 1897, § 2921, was amended, effective March 14, 1903, to read as follows: "If, at any time after the incurring of an indebtedness or liability or the accrual of a cause of action against him or the entry of judgment against him in this state, a debtor shall have been or shall be absent from or out of the state or concealed within the state, the time during which he may have been or may be out of or absent from the state or may have concealed or may conceal himself within the state shall not be included in computing any of the periods of limitation above provided. L. '03, Ch. 62, § 1." Now 1929 Comp. § 83-107.

Orman v. Van Arsdell, 12 N.M. 344, 78 P. 48, 67 L.R.A. 438, was decided the following year, in September, 1904. At the time of the amendment the case was pending before the district court of Santa Fe county. It was a suit on a domestic judgment obviously within the bar of the statute unless such bar were removed by C.L. 1897, § 2921, as it existed prior to amendment, the defendant never having been a resident of this state. An answer to the amended complaint was filed November 4, 1901, interposing the statute of limitations as a defense. The decision

in the Lindauer Case had not then been rendered. It was handed down, as above noted, on August 28, 1902. Then followed the amendment on March 14, 1903. And on July 25, 1903, a demurrer was interposed to the answer to the amended complaint, said answer containing the plea of limitations. The demurrer was sustained and, defendant refusing to plead further, upon proof furnished, judgment was entered against him. The judgment was reviewed upon writ of error

The first point decided was that a right, fully matured, under existing law, to defeat a debt by plea of the statute of limitations, is neither a vested right nor a property right, and may be taken away at will by the Legislature. Next arose the question whether the amendment had retrospective operation. If it did not, then judgment should have gone for defendant, since his right to protection of the statute as it existed prior to amendment had matured by the running of the full period of limitations. The court held, as the language of the amendment so plainly discloses, that the Legislature intended it to operate retrospectively as well as prospectively.

Having determined these preliminary issues there remained for decision the single question whether the defendant's status as a nonresident denied application of the amendment to him. If it did, the defendant was entitled to judgment. If it did not, the plaintiffs should prevail. The plaintiffs had judgment below. The territorial Supreme Court affirmed that judgment.

Thus the territorial court gave to the statute as amended the construction contended for by the plaintiff in the case at bar. The sole issue in that case was whether the defendant's nonresidence removed him from operation of the exception contained in the statute as amended. As it existed prior to amendment, it had been held in the Lindauer Case inapplicable to one in defendant's situation because of nonresidence. The amendment was held to have effected a change and to bring defendant within its operation.

Indeed, it seems to have been taken for granted by the court and counsel in Orman v. Van Arsdell, supra, that the amendment applied to nonresident as well as resident debtors. The sole effort was to defeat its application to defendant's case (1) as disturbing a right fully matured and (2) as having only prospective operation. If it could not be defeated on either of these grounds (and both were denied) counsel seem to have conceded its application to defendant.

As suggested by plaintiff's counsel in the instant case, it would indeed be anomalous that defendant in the Van Arsdell Case, whose defense had fully matured under the statute of limitations, should be deprived of that right by the retroactive operation of the amendment, and the defendants in the case at bar, under the same act, be permitted to escape because of non-

residence under the prospective operation of the law.

The effect which the amendment had on the rights of the parties in Orman v. Van Arsdell, supra, as a pending case is no longer possible in view of N.M.Const. art. 4, § 34, reading: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure in any pending case."

The construction adopted by the court in Orman v. Van Arsdell, supra, is in line with what is said to be the weight of authority. In 17 R.C.L. 837, § 199, under "Limitation of Actions" the author says: "According to the generally accepted doctrine, if the statute provides that the period of limitation shall not run in favor of a debtor who is absent from or out of the state, the saving clause extends to foreigners, or those who have never resided in the state, as well as to citizens who may be temporarily absent. Whether the defendant be a resident of the state, and only absent for a time, or whether he resides altogether out of the state, is immaterial. He is equally within the proviso."

The contention of counsel for defendants that the Van Arsdell Case decided only that the amendment of 1903 had retrospective operation must be denied. Inquiry on that subject would have been without purpose except for supposed application of the amendment to defendant. Nor does Northcutt v. King, 23 N.M. 515, 169 P. 473, in any way affect the holding in Orman v. Van Arsdell, supra. It does not even cite the Lindauer and Van Arsdell Cases. The trial court properly held the statute involved applicable to defendant.

Another point is urged concerning plaintiff's status as a holder in due course of the note sued upon. Since plaintiff makes no claim to such status and did not question that the note was subject to any defense which defendants might have against it, we will not enter upon a consideration of when one is a holder in due course.

Finding no error, the judgment of the trial court will be affirmed.

It is so ordered.

HUDSPETH, C. J., and ZINN, J., concur.

BICKLEY and BRICE, JJ., did not participate.

73 P.2d 812

ANDERSON et al. v. TEXAS-LOUISIANA POWER CO.

No. 4283.

Supreme Court of New Mexico.

Nov. 15, 1937.

E. L. Medler and Ove E. Overson, both of Hot Springs, for appellants.

Edward C. Wade, Jr., and Jones, Hardie, Grambling & Howell, all of El Paso, Tex., for appellee.

HUDSPETH, Chief Justice.

The questions raised by this appeal involve the jurisdiction of courts over a corporation and its property in course of reorganization under section 77B of the Bankruptcy Act (11 U.S.C.A. § 207). The appellants, plaintiffs below, sued the Texas-Louisiana Power Company for damages based upon personal injuries alleged to have been received as the result of the negligence of the receivers of said corporation while they were operating an electric light and power plant at Lordsburg, N. M. The trial court held that the allegations of fact setting up the negligence and injuries stated a cause of action, but sustained a plea in abatement on account of lack of jurisdiction by reason of the close of reorganization proceedings in the United

States District Court for the Northern District of Texas under section 77B of the Bankruptcy Act.

In December, 1931, suit was instituted in the United States District Court for the Northern District of Texas in Fort Worth by creditors against the Texas-Louisiana Power Company and receivers of the debtor corporation were appointed. In January, 1932, ancillary bill was filed in the United States District Court for New Mexico, and shortly thereafter ancillary receivers were appointed, who took possession of the assets of the corporation in this state and continued operation of the plant at Lordsburg. On January 24, 1934, plaintiffs' cause of action arose against said receivers. On June 10, 1934, the Texas-Louisiana Power Company filed petition in bankruptcy, cause No. 1734, in the United States District Court at Fort Worth, Tex., under section 77B, and on the same day a trustee was appointed under that section to take title to and possession of all the properties of the debtor corporation wherever situated, and the debtor, its officers, directors, and agents, and each of them, and receivers of the debtor or any of its properties, were required and ordered to forthwith turn over and deliver to said trustee all and singular the properties and rights of the debtor, and the order further provides that "all persons whomsoever are enjoined from instituting or prosecuting any actions, suits or proceedings against the Debtor, or any action, suits or proceedings affecting any property in which the Debtor is interested, without the order and permission of the Judge of this Court". All claims were ordered filed with the trustee on or before August 15, 1934. The order also provided that a notice be published once a week for two successive calendar weeks in newspapers printed in Fort Worth, Chicago, Illinois and New York City. On December 11, 1934, an order of court was entered in cause No. 1734 by the United States District Court at Fort Worth reciting that due notice to all creditors had been given, and approving plan of reorganization, including transfer of assets to "new Corporation."

On March 13, 1935, this suit was filed in the district court of Hidalgo county, N. M., against the Texas-Louisiana Power Company. Neither the receivers nor the trustee were made parties. In April, 1935, the trustee executed and delivered to the Community Public Service Company a conveyance of all assets of Texas-Louisiana Power Company, which deed was filed for record in Hidalgo county May 9, 1935. On July 6, 1936, the trial court sustained a plea in abatement and dismissed this cause.

The appellant maintains that the property of the Texas-Louisiana Power Company, taken over by the Community Public Service Company as its successor corporation, can be held liable for the torts of the receivers of the Texas-Louisiana Power Company during receivership, and that the plaintiffs were not compelled to present their claim and prove it up in the federal court proceedings in Texas. They main-

tain that their action, having grown out of a tort of ancillary receivers, the proper place to adjust their claim when reduced to judgment is in the ancillary court, and failing there to resort to the property that had been in charge of the receivers.

The latest expression of the Supreme Court of the United States brought to our attention appears in City Bank Farmers Trust Co. v. Irving Trust Co., 299 U.S. 433, 57 S.Ct. 292, 294, 81 L.Ed. 324, where the court said: "2. The purpose of section 77B was to facilitate rehabilitation of embarrassed corporations by a scaling or rearrangement of their obligations and shareholders' interests, thus avoiding a winding up, a sale of assets, and a distribution of the proceeds. A salient element in such a reorganization is the discharge of all demands of whatsoever sort, executory and contingent, presently due or to mature in the future."

In Foust v. Munson Steamship Lines, 299 U.S. 77, 57 S.Ct. 90, 91, 81 L.Ed. 49, the court stated:

"Petitioner is the administrator of the estate of Coy E. Foust and, February 1, 1934, commenced an action at law under section 33 of the Merchant Marine Act of [June 5], 1920 [46 U.S.C.A. § 688] in the United States court for the Southern District of New York against the Munson Steamship Lines. His complaint alleges that, February 27, 1930, while deceased was at work for defendant as seaman on its steamship Mundelta, his death was caused by defendant's negligence and, for the benefit of petitioner as surviving father, prays damages in the sum of $15,000. Defendant's answer denies the negligence charged against it and alleges decedent's death was caused by risks assumed and his own negligence.

"June 11, 1934, defendant filed its petition for reorganization under section 77B of the Bankruptcy Act. The petition did not refer to the administrator's claim or to the action brought for its enforcement. Two days after it was filed, the court entered a decree that approved the petition as properly filed, declared the debtor unable to meet its debts as they mature, determined it required relief under section 77B, appointed trustees to take and operate its property and, inter alia, enjoined the institution or prosecution of any action at law against the debtor. * * *

"Section 77B gives to the District Judge power, to be exerted in accordance with its provisions, to alter the rights of creditors or any class of them. Subdivision (b) (10), § 77B (11 U.S.C.A. § 207 (b) (10), declares the term 'creditors' shall include, for all the purposes of the section, the holders of claims of whatever character and whether or not they would otherwise constitute provable claims under the Bankruptcy Act; that the term 'claims' includes debts, securities, other than stock, liens, or other interests of whatever character. Subdivision (h), 11 U.S.C.A. § 207 (h) directs that the final decree shall discharge the debtor from its debts and liabilities. Subdivision (c) (8), 11 U.S.C.A. § 207 (c)

(8), provides that, if a plan is not proposed or accepted or if proposed and accepted but not confirmed, the court may direct the estate to be liquidated. Subdivision (k) (4), 11 U.S.C.A. § 207 (k) (4) upon order for liquidation, authorizes to be proved as provided in section 57 (11 U.S.C.A. § 93) claims provable under section 63 [11 U.S.C.A. § 103], but declares that none of the sections mentioned in subdivision (k) except subdivisions (g), (i), (j), and (m) of section 57 [11 U.S.C.A. § 93 (g, i, j, m)] and subdivisions a and e of section 70 [11 U.S.C.A. § 110 (a, e)] shall apply in proceedings under section 77B unless and until an order has been made directing liquidation of the estate. Mere reading of pertinent parts of the above-mentioned provisions makes it plain that 'creditors' and 'claims' as used in proceedings under section 77B are more comprehensive than in the act before the addition of that section. See American Surety Co. v. Marotta, 287 U.S. 513, 517, 53 S.Ct. 260, 77 L.Ed. 466, 468. Undoubtedly 'creditors,' 'claims' and 'liabilities' to be dealt with in the reorganization proceeding include petitioner, the cause of action he asserts and the judgment he seeks to recover."

An interesting case involving similar questions is that of Van Heukelom et al. v. Black Hawk Hotels Corporation (Iowa) 270 N.W. 16, 20, where the court said:

"The foundation of appellant's claim that the lower court erred in striking the plea in abatement is based upon appellant's contention that the federal court entered an order enjoining the prosecution of claims of all kinds unless filed in the bankruptcy proceedings pending in the federal court, and upon the further ground that in bankruptcy proceedings under section 77B, claims based upon an action in tort can no longer be prosecuted in the state court, and that all such claims must now be filed and prosecuted in the bankruptcy proceedings.

"The difficulty with appellant's contention now is that the order of the federal court enjoining the prosecution of all claims in all other courts was modified so as to permit the prosecution of this action in the state court, but only for the purpose and to the extent of permitting and enabling the appellees, in the event they recover judgment, to use the same for the purpose of collecting on the bond of a liability insurance company and to that extent only, as follows: " 'That the applicants have filed a written stipulation * * * that if permitted to proceed with their suit in the state court * * * the judgment recovered therein, * * * will not be used as a claim against the estate of the Black Hawk Hotels Corporation * * * and no execution or other process issued in said action will be levied against or executed upon any property now or formerly belonging to the Black Hawk Hotels Corporation.

" 'Administrators * * * are permitted to prosecute their action on said claim in the District Court of * * * Polk County * * * to final judgment, * * * *but they are not permitted to levy upon, or in any manner molest or interfere*

with or claim against any of the property now or formerly belonging to the Black Hawk Hotels Corporation, other than to proceed against any liability or casualty company which may be liable under said policy issued covering such a claim.' (Italics ours.)

"Under this order the appellees were especially authorized to continue the prosecution commenced in the state court, and under it the objections to such prosecution no longer exist."

The Iowa court quoted extensively from Foust v. Munson Steamship Lines, supra, including the following: "The power to stay does not imply that it is to be, or appropriately may be, exerted without regard to the facts. The granting or withholding of injunction is left to the discretion of the court."

While the Supreme Court of the United States in Foust v. Munson Steamship Lines, supra, held that the bankruptcy court erred in not granting leave to the administrator to maintain his action at law for damages, it was on the ground that there was no showing that prosecution of the action at law would hinder, burden, delay, or be at all inconsistent with the pending corporate reorganization proceedings. It is for the federal court to say whether it will grant leave to a claimant to prosecute his claim in another court. Rathje v. Serb et al., 287 Ill.App. 142, 4 N.E.2d 750. In Union & New Haven Trust Co. v. Taft Realty Co. et al., 123 Conn. 9, 192 A. 268, 270, the court said: "Whether or not the bankruptcy court will stay foreclosure proceedings in the state court under this section of the Bankruptcy Act is a matter within its discretion which has frequently been exercised by declining to interfere with the action of the state court. In re Murel Holding Corp., supra [(C.C.A.) 75 F.2d 941]; In re Granada Hotel Corp. (D. C.) 9 F.Supp. 909, 28 A.B.R.(N.S.) 90; In re Coney Island Hotel Corp. (C.C.A.2d Cir.) 76 F.2d 126."

Appellants also rely upon the fact that the Lordsburg plant is in a different jurisdiction, but that point is without merit. 6 Am.Jur. 859; In re Greyling Realty Corp. (Troutman et al. v. Compton) (C. C.A.) 74 F.2d 734; Bovay v. H. M. Byllesby & Co. (C.C.A.) 88 F.2d 990; Simon et al. v. Chambless (C.C.A.) 86 F.2d 569; United States v. Tacoma Oriental S. S. Co. (C.C.A.) 86 F.2d 363.

While appellants complain that the ancillary receivers of the Texas-Louisiana Power Company's property in New Mexico were discharged without notice, they do not complain of want of notice of the appointment of the trustee under section 77B or the injunction and order requiring all creditors to file claims before August 15, 1934. Appellants' brief states their position, as follows: "Section 77B specifically defines by classes those who are entitled to share in the plan of reorganization. Holders of claims for tort, in process or suit, which have not been reduced to judgment are not described as creditors."

Clearly appellants are in error. It seems that they were fully advised as to the pending reorganization proceedings under section 77B in the bankruptcy court. Appellants further say: "Upon the facts as disclosed by this plea, the court below held that the plaintiffs were precluded from holding the successor corporation or the assets that it took over by reason of their failure to present their claim to the Federal court in Texas, and that the Texas court had power to adjudicate what claims should be enforceable against the New Mexico property, and had done so in its order barring all claims not filed with it. This holding of the court required dismissal of the action, and judgment to that end was entered and the appeal taken."

There was no request on the part of appellants for time to obtain leave from the judge of the federal court to prosecute this suit. Appellants planted themselves squarely on the proposition that they might ignore the federal court and the pending reorganization proceedings under section 77B in bankruptcy. Appellants cite Butler v. Ellis (C.C.A.) 45 F.2d 951; Fidelity Trust Co. v. Gaskell (C.C.A.) 195 F. 865; Bartlett v. Cicero Light, etc., Co., 177 Ill. 68, 52 N.E. 339, 42 L.R.A. 715, 69 Am.St.Rep. 206; American Welding & Tank Co. v. DeSoto Brewing Co. (Fla.) 170 So. 449. The question of jurisdiction has been settled by the Supreme Court of the United States in the cases heretofore cited. See In re Diana Shoe Corp. (C.C.A.) 80 F.2d 92 as to the right of a tardy claimant.

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

SADLER and ZINN, JJ., concur.

BICKLEY and BRICE, JJ., did not participate.

73 P.2d 816

FARMERS OIL CO., Inc., v. STATE TAX COMMISSION et al.

No. 4326.

Supreme Court of New Mexico.

Nov. 15, 1937.

Otto Smith, of Clovis, for appellant.

Frank H. Patton, Atty. Gen., and A. M. Fernandez, Asst. Atty. Gen., for appellees.

SADLER, Justice.

The Farmers Oil Company, Incorporated, a domestic corporation with its principal place of business at Clovis in Curry county, sued State Tax Commission to recover certain taxes paid under protest pursuant to Laws 1934 (Special Session), c. 7, and Laws 1935, c. 73. A demurrer having been interposed to the first amended complaint, it was argued and sustained. The appeal is from the order sustaining the demurrer. The appeal may be treated as an election not to plead further and the order sustaining demurrer deemed appealable as an interlocutory one practically disposing of the merits of the action. Roeske v. Lamb, 38 N.M. 309, 32 P.2d 257.

The claim to immunity, which is set forth in the formal protest against the tax and embodied also in the amended complaint as a part thereof, reads as follows:

"I. That it is a co-operative association, engaged solely in the distribution of gasoline, fuel oil, kerosene, oils, greases, and like commodities to its members, all of whom own and operate farms and ranches for the purpose of producing products of the farm and ranch; that all such distribution is made on a co-operative basis and not for profit, gain, benefit or advantage, either direct or indirect; and that no profit, gain, or advantage is made therefrom.

"II. That the stock of said corporation is sold only to producers and operators of farms and ranches, and the commodities handled are distributed only to members; that no profit, gain or advantage is made therefrom; and that no dividends are paid on said stock, or to any of said members; that a copy of its by-laws are attached hereto, marked 'Exhibit A2' for identification purposes and made a part hereof.

"III. That it is not engaged in business as the term 'business' is defined in subsection (f) of section 3, article 1, chapter 7, of the Session Laws of New Mexico for 1934, and the same subsection, section [103], and article of chapter 73 of the Session Laws of New Mexico for the year 1935, for the reason that it does solely a co-operative business as hereinbefore shown, and that the aforesaid tax can only be legally collected from such persons, firms, corporations, and associations as are engaged in business as the term 'business' is defined in said statutes.

"IV. That its sales are not subject to taxation under said laws for the reason that they are exempt therefrom under and by virtue of subsection (a) of section 212 of said acts, which exempt societies and other organizations not operated for gain or profit."

The plaintiff's articles of incorporation show that it is organized as a private corporation. It is given all the broad powers enjoyed by any other corporation engaged in merchandising. It may and does "carry on the business of buying, selling and dealing in oil, kerosene, gasoline, distillate,

greases and lubricants, and all goods and all other merchandise usually handled by oil companies", and operates three service stations. It may "buy, sell, ship and deal in grain, produce, poultry and all other products of the farm and ranch."

While in practical operation the plaintiff sells only to its members (stockholders) there is nothing either in its articles of incorporation or in its by-laws confining it to dealings with its own members. Its by-laws provide that a reserve fund shall be created by adding to the sale price "not to exceed five per cent. over and above the gross cost of any one commodity." The reserve fund may be used for the payment of taxes, general and special, necessary equipment and repairs, and unquestionably is used to cover general overhead expense of operation. The fund also can be used when authorized by the board of directors for the purchase of material and supplies or "in business expansion."

An amendment to the by-laws limits membership to farmers or farm owners in the state of New Mexico. Not more than five shares may be issued to any one person and, regardless of the number of shares owned, each member is entitled to but one vote. The by-laws further provide that the "corporation shall be a nonprofit corporation" and that "no dividends shall be paid on the stock thereof."

The provisions of Laws 1935, c. 73, known as the Emergency School Tax Act, relied upon by plaintiff as affording the exemption claimed, which differ in no material respect from corresponding provisions of Laws 1934 (Special Session), c. 7, and in most instances are exactly the same, read as follows:

"(a) The term 'person' or the term 'company' herein used interchangeably, includes any individual, estate, trust receiver, business trust, corporation, firm, copartnership, joint adventure, association, or any other group or combination acting as a unit, and the plural as well as the singular number, unless the intention to give a more limited meaning is clearly disclosed by the context." Laws 1935, c. 73, § 103(a). Cf. Laws 1934 (Sp.Sess.), c. 7, § 3(a).

"(f) The term 'business' when used in this Act shall include all activities or acts engaged in (personal, professional, and corporate) or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect." Laws 1935, c. 73, § 103(f). Cf.Laws 1934 (Sp.Sess.), c. 7, § 3(f).

"Section 201. There is hereby levied, and shall be collected by the Tax Commission, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the State of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows: * * *

"D. At an amount equal to two per cent. of the gross receipts of the business of every person engaging or continuing

in the business of selling at retail of goods, wares, materials and commodities," etc. Laws 1935, c. 73, § 201, subd. D. Cf. Laws 1934 (Sp.Sess.), c. 7, § 201, subd. D.

"Section 212. There are exempted from the taxes imposed by this act the following:

"(a) The business of societies and other organizations not operated for gain or profit." Laws 1935, c. 73, § 212 (a). Cf. Laws 1934 (Sp.Sess.), c. 7, § 212 (a).

The question for decision may be held within a narrow compass. Is the plaintiff engaged in business with the object of gain, benefit, or advantage, either direct or indirect? If so, it must pay the tax unless forsooth it is a "society or organization not operated for gain or profit." These are the only two grounds of exemption claimed in the protest filed and they are the only two urged here. The definition of "business" in Laws 1935, c. 73, § 103 (f), controlling upon the first claim of exemption is just about as broad as the English language can make it. It includes "all activities or acts engaged in (personal, professional, and corporate) * * * with the object of gain, benefit or advantage either direct or indirect."

While ordinarily the major purpose of corporate organization and management is profit to the corporation as an entity in the first instance, we know from experience and observation that the profit earned is destined for the stockholders in the form of dividends. In fine, therefore, the ordinary corporation organizes and engages in business for the pecuniary advantage of its stockholders. Do plaintiff's organization and activities appear to be for some other purpose? We think not.

The mere fact that plaintiff makes the volume of purchases from it by members, rather than the number of shares owned, the measure of their gain in no way alters the fact that it, as well as its members, receives benefit and advantage in thus fulfilling the very purpose of its corporate existence.

The by-laws contemplate the creation of a reserve fund subject to use in the purchase of new equipment; also, when authorized by the board of directors, in business expansion. Certainly, "business expansion" thus accomplished represents gain or profit to the corporation itself, direct, immediate, and pecuniary and, likewise, to its stockholders upon dissolution.

The plaintiff places sole reliance as authority upon the case of Yakima Fruit Growers' Ass'n v. Henneford, 182 Wash. 437, 47 P.2d 831, 833, 100 A.L.R. 435. The question involved was whether a corporation organized by fruit growers of Yakima Valley in the state of Washington was subject to an occupation tax as engaging in business. Its stockholders were producers and a few former producers, the corporation being organized on a nonprofit basis to assist the growers in the production, packing, warehousing, and marketing of their crops. Under the taxing act an exemption was extended to persons engaged in the business of "grow-

ing or cultivating for sale, profit or use any agricultural or horticultural product or crop." Laws Wash.1933, p. 879, § 4, as amended by Laws 1933, Ex.Sess., p. 159, § 3. The court, in a five to four decision, held the corporation entitled to the exemption claimed on the theory of agency. It said: "We see no reason for holding that, because a large number of producers, most of whom are not what would be called large producers, cause a corporation to be organized for the purpose of assisting them in the production, packing, warehousing, and sale, they should not be on the same basis as a producer individually, whether large or small, or two or more persons co-operating together by joint enterprise rather than by corporate entity."

This decision brought about an amendment of the statute among other things in its definition of the word "person" or "company," so as to include nonprofit corporations. As amended, it embraced any "individual, * * * joint venture, * * * company, * * * corporation, * * * whether mutual, co-operative, fraternal, non-profit or otherwise." Laws Wash. 1935, p. 711, § 5(b). The same corporation in Yakima Fruit Growers' Ass'n v. Henneford, 187 Wash. 252, 60 P.2d 62, was again before the court under the statute as amended. This time, and by another five to four decision, the court held the corporation subject to the tax.

The first decision, reported in 182 Wash. 437, 47 P.2d 831, 100 A.L.R. 435, is clearly distinguishable. In order to render the analogy more nearly perfect the plaintiff should be able to point in our statute to an exemption as a measure for the tax of the proceeds of sales to farmers and farm owners, as plaintiffs in that case were able to point to an exemption in favor of persons growing for sale, profit, or use, agricultural or horticultural crops.

A case more nearly in point is decided by the same court. It is Peninsula Light Co. v. State Tax Commission, 185 Wash. 669, 56 P.2d 720, 721. It involves the same statute construed in the earlier decision. The plaintiff corporation, seeking to enjoin the State Tax Commission from enforcing the statute against it, was doing exactly the same for its members that the plaintiff in the instant case claims to be doing for its members, except that the commodity dealt in was electricity instead of motor fuels. The court held it to be engaged in business activities for gain, benefit, or advantage and subject to the tax. The court said:

"Appellant's sole reliance is the decision of this court in Yakima Fruit Growers' Association v. Henneford, 182 Wash. 437, 47 P.2d 831, 100 A.L.R. 435, which is not controlling.

"In that case we held that co-operative associations could perform service for their fruit grower members who, by section 4 (2) (a), Laws 1933, p. 879 as amended by Laws 1933, Ex.Sess. p. 159, § 3 were expressly exempted from the tax, where performing such services for themselves; but the members of this company are not mere

co-operative members acting as agents for themselves. This company buys electric power wholesale from Tacoma and resells it to its constituent members at retail. This is certainly an activity which is engaged in with the object of gain, benefit, or advantage, either direct or indirect under the provisions of section 1 (7), supra.

"The United States Supreme Court in Von Baumbach v. Sargent Land Co., 242 U.S. 503, 37 S.Ct. 201, 61 L.Ed. 460, held that corporations organized under the laws of Minnesota, not for charitable or eleemosynary purposes, but for the pecuniary advantage of their shareholders, were organized for profit within the meaning of the Federal Corporation Tax Law.

"In State ex rel. Dawson v. Sessions, 95 Kan. 272, 147 P. 789, that court held that an incorporated co-operative society organized for the purpose of providing wires for connection with a telephone exchange and of maintaining a system of irrigation, for the benefit of its members, was a corporation operated for pecuniary profit, doing business for pay, within the meaning of those phrases as used in the act, as distinguished from concerns organized for moral profit or benevolence.

"So here, appellant was not organized and was not engaged in business activities for any moral or benevolent purpose. Its sole object in its activities was at least indirect pecuniary benefit. We conclude that the receipts of such activities are taxable. The judgment of the trial court is right."

The plaintiff does not come in for an exemption under section 212 (a) of the 1934 and the 1935 acts removing from operation of the tax "the business of societies and other organizations not operated for gain or profit." This exemption, as suggested by the Attorney General, evidently has reference to the state's policy of exempting, in a measure, religious, benevolent, and eleemosynary organizations. See 1929 Comp., § 141-110. Plaintiff cannot qualify. Indeed, what already has been said in reference to the first ground of exemption disposes of this slightly different claim.

Other authorities lending support to the conclusion that plaintiff is engaged in business with the object of gain, benefit or advantage, are State ex rel. Dawson v. Sessions, 95 Kan. 272, 147 P. 789; Appeal of Beaver County Co-op. Ass'n, 118 Pa.Super. 305, 180 A. 98; Rye Country Day School v. Lynch, 239 App.Div. 614, 269 N.Y.S. 761; Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499.

We assume the proceeds furnishing the measure of the tax involved arose from the sale of motor fuel on which a tax for the sale or use thereof was not imposed by the laws of the state; otherwise, it seems, exemption would have been claimed under section 212(i) of the act. Whether this be true or not, the protest not claiming exemption under this provision of the statute, it is not open to plaintiff. Laws 1935, c. 73, § 313.

Finding no error, the judgment of the trial court will be affirmed.

It is so ordered.

HUDSPETH, C. J., and ZINN, J., concur.

BICKLEY and BRICE, JJ., did not participate.

73 P.2d 820

HARTZELL et al. v. JACKSON et al.

No. 4277.

Supreme Court of New Mexico.

Nov. 15, 1937.

E. L. Medler, of Hot Springs, for appellants.

Edward D. Tittmann, of Hillsboro, for appellees.

SADLER, Justice.

The plaintiffs (appellees) sued the defendants in the district court of Sierra county to recover judgment on promissory notes aggregating $3,500 and to foreclose a real estate mortgage securing said indebtedness. The notes so secured represented balance of the purchase price of a ranch in Sierra county sold by plaintiffs to defendants. A cash payment of $500 on the purchase price had been made at the time deed was passed to the purchaser.

The real estate involved consisted of 360 acres of patented land, plaintiffs' interest in state purchase contract No. 807, covering 240 acres of state land, and a state grazing lease on school sections 2 and 36 in adjoining townships; also some town lots in the town of Fairview—all in Sierra county, New Mexico.

The defendants answered, entering a general denial to the claim of indebtedness asserted against them. Further answering, they set up a fraudulent misrepresentation on defendants' part in this: That at the time of said purchase it was made known to plaintiffs that defendants desired to use the land as a cattle ranch and that they falsely represented to defendants that there was then located on said section 2 in township 11 south, range 8 west, a certain well; that afterwards a government survey disclosed said well was on section 25 in township 10 south, range 8 west, owned by other parties. That if said well had been on section 2 the land in the vicinity thereof would have been suitable and useful as a cattle ranch; otherwise not. That said representation was material, was relied upon by defendants, and that but for same they would not have made the purchase.

The defendants also incorporated into their answer a cross-complaint repeating the allegations of fraud and praying rescission of the purchase and reimbursement to them of all moneys paid out in connection therewith. The plaintiffs' reply put at issue all material facts raised by the answer and cross-complaint. The reply also alleged that if ever defendant had the right of rescission it was lost through delay.

The case was tried before the court without a jury, resulting in a judgment for plaintiffs for the amount of their debt.

and a foreclosure of their mortgage. Defendants prosecute this appeal seeking to set aside said judgment and either have judgment here in their favor or direction for a new trial.

The judgment proper contains only a general finding of the issues in favor of the plaintiffs. The defendants tendered certain requested findings, some of which the trial court adopted and some of which it refused. It is on the strength of certain findings made at defendants' request that they predicate their right to judgment. They base their right to a new trial on the trial court's action in refusing certain findings.

The specially requested findings of the defendants, with action of the trial judge noted after each, are as follows:

"1st. That in the year 1930, the said plaintiffs and defendants entered into negotiations for the purchase of the property described in the complaint, and the plaintiffs represented that the same was suitable for a cattle ranch, and having a certain well thereon, and in pursuance of such negotiations a contract of sale thereof was entered into on the 5th day of August, 1930. (Found) Harry P. Owen, Judge.

"2nd. That in pursuance of such contract of sale, the said sale was consummated on or about the 26th day of September, 1931, and in the consummation thereof, the plaintiffs executed to the defendant H. C. Jackson, their warranty deed, and as a part of the purchase money to be paid in accordance with said contract, the defendants herein executed a mortgage and notes, being the mortgage and notes sued upon in the complaint. (Found) Harry P. Owen, Judge.

"3rd. That at the time of the entering into of said contract of purchase, the plaintiffs had represented that there was a well located upon Section 2, in Township 11 South, Range 8 West, being a part of the land included in said contract of purchase. (Not Found) Harry P. Owen, Judge.

"4th. That the said defendants were induced to enter into said contract upon the representation that there was a well located upon said Section 2, in Township 11 South, Range 8 West. (Not Found) Harry P. Owen, Judge.

"5th. That the said defendants purchased the said property for use as a cattle ranch, and if said well had not been upon the property, would not have purchased the property included in said contract of sale. (Not Found) Harry P. Owen, Judge.

"6th. That afterwards and in the summer of the year 1933, it was definitely determined by a government survey of lines in Township 10 S. Range 8 W., N.M.P.M. that the said well was not upon Section 2, in Township 11 South, but in fact in Section 25 in Township 10 South Rg. 8 W., N.M.P.M. (Found) Harry P. Owen, District Judge.

"7th. That the said lands involved in Sections 2 and 36 in an Institutional Lease

which was a part of said sale, are worthless as a cattle ranch or for grazing purposes without water thereon, and without water upon either of said sections do not control the range. (Not Found) Harry P. Owen, Judge.

"8th. That upon a government survey establishing the lines in said Township 10 South, and upon its being determined that the said well was not on said Section 2, the Defendants refused to further perform said contract, and notified the plaintiffs that they would make no further payments upon said purchase-money mortgage, or pay the notes securing the same, and called upon plaintiffs to make an adjustment because of such well not being upon the land. (Found) Harry P. Owen, Judge.

"9th. That at the time of entering into the contract of sale, the defendants believed that said well was upon said section 2 in Township 11 South, Range 8, and by reason of such well that they would be able to use said property as a cattle ranch, and control the surrounding range. (Found) Harry P. Owen, Judge.

"10th. That said representation that said well was upon said land was made for the purpose of inducing said defendants to purchase said property, and said purchase would not have been made but for said representation. (Not Found) Harry P. Owen, Judge.

"11th. That defendants paid in all on account of said contract the sum of $500. on account of purchase, $210. interest for the first year; $37.50 for the building of three-fourths mile of four wire strand fence, *meaintaing* lease and lease rentals upon Section 2 and 36, $117.39; installments upon contract of purchase, $105.81 and taxes upon the patented land $32.76. (Found) Harry P. Owen, Judge.

"12th. That defendants have never resided upon any part of the land involved in the contract of purchase. (Found) Harry P. Owen, Judge."

The defendants' position in reference to claimed error, if seemingly inconsistent, is nevertheless understandable. First, they insist in support of an asserted right to judgment that the court found the fraudulent representation pleaded was made. And, next, they assign error upon the trial court's refusal so to find. The apparent inconsistency in their position arises from some degree of confusion in the trial court's action on defendants' specially requested findings. When viewed as a whole, however, seeming inconsistency between findings made and those refused disappears and the judgment rendered finds adequate support in the trial court's action on the requested findings.

In order to have an intelligent understanding of the findings, the evidence upon the question of the fraudulent representation must be reviewed. Negotiations for the purchase of the ranch appear to have commenced as far back as November, 1929. Answering an inquiry from defendant H. C. Jackson, the plaintiffs in a letter dated November 29, 1929, described the ranch

generally, among other things saying: "This ranch consists of 360 acres patent land, 240 acres which we are buying from the State of N. Mex., under contract and two sections of leased land, lease to run five years, having just been renewed this fall. It is all good grazing land, some of it being on hill-side, affording protection from freezing, *has a well on it,* an adobe house, and is partially fenced. The climate is wonderful and cattle and sheep do wonderfully—but you probably know as much about that as we do." (Italics ours.)

The defendant H. C. Jackson and his son, L. M. Jackson, in the company of the plaintiff Edward Hartzell, visited the ranch prior to contracting its purchase. On such occasion, according to the testimony of the Jacksons, Hartzell represented to them that the well up a certain canyon was on the school lease, section 2, and that while he didn't know how much water it afforded, he did know it "affords plenty of water and was on his lease." The plaintiff Hartzell did not accompany the Jacksons to the actual site of the well. He remained behind while the Jacksons, father and son, alone made the trip up the canyon, about two miles in a "stripped down Ford."

Asked about the statements so attributed to him concerning the well, the plaintiff Hartzell testified:

"Q. You have heard the testimony of Mr. Jackson, the father in this case? A. Yes.

"Q. Did you talk to him about this well? Please tell the Court exactly what you told Mr. Jackson at the time you were out in Fairview—when you were about to make this deal. A. I met Mr. Jackson, and we were talking about it, and he was trying to locate these leased sections, and I told him that there was supposed to be a dug well on section 2. I was told that myself. I knew nothing about the lines, and this well never had any value as a water well, that I knew. If he measured it and found 15 feet there, it must have been in the rainy season and run in from the top. I didn't use that well you refer—

"Mr. Medler: I object to that.

"A. Something along this line; it is a long time ago. I am a pretty old man. * * *

"Q. You did go with them, part way, up the canyon? A. Very little ways.

"Q. You told them by going on up the canyon— A. They said they were told by a party that was riding by that hole was on section 2; it wasn't a well.

"Q. You told them that it never had any value, so far as you knew? A. I never looked at it.

"Q. And anyway, you knew they went up there to look at it? A. To get the lines of the section that the well was in.

"Q. You sent them up to get the lines of Section 2, and to get those lines they would find a well? A. I told them I had been told this well was on section 2."

Thus according to defendants' testimony, an actionably false representation

regarding location and ownership of the well was made. Whereas, according to the plaintiffs' version, no representation at all was made, merely repetition of a rumor or report that the well was on section 2. The very form of Hartzell's statement suggests caution and a want of positive knowledge on his part regarding the fact. In order to be actionable or available as a ground for rescission, the representation must have been definite and specific, and not vague, loose, or general. Black on Rescission and Cancellation (2d Ed.) § 69; cf. Id. § 77, p. 210.

"If the fact of deception is accomplished the form of deceit is immaterial. In its generic sense a false representation is anything short of a warranty which produces upon the mind a false impression conducive to action. The representation must, however, be definite and specific, mere vague, general, or indefinite statements being insufficient, because they should ordinarily put the hearer upon inquiry, and there is no right to rely upon such statements." 26 C.J. 1066.

The present case in this respect is quite different from Bell v. Kyle, 27 N.M. 9, 192 P. 512, 513. There a positive misrepresentation as to location of a spring on the land purchased was found to have been made. And, as this court said: "Not a single circumstance appears from the testimony which would be calculated to put the appellee upon notice of the falsity of this representation."

That there was some uncertainty as to whether the well was located on section 2 is suggested in the record by the fact that within a year or more following the sale government surveyors ran out the lines and established its site elsewhere.

It is, however, contended by counsel for defendants that the trial court found that the fraudulent representation was made. The argument rests upon an effort to supply the words "certain well" in defendants' specially requested finding No. 1 as an antecedent for the word "said" before the word "well" in their requested finding No. 6. The court made both of these requested findings. In other words, defendants say that "said well" referred to in requested finding 6 is the "certain well" mentioned in finding 2. It is only through this ingenious argument that defendants are able to put plaintiffs in the position in the court's finding No. 1 of representing the "certain well" there mentioned as being on section 2. Requested finding 1 itself goes no further than to say the plaintiffs represented to defendants that there was a certain well on the ranch. It is our duty to endeavor to reconcile seeming inconsistency in the action on the requested findings before placing the trial court in the position of doing the absurd thing of finding that the fraudulent representation was made and that it was not made. See Guaranty Banking Corp. v. Western Ice & Bottling Co., 28 N.M. 19, 205 P. 728.

When the findings made and refused are considered in the light of the evidence and in their proper grammatical relationship to each other, we think it sufficiently appears that the trial court's reference to a "certain well" in the first finding did not relate to the supposed well on section 2. The requested finding No. 6 refers to the well in controversy supposedly located on section 2 by mentioning the section, township, and range. This well is previously mentioned in requested finding No. 3, declaring the plaintiffs to have represented there was such a well on section 2, which finding the court refused; and in requested finding No. 4, declaring the defendants were induced to make the purchase upon plaintiffs' representation that there was a well on section 2, which finding the court likewise refused.

In plaintiffs' letter to defendants, dated November 29, 1929, it had been represented that there was a well on the ranch. The evidence disclosed that there was, and a good one, which defendants admitted they had never been able "to pump dry." This well was located on the patented land a distance of about three miles from section 2. It is also to be remembered that the plaintiff Hartzell admitted stating to defendants "that there was supposed to be a dug well on section 2." That he had been told it was on section 2. Requested finding No. 6, which the court adopted, does no more than to find that the well supposedly on section 2 under plaintiff Hartzell's own testimony, but which, in rejecting findings numbered 3 and 4, the court refused to find he had represented was there, had been finally determined by government survey not to be on said section. The supposed well mentioned in requested findings numbered 3 and 4 as located on section 2 furnishes the nearest antecedent for "said well" referred to in finding number 6. The "certain well" mentioned in finding No. 1 may reasonably be related to the well in good condition on the patented land about which there is no dispute. Thus interpreted, and this evidently is the view taken by the trial court, the claimed inconsistency disappears.

Defendants assign error on the court's refusal to award rescission of the contract of purchase. The claim to this relief presupposes a finding that the fraudulent representation pleaded was made. The court refused a proposed finding specifically so declaring, the equivalent of a direct finding to the contrary. Field v. Otero, 32 N.M. 338, 255 P. 785; In re Frick Book & Stationery Store, Inc., 38 N.M. 120, 28 P.2d 660.

It is also urged as error that the trial court failed to make findings upon which its judgment is based. Although no specific request for additional findings was made, Apodaca v. Lueras, 34 N.M. 121, 278 P. 197, is cited to the proposition that defendants' requested findings operated as such a request. The Apodaca Case is not in point. There, as in the case before us, so far as the judgment itself is concerned, the court placed in it only a general finding. But,

whereas, in the Apodaca Case a request for twenty specific findings were made *all of which were refused,* here twelve specific findings were requested by defendants of which the trial court adopted seven and rejected five.

In Morrow v. Martinez, 27 N.M. 354, 200 P. 1071, 1072, we stated the purpose of the statute (1929 Comp. § 105-813) imposing on the trial court the duty to make findings in cases tried by the court, involving questions of fact, as follows: "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."

It is unimportant from which side comes the request for specific findings. The tendered findings become findings of the court when adopted as fully as if made of the court's own motion. And where, as in the instant case, the findings actually made, including the converse of a refused finding on a vital issue, are sufficient to support the judgment rendered and at the same time to afford the unsuccessful party a record adequate for the review sought, the purpose of the statute has been fulfilled.

Although Field v. Otero and the Frick Case are cited supra to the point that in a proper case we may consider as made the converse of a refused finding, we have never yet pushed this doctrine to the extent of holding that the converse of refused specifically requested findings, rejected in entirety, as in Apodaca v. Lueras, supra, will furnish compliance with the statutory duty imposed on the court trying a facts case to make and file written findings of fact and conclusions of law.

It seems obvious from the record that the trial court did not believe the fraudulent representation claimed was made. That was the vital issue. Defendants' whole defense melts in the face of the adverse finding of the court on this issue. The evidence, although conflicting, affords substantial support for the court's finding.

The judgment of the lower court will accordingly be affirmed, and

It is so ordered.

HUDSPETH, C. J., and ZINN, J., concur.

BICKLEY and BRICE, JJ., did not participate.

73 P.2d 1351

In re BAEZA'S ESTATE.

VANCE v. LEVENSON.

No. 4309.

Supreme Court of New Mexico.

Dec. 1, 1937.

Rehearing Denied Dec. 11, 1937.

W. C. Whatley, of Las Cruces, for appellant.

R. C. Garland and J. H. Paxton, both of Las Cruces, and D. J. Smith, of El Paso, Tex., for appellee.

ZINN, Justice.

M. I. Levenson was appointed on April 23, 1935, as administrator of Baeza's estate, and duly qualified the next day. He gave notice of such appointment by publication in a proper newspaper as required by 1929 CompSt. § 47-123. The record shows that the notice was published in the Las Cruces Citizen, a weekly newspaper published in the town of Las Cruces, Dona Ana county, for four consecutive weeks, to wit, April 25th through May 16, 1935. The four-week publication is required by Laws 1931, c. 150, impliedly amending 1929 Comp.St. § 47-123, which only required publication for three weeks. The four weeks' requirement was first enacted by Laws 1912, c. 49, § 5, and carried into 1915 Code, as section 4647, and into 1929 Comp.St. as section 113-103.

On September 15, 1935, the appellee mailed to the probate court a claim against the estate for $727.01. A copy of this claim was mailed to the probate clerk, with instructions to serve the same on the appellant. The probate clerk did mail the copy to the administrator.

On June 30, 1936, there was regularly served on attorney for appellant, the following notice:

"To: W. C. Whatley, Attorney for Administrator.

"You will please take notice that the undersigned attorneys for the claimant, Pecos Mercantile Company, a corporation, will call up for hearing before the Hon. Juan Guerra, Judge of the above entitled Court, at his office in the County Court House of Dona Ana County, New Mexico, on the 6th day of July, 1936, at the hour of 10:00 o'clock A. M., of said day, the claim of J. L. Vance, agent of the Pecos Mercantile Company, a corporation, the same being the sum of $456.25, due on a certain promissory note bearing date of March 18, 1931, made, executed and delivered by the deceased, Hilario Ramos Baeza, to said Pecos Mercantile Company, a corporation and heretofore filed herein as a claim against the estate of said decedent; that if the attention of the Court

cannot be had at said time then said claim will be presented to the Court as soon thereafter as his attention may be had.

"Dated at Las Cruces, New Mexico, this 30th day of June, 1936.

"[SGD.] R. C. Garland
"J. H. Paxton
"Attorneys for Claimant
"Las Cruces, New Mexico."

On July 8, 1936, the claim was allowed by the judge of the probate court and ordered paid. An appeal was taken from this order to the district court in due time, and a hearing de novo was had before said court on March 1, 1937. The district court allowed the same, from which order of allowance this appeal is prosecuted.

Upon request of appellant, the trial court made the following findings of fact:

"I. That Hilario Ramos Baeza died intestate in Dona Ana County, New Mexico, on April 11, 1935, leaving an estate in Dona Ana County, and a large number of heirs.

"II. That on April 24, 1935, M. I. Levenson was appointed and duly qualified by the giving of necessary bond and the making of the usual oath of office as administrator of the estate of said Hilario Ramos Baeza, deceased.

"III. That on September 15, 1935, J. L. Vance, agent for Pecos Mercantile Company, filed a claim against said estate in the office of the Clerk of the probate court of Dona Ana County, New Mexico, the said claim being based upon a promissory note given by said decedent to the Pecos Mercantile Company, on March 18, 1931, for the principal sum of $456.25, bearing interest from its date at the rate of 10% per annum, and the same having been stated in detail, properly entitled, and sworn to, but not having been approved by the administrator.

"IV. That no notice of a hearing on said claim was filed in said probate court in said proceeding until June 30, 1936, and no hearing on the said claim was had until July 6, 1936, when in pursuance of the notice of hearing filed June 30, 1936, the probate court heard proof as to the validity of said claim and by his order of July 8, 1936, allowed the same and ordered it paid"—but refused to make the following conclusion of law as requested by appellant: "That said claim is barred, by reason of the failure of claimant to file in said court, within one year from the date of the appointment of said administrator, a notice of hearing thereon."

At the request of the appellee, the court made the following findings of fact and conclusions of law:

"The Court finds that the administrator of the estate of Hilario Ramos Baeza, deceased, wholly failed and neglected to publish notice to creditors in the Spanish language as by law required.

"Claimant's requested finding No. 2: The Court finds that the surnames of the decedent and all of his heirs at law, the same being his sole and only heirs, are Spanish names.

"Claimant's requested conclusion of law No. 1: As a matter of law the Court con-

cludes that no notice was given to creditors in the probating of this estate, in the Spanish language and that the same is necessary and essential to a proper administration of said estate, required by law; that by reason of the failure of the administrator to publish notice to creditors in the Spanish language the period for presenting claims against said estate has not lapsed and cannot lapse until such notice to creditors be published as by law required."

Proper objections and exceptions were made by both sides to the court's findings and conclusions.

In the final judgment the district court disallowed the appellee's claim for attorney's fees as provided by the note, which note is the foundation of appellee's claim, and only allowed the claim in the sum of $660.92.

The appellee did not object to the reduction in the trial court, though he does interpose an attempted cross-appeal in this court based on this point.

The appellant's claim in this court is to the effect that because no notice of hearing was given on the claim, as required by 1929 Comp.St. § 47-504, to the administrator within one year from the date of the appointment and qualification of such administrator, the claim was barred by virtue of 1929 Comp.St. § 47-505.

The appellee counters this assertion of appellant for the following reasons: "1. The claimant's notice to the administrator, and the service thereof, is to be tested according to the requirements and objects of the Procedure Statute, not of the Limitation Statute; 2. The claimant's notice to the administrator herein, and the service thereof, was sufficient according to the requirements and objects of the Procedure Statute, and therefore sufficient for all purposes; 3. The question of the sufficiency of such notice, and of the service thereof, is a question of first impression in this jurisdiction; and 4. The publication of the administrator's notice to creditors herein was not sufficient in law; and consequently no statutory year has been fixed for the filing of claims."

As to the first contention of appellee that 1929 Comp.St. § 47-505 is not in pari materia with 1929 Comp.St. § 47-504, we are not impressed. Section 47-505 is a statute of limitations unequivocally barring all claims against the estates of deceased persons, which are not filed and notice given in the manner provided by section 47-504. The statute of nonclaim was enacted to apprise the administrator and the probate judge of claims against the estate of decedents and to facilitate the closing of decedent's estates with safety. The statute is mandatory. We have so held. In re Landers' Estate, 34 N.M. 431, 283 P. 49, 50.

Section 47-504 specifically points out the path the claimant must travel if he would have his claim allowed. Section 47-505 advises him that the penalty for deviation from such path bars the claim. The two sections must be read together.

"Our statute says the claimant must file his claim and give notice of a proposed

hearing on it within the year. We have held that both of these requirements must be met. (Otherwise the claim is barred.) Buss v. Dye, 21 N.M. [146] 150, 153 P. 74." (Insertion in parenthesis ours.) In re Landers' Estate, supra.

We know of no plainer, clearer language than that used by Justice Simms in the Landers' Case interpreting the meaning of the two sections above referred to. This law and its interpretation by this court was in effect when the rights of the parties to this action were fixed. See subsequent amendments Laws 1933, c. 173 and Laws 1937, c. 136. The appellee cannot escape the plain meaning of the law as interpreted.

The second claim of appellee is in effect that there was a substantial compliance with the statute, in that a copy of the claim was sent to the administrator by the probate clerk, and which claim included the following:

"Wherefore be it prayed that a copy of this claim be served on M. I. Levenson, Administrator of the Estate of Hilario Ramos Baeza, Deceased, and that a date be set for hearing thereof, and that upon final hearing the said claim for $727.01 be approved, and costs of this hearing be allowed against the said estate of Hilario Ramos Baeza, deceased.

"[Sgd] Fred C. Knollenberg,
"415 Caples Bldg.,
"El Paso, Texas.
"[Sgd] David J. Smith,
"312 Caples Bldg.,
"El Paso, Texas.
"Attorneys for Claimant."

We must announce an unsympathetic viewpoint. The statute is plain and unambiguous and is mandatory. Not even substantial compliance is here shown. 24 C. J. 364. In re Landers' Estate, supra. All that the administrator had in the instant case was a copy of the claim. The administrator had no notice that a date for hearing on the claim had been set or would be set. In the instant case, the five days' notice required by section 47-504 was not given until June 30, 1936. More than one year had elapsed from "the date of the appointment of the executor or administrator," and, no such notice having been given within one year, the same is barred. Section 47-505. Our statute specifically points out the result to follow noncompliance with its terms and the appellee must suffer for his departure from the designated path.

Appellee can find no comfort in the case of Brickley v. Spence, 33 N.M. 248, 264 P. 959. True, the statute of nonclaim is not meant as a trap for the unwary, nor to be applied with unnecessary harshness or technicality. Yet in view of its purpose and character so often declared by this court, and in view of its plain mandate, we cannot mark off a path different than that outlined by the Legislature to accomplish its purpose.

We come now to appellee's claim, and finding of the trial court, that the notice to the creditors not having been published in the Spanish language as required by law, and that inasmuch as the surnames of the decedent and all his heirs at law are Spanish names, the period for presenting claims

against said estate had not lapsed and cannot lapse until such notice to creditors is published as required by law.

We are bound by the court's mixed finding of fact and conclusion of law as set forth hereinabove to the extent that no notice was given to creditors in the probating of this estate in the Spanish language, "as required by law."

From this we assume that there was evidence before the court that in Dona Ana county there is published a newspaper of general circulation, at least 30 per cent. of the reading matter of which is in the Spanish language. If that be true, and we must so assume from the court's finding, then the publication of the notice was not in compliance with Laws 1931, c. 150, § 3, which reads as follows: "Sec. 3. In counties wherein there is published a newspaper of general circulation, at least thirty per cent of the reading matter of which is in the Spanish language, publications referred to in Section 1 hereof, required by law to be made, shall likewise be published in the Spanish language in such newspaper; provided, in all legal proceedings wherein no named party to the record has a Spanish surname, publication in the Spanish language shall be unnecessary. In proceedings before the Probate Court, publication in Spanish shall not be required unless the decedent or some heir, devisee or legatee named in the petition for the appointment of an administrator or the probate of the Last Will and Testament of decedent shall have a Spanish surname."

Laws 1931, c. 150, requires such legal publications as are covered by said act to be published in Spanish as well as English, when the parties to the record, or in probate proceedings when the decedent, some heir, devisee, or legatee named in the petition for appointment of an administrator, or the probate of the last will and testament of decedent, shall have a Spanish surname, and when such proposed publication is to be had in a county wherein there is a newspaper of general circulation, at least 30 per cent. of the reading matter of which is in the Spanish language.

However, the appellee must hurdle a much more serious proposition. Does publication of the notice of appointment of an administrator, as provided by section 47-123, have any bearing whatever on the proposition here presented?

In other words, Would an absolute failure of publication of notice of appointment under the terms of the law at the time that the rights of the parties in this case were fixed, toll the time within which the statute of nonclaim would start to be computed for the purpose of barring claimants against the estates of decedents?

Comp.St. 1929, § 47-505, is as follows: "All claims against the estates of deceased persons not filed and notice given, as provided in the preceding section, within one year from the date of the appointment of the executor or administrator, shall be barred. No suit upon any claim shall be maintained unless the same be begun within

eighteen months after the date of such appointment."

This statute clearly bars all claims against the estates of deceased persons which have not been filed and notice given, as provided by section 47-504, within one year from the date of the appointment. This statute is silent respecting publication.

The period within which claims against an estate must be presented is fixed by statute. We cannot change that. The appellee, however, argues that the failure of the administrator to publish notice to the creditors as required by law is fatal, and that, in the absence of such publication, the administrator cannot invoke the statute of nonclaim.

We have held that neither the heir nor the administrator controls the statute of nonclaim.

"It was enacted to facilitate the closing of decedent's estate with safety, and contains no saving clause or discretionary provisions, such as are sometimes found in the statutes from other states." In re Landers' Estate, supra.

The time within which claims must be presented to the executor or administrator is governed by the statute of nonclaim and not the publication statute. Where a statute gives a remedy for the collection of claims against the estates of deceased persons, and fixes a time limit for their presentation to the court, it is generally held that such statute furnishes the exclusive remedy for the collection of such claims. 11 R.C.L. 212, § 235, Title, "Executors and Administrators."

"(§ 959) b. Computation of Time. Under some statutes the period within which claims against an estate must be presented runs from the time when letters testamentary or of administration are granted, not from the representative's advertisement or publication of notice. * * *" 24 C. J. 338. See cases cited in note 24 C. J. 338.

As to appellee's contention that failure to give notice in the manner provided by the statutes is fatal, and absent such proper notice the statute of nonclaim does not start in operation to bar the claim, we believe that may be true in those jurisdictions where the statutes tie the time of computing the period of limitation to either the publication of the notice or some incident thereto. Cases cited in support of the appellee's contention may be distinguished from those holding contra because of the difference in the statutes construed in those cases from the New Mexico statute in effect at the time the rights of the parties were fixed. We call attention to Laws 1937, c. 136.

For instance, the case of Brill v. Ide's Estate, 75 Wis. 113, 43 N.W. 559, is cited by appellee to support his contention. The Wisconsin statute provided: That the "county court shall appoint convenient times and places when and where the court, or commissioners, will receive, * * * such claims, and within sixty days after granting letters testamentary * * * shall give notice of the time and places fixed for

that purpose, and of the time limited for creditors to present their claims, by causing a notice thereof to be published," etc. Rev. St. Wis. 1878, § 3839. It is obvious that unless such notice was given creditors would not know when or where to present their claims, and that a failure to give notice in such a case would relieve the creditor of the duty of filing.

Another case cited by appellee is Wilson v. Gregory, 61 Mo. 421, which construes a statute of Missouri. The Missouri statute requires the administrator to publish, within a prescribed time, a notice which shall require claims to be exhibited for allowance within one year after the date of the letters testamentary, "and that if such claims be not exhibited within two years from the time of such publication, they shall be forever barred." The notice given in this case was for three years, instead of two; and the court held that this was not a compliance with the statute. There was no question as to whether the time ran from the date of the issuance of letters testamentary or from the date of publication, since the statute is clear on the subject.

The Oklahoma statute which is construed in State v. Soliss, 66 Okl. 310, 152 P. 1114, cited by appellee in his brief, says that the notice shall require claims to be presented within four months from the date of said notice. It also prescribes the exact form for said notice, and the Soliss Case merely holds that the notice must be in that form to be valid. The court held that a material part was omitted and the notice was therefore void and did not start the statute of limitations, since the time runs from the date of the notice.

The statutes involved in the Montana case of Roche Valley Land Co. v. Barth, 67 Mont. 353, 215 P. 654, cited in support of appellee's contention, provide for notice by the executor or administrator, and say that such notice shall specify the place for presenting vouchers, etc., and that all claims must be presented within the time limited in the notice. Here, again, it is not surprising that the court held the statute must be strictly complied with, since without such compliance the claimant would be unable to ascertain when and where to file his claim.

The limitation and nonclaim statutes of Iowa also require filing of claims within twelve months from the giving of notice, and, in addition, that the notice of the administrator shall be such "as the court or clerk may direct." The case of McConaughy v. Wilsey, 115 Iowa 589, 88 N.W. 1101, although cited in this connection, merely holds that evidence of the fact of publication is insufficient to establish its regularity, in the absence of any showing that the publication made was pursuant to any order. Since the notice was held to be void and the statute runs from the time of notice, the claimant was not barred.

Thus, it is evident that each of the cases cited by appellee is based on a statute which expressly starts the running of the limitation period with the notice instead of with the qualification of the administrator, as does our statute.

Comp.St. 1929, § 47-505, is too clear to require argument to sustain its clear language

and import. There is nothing in our publication statute which indicates in the slightest degree that failure to publish tolls the statute of nonclaim.

In the instant case, the appellee cannot complain of insufficient notice. He filed his claim in due time, and his failure to give the notice required by section 47-504 is the cause of his dilemma and not the failure of appellant to publish a proper notice to creditors as found by the trial court.

For the reasons given the judgment of the district court will be reversed, the cause remanded, with directions to deny the claim of appellee and for appellant's costs.

It is so ordered.

HUDSPETH, C. J., and SADLER, BICKLEY, and BRICE, JJ., concur.

73 P.2d 1356

DYER et ux. v. COMPERE.

No. 4300.

Supreme Court of New Mexico.

Nov. 15, 1937.

Rehearing Denied Dec. 13, 1937.

Pearce C. Rodey, Don L. Dickason, and Benjamin Osuna, all of Albuquerque, for appellants.

John Baron Burg, of Los Lunas, for appellee.

SADLER, Justice.

The appellants (plaintiffs below) sued in equity to enjoin and restrain appellee from keeping and maintaining a gate crossing, a tamarisk hedge, and other claimed obstructions and encroachments on a certain right of way or easement for the use of appellants' property located to the east and at the rear of appellee's property.

Santiago Garcia and Candelaria Garcia, his wife, predecessors in title to both appellee, W. Gano Compere, and appellants, Clarence M. Dyer and Maude Dyer, his wife, were, prior to June 16, 1927, the owners of two tracts of real estate adjoining each other. Tract 1 is that tract now owned by the appellee, W. Gano Compere, and tract 2 is the tract now owned by the appellants, Clarence M. Dyer and Maude Dyer, his wife. Tract 1 is bounded on the west by highway 66, commonly called North Fourth Street road, and on the east by the Chamisal Acequia, which acequia is also the west boundary of tract 2, located directly at the rear of tract 1, considering the west boundary of tract 1 running along highway 66 as the front portion. The north boundary of tract 1 runs parallel with the north boundary of tract 2, coinciding with it at the Chamisal Acequia.

By warranty deed dated June 16, 1927, Santiago Garcia and Candelaria Garcia, his wife, deeded both tract 1 and tract 2 to the appellant Clarence M. Dyer; both tract 1 and tract 2 were described separately and; as to tract 1, the tract now owned by appellee, W. Gano Compere, the deed reserved, or rather excepted, a right of way as follows: "except from the North boundary of said tract a roadway 8 feet in width," and, as to tract 2, the tract in the rear and now owned by the appellants, Clarence M. Dyer, and Maude Dyer, his wife, the deed excepted the same roadway as follows: "There is excepted from the tract last above described (Tract No. Two) a roadway eight feet in width running along the North boundary of the described land."

The appellants thereafter, on February 20, 1929, deeded tract 1 to Mrs. Rosario Duprez Eaton, the predecessor in title to appellee, W. Gano Compere, in which deed appellants reserved the right of way easement in the roadway excepted by their predecessor in title in words as follows: "A right of way eight feet in width is hereby left open along the North line of the above described property for the use of the property owners in rear, namely, Clarence M. Dyer and Amado Lopez."

At the time of said conveyance there was maintained at the west entrance to tract 1 now owned by appellee, a cattle guard and gate. Pedestrians and motorcars entering the right of way from North Fourth street might do so over the cattle guard. Livestock and horse-drawn vehicles were compelled to use the gate, which was never locked, although kept closed except when

opened to permit the passage of vehicles. The cattle guard was located nearest the fence marking the north boundary of said property, the north end thereof being attached to a post about 1½ feet from the fence. The gate was immediately south of and adjoining the cattle guard. Together, they extended some 20 feet south of the north boundary of appellee's property, tract 1.

Following the purchase of tract 1 by Mrs. Rosario Eaton, she commenced to plant a tamarisk hedge along the north boundary thereof. Appellant Dyer made some protest, but, upon her assurance "that she wouldn't get it up to bother," he apparently acquiesced and she proceeded with the planting of the hedge. Mrs. Eaton sold to one Hall, and Hall sold to appellee, Compere, about December, 1932. At the time of his purchase the hedge had a considerable growth. Appellee endeavored to remove it, cutting "the main trunk back and roots down into the ground from three to five inches." Nevertheless, the hedge came up from the various roots, making "a very big hedge," so he let it grow and trimmed it.

During none of this time did appellants or their tenants confine themselves in the use of the right of way to the exact 8 feet south of the north boundary of tract 1. At the time of the trial the hedge was from 3 to 5 feet in width for a distance of some 35 feet adjacent and in contact with the north line of said tract 1 which tract is bounded on the north by a line of posts and barbed wire fence. Accordingly, in the use made by appellants of the right of way, a detour is made around the hedge over appellee's property, and such has been its use since appellants parted with title to tract 1.

The appellants maintain a gate in the fence along the boundary line between tract 1 and tract 2, which gate must be passed through in leaving appellee's property at its east end upon entering appellants' property. Some 22 feet west of said fence the roadway leaves the 8-foot right of way and proceeds south over appellee's property in order to enter said gate.

In cultivating appellee's lands in several instances, shallow plowing had encroached from 6 to 7 inches on the right of way. In only one instance had this encroachment attained one foot in extent.

The trial judge himself, by consent of the parties, went out to view the premises, and at conclusion of the evidence denied the appellants the injunctive relief sought. Certain findings, made of the court's own motion, read:

"The court finds that there has been no material encroachment on the passageway and easement reserved in the deed in question, and that the passageway has at all times and now is, open, and affords an open, definite and sufficient passageway for vehicles and farm machinery, and that the said passageway is eight feet throughout the way, excepting when there is a slight encroachment of a few inches by shallow plowing, and which condition was and is

temporary only, and in excess of eight feet in some places, and that the slight bend complained of around where the shrubbery is, is of no consequence and does not in any way place a burden on the easement, or limit the use of the easement by plaintiff, and that the easement now afforded plaintiff is the same as always afforded and intended by the parties to the conveyance containing the reservations.

"The court further finds that the passageway and easement now in use, and which is complained of, is substantially that in use at the time the reservation was made in the deed in question, and that the parties did not contemplate that the eight foot easement and driveway should be exactly against the North line of defendant's property, and that no substantial rights of plaintiff have been denied or jeopardized by either the growth of the shrubbery, as it now appears, or the position of the gate and opening, as it now appears."

Judgment was entered dismissing appellants' complaint, to review which this appeal is prosecuted.

Error is assigned upon the denial of the mandatory injunction prayed for. Appellants say that the grant or reservation of their right of way as to its location and dimensions is clear and definite, and that the trial court was without right to say that something else than what they contracted for is just as good. A statement of some controlling principles will help us to a decision of the questions presented.

The extent of an easement is to be determined by a true construction of the grant or reservation by which it is created, aided by any concomitant circumstances which have a legitimate tendency to disclose the intention of the parties. Where, however, the grant or reservation is specific in its terms, it is, of course, decisive of the limits of the easement. 9 R.C.L. 785, § 43, "Easements"; Dewire v. Hanley, 79 Conn. 454, 65 A. 573; Gerrish v. Shattuck, 128 Mass. 571; J. S. Lang Engineering Co. v. Wilkins Potter Press, 246 Mass. 529, 141 N.E. 501; Rudolph Wurlitzer Co. v. State Bank of Chicago, 290 Ill. 72, 124 N.E. 844; Doan v. Allgood, 310 Ill. 381, 141 N.E. 779; F. W. Woolworth Co. v. Vogelsang, 176 Wis. 366, 187 N.W. 179. Cf. Arizona & C. R. R. Co. v. Denver & R. G. R. R. Co., 13 N.M. 345, 84 P. 1018.

The rights of one holding an easement in the land of another are measured by the nature and purpose of the easement; and, so far as consistent therewith, the owner of the fee may make any reasonable use desired of the land in which the easement exists. 9 R.C.L. 784, § 42, "Easements"; Doan v. Allgood, supra; F. W. Woolworth Co. v. Vogelsang, supra. The owner of the servient estate is under no obligation, in the absence of special agreement, to repair or maintain the way, the rule being that he who uses the easement must maintain it in proper condition or suffer the resulting inconvenience. 19 C.J. 980, § 228; 9 R.C.L. 794, § 51; Doan

v. Allgood, supra; Hammond v. Hammond, 258 Pa. 51, 101 A. 855, L.R.A.1918A, 590.

Incident to such duty, the owner of the easement has the right to go upon the servient estate at all reasonable times to effect proper repairs and maintenance. 9 R.C.L. 795; Tong v. Feldman, 152 Md. 398, 136 A. 822, 51 A.L.R. 1291. A kindred right exists in the owner of an easement to remove obstructions unlawfully placed thereon by the owner of the servient estate or any other person, as well as natural obstructions interfering with use of the way, so long as the same may be done without a breach of the peace. 19 C.J. 988, § 244; 9 R.C.L. 801, § 57.

Instructive annotations dealing with various phases of the subject under discussion will be found in 47 A.L.R. 552, 95 Am.St. Rep. 318, and 10 Eng.Rul.Cas. 311.

Applying the foregoing principles to the facts before us, we find a specific reservation of an easement in the form of a right of way "eight feet in width * * * along the north line of the above described property." No uncertainty or ambiguity appears in the language employed. The use of extraneous facts and circumstances to give a contrary meaning to the limits of the easement thus defined is therefore inadmissible. The appellants' easement is exactly eight feet in width paralleling the north boundary of appellee's land.

But this conclusion does not settle the matter. For almost seven years appellants have seemed satisfied to enjoy the way over lands of appellee in part outside the boundaries of the reservation. While invoking the strong arm of equity to place them inside its boundaries, appellants have a gate so located at the east terminus of the way that they must of necessity leave the right of way and cross over appellee's property in order to enter their own. We examine, then, to ascertain whether appellants have made out a case entitling them to the mandatory injunction prayed for.

In the first place, the principal obstruction complained of, the tamarisk hedge, was not of appellee's planting or planning. Under the undisputed evidence it was placed on the way by Mrs. Rosario Eaton, a predecessor in title twice removed from appellee. It was done, if not with appellants' express consent, at the least with their acquiescence. When appellee came upon the premises, he attempted to eradicate and remove it, failing in which he began to trim it. Appellants were not using that part of the way then and have not done so since, appellee being content to permit them to make a slight detour around the hedge over other lands of his not within the boundaries of the way.

The learned trial judge who viewed the right of way found this detour worked no inconvenience to appellants. Such finding, however, is not determinative of their rights. The reservation being specific, they are entitled to the use and enjoyment of the very way reserved. Nevertheless, the duty rests upon them to repair and maintain the same.

The complaint at times seems framed in the mistaken conception that appellee is obligated to remove the hedge. This reflects an erroneous view of the relative rights of the parties. The planting or maintenance of the hedge, if it prevented proper and reasonable use of the way, might have been restrained by appellants in the first instance as against the original wrongdoer. But that wrong was personal to her. Responsibility therefor did not follow the land into appellee's hands.

The evidence proper fails to disclose that appellee ever denied appellants the right themselves to remove the hedge. The most that can be gleaned from it is the expression of a wish by appellee that the hedge remain. If the matter stood thus, we should be compelled to hold there was not presented a prima facie case for injunctive relief. However, the answer contains an admission of the allegation that appellee had refused appellants the right to remove the hedge. Upon this admission the appellants were entitled to an injunction restraining appellee from interfering with their right to remove the hedge. The trial court erred in ruling otherwise.

We do not have before us a case such as Clough v. W. H. Healy Co., 53 Cal.App. 397, 200 P. 378, where, upon a balancing of conveniences and equities, the court exercised its discretion against injunctive relief. It seems obvious that the presence of the hedge prevents the use by appellants of the right of way reserved. And it does not appear that its removal will produce inconvenience or damage to the appellee. The expense element is eliminated since it is the appellants themselves, seeking the injunction, who must remove same in fulfillment of their duty to repair the way or suffer the resulting inconvenience.

We are not impressed that the trial court erred in declining to enjoin the use of a gate by appellee at the North Fourth street entrance to the premises. The reservation is not so clear in this respect as it is in regard to the limits of the way. It reads: "A right of way eight feet in width is hereby *left* open. * * *" (Italics ours.) This at least suggests inquiry as to what was then considered "open." When we look to the evidence we find a gate as well as a cattle guard in use at the time. The gate at no time has been used to obstruct appellants' free use of the right of way but only to prevent trespassing. So far as the record shows, the right of way has always had a gate at this entrance. Appellant Dyer, himself stated that invariably he had been able to get through. The trial court correctly held that the right of way was "left open" within the intended meaning of such words in the reservation creating the easement. 19 C.J. 986, § 240; 9 R.C.L. 800, § 56; annotations, 73 A.L.R. 778 and 48 L.R.A.(N.S.) 87; Thomas v. Vanderslice, 201 Ala. 73, 77 So. 367; Brady v. Correll (Tenn.App.) 97 S.W.2d 448; Ford v. Rice, 195 Ky. 185, 241 S.W. 835; Fendall v. Miller, 99 Or. 610, 196 P. 381.

The fee owner in plowing his lands had the right to use the easement for turning at the end of the rows. Doan v. Allgood, supra. The slight encroach-

ment made when the furrows penetrated the right of way a few inches in places was characterized by the trial judge who viewed same as "temporary only" and as not being a material encroachment. It evidently was regarded by him as insufficient to move his discretion in the matter. Clough v. W. H. Healy Co., supra. We see no occasion to disturb his ruling, although such minor encroachments, if persisted in, could become the basis of injunctive relief. Appellee testified they were not intentional but due to inadvertence.

It follows from what has been said that the judgment of the trial court must be reversed with a direction to set aside its judgment and award to appellants an injunction restraining appellee from interfering with their right to remove the hedge from the right of way reserved. Appellants will recover their costs.

It is so ordered.

HUDSPETH, C. J., and BRICE and ZINN, JJ., concur.

BICKLEY, J., did not participate.

73 P.2d 1360

In re MORROW'S WILL.

No. 4252.

Supreme Court of New Mexico.

Nov. 22, 1937.

Hugo Seaberg, of Raton, and Reid & Iden, of Albuquerque, for appellants.

Crampton & Robertson, of Raton, for appellee First Nat. Bank in Raton.

F. S. Merriau, of Raton, for appellee Anna Doogan.

Fred C. Stringfellow, of Raton, guardian ad litem for appellee Margaret Jean Sweeney, a minor.

PER CURIAM.

Upon consideration of appellees' motion for rehearing, we have withdrawn the

original opinion and substituted the following as the opinion of the court:

Opinion.

BRICE, Justice.

A demurrer was sustained to appellants' petition to contest the will of Mary J. Morrow, deceased. They declined to amend and the contest was dismissed. From the order of dismissal this appeal has been prosecuted.

The first paragraph of the petition is as follows: "Now come John Morrow, Jr., Ruth Morrow Hart as the executrix of the estate of John Morrow, Sr., Raymond Morrow, Ruth Morrow and James Morrow, all residents of the County of Colfax, State of New Mexico, as petitioners interested in the property of the deceased, Mary J. Morrow, attempted to be disposed of in the herein described will, and hereby contest the supposed and purported will presented to this court for probating by the First National Bank in Raton, of Raton, New Mexico, and because of the common and general interest of each and all of the heirs at law of the said Mary J. Morrow, hereinafter mentioned and described, these petitioners file this petition in their own behalf and in behalf of each and every one of the hereinafter described and interested persons, stating and describing each interest separately and individually; and the said contestants aver:"

The additional facts alleged in the complaint are in substance as follows:

John Morrow, Sr., of Wisconsin, died July 6, 1915, leaving surviving him four sons and one daughter, to wit: Julia Sweeney, Henry Morrow, Thomas E. Morrow, John Morrow, Sr., of New Mexico, and James Morrow. Fred Morrow of Wisconsin and Thomas Morrow of Colorado are the sons of James Morrow above mentioned. Thomas E. Morrow died intestate in Colfax county, N. M., on the 15th day of October, 1925, leaving surviving him Mary J. Morrow, his widow (the deceased). Ruth Morrow Hart, Mary Morrow Adams, John Morrow, Jr., Raymond Morrow, and James Morrow, all of New Mexico, are the sons and daughters and heirs at law of John Morrow, Sr., of New Mexico, who died February 25, 1935, of whose will Ruth Morrow Hart is the duly qualified and acting executrix, appointed by the probate court of Colfax county by an order entered April 6, 1935. All the above-named persons are interested in the estate of Mary J. Morrow and in the will herein described. Mary J. Morrow died the 7th day of January, 1935.

The property involved in this suit was inherited by Mary J. Morrow, deceased, from her deceased spouse, Thomas E. Morrow, of New Mexico, who inherited said property from his deceased father, John Morrow, Sr., of Wisconsin, and it was therefore the separate property of said Thomas E. Morrow of New Mexico at the time of his death.

The will of Mary J. Morrow, deceased, dated the 10th day of May, 1934, was filed for probate in the county of Colfax, and admitted to probate by order of the probate court of that county on the 18th day of February, 1935. The subscribing witnesses, E. Christiansen and Harry McBride, were each disqualified to act as a witness because among the persons and corporations receiving benefits and legacies under said will, in that they were stockholders, agents, and trusted employees of the beneficiary of the will, the First National Bank in Raton; and each are interested in said will and property devised and bequeathed thereby.

At the time of the execution of the will of Mary J. Morrow, she was not of sound memory and disposing mind, but was of such age and extreme condition of mental and physical weakness that she was not capable of making a will. At said time and long prior thereto she was in poor health, unable to transact important business and not of mental capacity sufficient to enable her "to know her obligations to the natural objects of her bounty or the character or value of her estate nor to enable her to dispose of it according to a fixed purpose of her own." That she had great confidence in the integrity of the officers and employees of the First National Bank in Raton, and by reason thereof called upon them to assist her in preparing her will. That by undue influence of said officers and employees, they procured her to make the present will, by which practically all of her property was devised and bequeathed to the First National Bank in Raton, as trustee, to be held for a period of ten years to the exclusion of the heirs at law, except Anna Doogan, a sister of the deceased. That said purported will was not the free and voluntary act of the decedent, but was procured by the improper and undue influence of said bank. The demurrer admitted these alleged facts. The court in its order probating the will found that Mary J. Morrow at the time of her death left no children or direct descendants.

The grounds of the demurrer are as follows:

First. That petitioners do not allege facts from which it can be determined that appellants are "persons interested," as contemplated by the statute; in that the facts pleaded, if proven, would not establish that appellants are heirs at law of Mary J. Morrow, deceased.

Second. That, assuming the facts alleged are sufficient to show that appellants are heirs at law of Mary J. Morrow, deceased; yet they are not "persons interested" in contemplation of section 154-211, Ann.Comp.St.1929, because they were not such heirs at law until *after* the will of Mary J. Morrow, deceased, had been probated.

The statute in question is: "When a will has been approved, any person interested may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he

shall file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked."

The claim of interest is made as heirs of Mary J. Morrow, deceased, under section 68-410, N.M.Comp.St.1929, the material part of which is as follows:

"If a deceased person is a widow, or widower, and leaves no issue, * * *

"If the estate, or any portion thereof, was separate property of such deceased spouse, while living, and came to such decedent from such spouse by descent, devise, or bequeath, such property goes in equal shares to the children of such spouse and to the descendants of any deceased child by right of representation, and if none, then to the father and mother of such spouse, in equal shares, or to the survivor of them if either be dead, or if both be dead, then in equal shares to the brothers and sisters of such spouse and to the descendants of any deceased brother or sister by right of representation."

The last-stated ground of demurrer raised the principal question, which will be disposed of first.

So that the issue will be clearly stated, we copy the following from appellee's brief: "As indicated above, it may be conceded that (assuming John Morrow, Sr., of New Mexico himself had an interest) if he had died after Mary J. Morrow but *before* her will was probated, then the present contestants would have been 'interested' in the probate of the will and would consequently have been entitled to file a contest petition. * * * We contend that where the testator's heir dies or makes an assignment *prior to* probate, his heirs, personal representatives, or assigns acquire an interest sufficient to enable them to contest. But if the testator's heir dies *after probate* or attempts to make an assignment after probate, the heirs, personal representatives, and assigns have no interest sufficient to entitle them to contest the will. Much confusion has resulted from a failure to note this important distinction." (Appellees' italics)

Appellees contend in other words, though the appellants are in fact "interested persons," yet because they did not become interested *until after the will was probated,* they are deprived of the right to prove (if they can) that the instrument probated as the last will and testament of Mary J. Morrow was in fact not her will; though the will was forged or executed by means of duress, fraud or undue influence, appellants must be deprived of rights which it is conceded are theirs. We cannot conceive of any reason for such discrimination on the part of the Legislature, and no such construction should be adopted unless the wording of the statute requires it.

In Re Baker's Estate, 170 Cal. 578, 150 P. 989, 992, in holding that the personal representative of the contestant of a will should have been substituted for him upon his death, it is stated: "Such in its gen-

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eral aspects is the nature of the proceeding for the contest of a will. Specifically our law provides (Code Civ.Proc. 1327) that 'any person interested' may contest a will which has been admitted to probate within one year thereafter. Upon what is the right of an heir or other person in interest to contest a will fundamentally based? Manifestly, upon the illegal deprivation occasioned to him, the illegal loss to him of property or property rights, by giving recognition to an instrument depriving him of those rights, which instrument for one or another cause, is illegal, invalid and void. While the mere expectancy of an heir is not usually regarded as property, the moment the ancestor has died, that expectancy is changed into a vested interest in property. It becomes thus vested by virtue of the death. If, then, those rights are destroyed or impaired by an instrument which, though in form a will, is not for any reason recognized by the law a valid instrument, clearly the heir is being stripped of his vested rights to property by a paper writing as iniquitous as though it were forged as indeed it may be."

[redacted] It is unreasonable and unjust that an heir at law of a testator, and the former's heir at law, who becomes "interested" in the testator's estate before the probate of a will, should have advantage over one equally interested but whose interest arises subsequent to the probate of a will. If the statute is susceptible of no other reasonable construction, it must be accepted as correct; but the injustice resulting from such construction weighs heavily against it, and if it can be reasonably construed so that the rights of all persons interested will be as nearly uniform as is practical under their different situations, it should be adopted. It should be presumed, if permissible, that the Legislature did not intend such discrimination against persons equally interested. People ex rel. Burhans v. New York, 198 N.Y. 439, 92 N.E. 18; Plum v. Kansas City, 101 Mo. 525, 14 S.W. 657, 10 L.R.A. 371; 59 C.J. title "Statutes, § 600; Black on Interpretation of Laws (2d Ed.) § 44.

For convenience we copy the statute again: "Sec. 154-211. When a will has been approved, any person interested may at any time within one year after such probate, contest the same or the validity of the will. For that purpose he shall file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked."

"When" is defined in Webster's New International Dictionary as follows: "At what time; at, during, or *after* the time that; at or just after the moment that." It is used in this statute in the sense of "after the time that."

[redacted] Provision is made in the statutes for probating wills in common form; and there is no provision permitting contest until a will is probated. But this statute provides, in effect, that after a will has been probated *any person interested* may,

at any time within one year after such probate, contest the same or the validity of the will. The right to contest a will is not confined to those persons interested in an estate before the will is probated, but includes all persons who may become pecuniarily interested within one year after it is probated. We so construe this statute, before making any reference to authorities.

Appellee states: "* * * As pointed out in the foregoing authorities, the right to contest a will was unknown at common law. Consequently, such a right did not survive at common law, and, under the language of our statute, it does not survive."

We stated in Re Morrow's Will, 41 N. M. 117, 64 P.2d 1300, 1306 (on motion to dismiss this appeal), with reference to our statutes for contesting wills:

"The remaining provisions provide for process and service, the manner of trial, etc. These statutes are purely procedural and add nothing to the general law, to which we must look to determine the grounds upon which such contest can be invoked. Such laws are common among the American states and are effective in giving a convenient remedy to enforce rights within the English law; under which the validity of devises of real estate were generally contested in actions at law (though there are exceptions) and that of personal property in proceedings to probate in the ecclesiastical courts, which had no jurisdiction over devises of real estate. 2 Pomeroy, Eq.Jur.(2d Ed.) § 913, and English cases cited in notes; 1 Storey, Eq. Jur.(14th Ed.) § 579; Gaines v. Fuentes, 92 U.S. 10, 23 L.Ed. 524; Kieley v. McGlynn, 21 Wall. 503, 22 L.Ed. 599; Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364, L.R.A.1918D, 575; 1 Page on Wills § 542; 28 R.C.L. § 405; 68 C.J. Title Wills, § 668; Newman v. Waterman et al., 63 Wis. 612, 23 N.W. 696, 53 Am.Rep. 310; 28 R.C.L. Title Wills, § 401.

"With reference to proceedings in the English courts, see Ellis v. Davis, 109 U.S. 485, 3 S.Ct. 327, 332, 27 L.Ed. 1006.

"There are a number of proceedings common to nearly all the states which have in effect simplified the procedure for enforcing ancient rights, such as ejectment, suits to quiet title, and contests of wills. All of these have been enacted as new remedies for the enforcement of rights recognized by the laws of England."

A statute of Texas (Rev.St.1925, art. 5534) provides: "Any person interested in any will which shall have been probated under the laws of this State may institute suit in the proper court to contest the validity thereof, within four years after such will shall have been admitted to probate, and not afterward."

In construing this statute the Commission of Appeals of Texas in Dickson et al. v. Dickson, 5 S.W.2d 744, 746, to which we have referred, stated regarding the Illinois cases relied on by appellee: "We are, however, not in accord with these quotations, believing that the better reasoning,

as well as the weight of authority, supports the contrary idea to the effect that this right of action is assignable and is the subject of conveyance, and that a 'person interested' means any one who has an interest in the subject-matter of the proceeding, which is the estate of the deceased, at any time within the four years within which a suit to contest the will can be instituted."

The Washington cases hereinafter referred to are cited with approval.

The same case is reported in Dickson v. Dickson's Estate, 286 S.W. 295, 298, in which the Court of Civil Appeals stated: "But turning from the consideration of precedents to a discussion of the question upon principle, we think that under our law the right to contest the validity of a will does survive and may be assigned. It is true that the right to contest a will, especially after the instrument has been regularly probated, is purely statutory, but that fact does not make the right exclusively a personal one. It might be otherwise if the right were given to persons classified by their relations to the testator. But our statute provides, in effect, that it may be exercised by any one having an interest in the estate disposed of by the will."

The leading case supporting our conclusion is Ingersoll v. Gourley et al., 72 Wash. 462, 130 P. 743, 745, and is usually cited as the principal authority on the question by courts of the same view. In regard to this case appellees state: "The third case cited by appellants * * * is not strictly in point. The actual holding in the case is that *where a contest has been started by a proper party, the proceeding does not abate on the death of that party.* The case is therefore clearly distinguishable. There is a clear difference between *causes of action* which survive on the one hand, and *actions* which do not abate on the other. * * * It is true that by way of pure dictum, the Washington court goes on to say that the cause of action itself survived * * *." (Appellees' italics.)

We think appellees are in error. The statutes of Washington quoted in the opinion have been construed "as not intended to define what causes of action survive, but as referring to causes already survived, and as merely directing in whose name the prosecution of such surviving causes may be continued." So the court held in the Ingersoll Case. The issue was stated as follows: "The sole question presented for our determination is: Does the death of a contesting heir of the putative testator terminate the contest of the will, or may the contest be revived and continued in the name of the administrator or heir of the deceased contestant? In other words, Does the right to contest a will survive to the heirs or personal representatives of the heir of the putative testator?

It was in effect held that unless the right to contest the will survived, then the contest could not be revived by the heirs and further:

"Whether the right to contest a will does survive must, therefore, be determined upon the same principles as govern in other causes of action. If, under such principles, the right survives, then under the statutes quoted the action may be revived and prosecuted in the name of the personal representatives or successors in interest of the person originally entitled to contest.

"It is a general rule, and one to which this court has adhered, that the test of survivorship of a cause of action is its assignability, and, conversely, the test of assignability is survivorship; that is to say, they are always concomitant."

It is clear that the same question was before the Washington court as that now being considered, and that it is not "pure dictum" as appellees suggest. The suggestion that the opinion of the Washington court "is not entitled to much, if any weight," is not borne out by the opinions of other courts which have cited it with approval. Dickson et al. v. Dickson et al., supra; Chilcote v. Hoffman, supra; 1 Page on Wills, § 549.

The Washington statute (Rem. & Bal. Code, § 1307) governing will contests (since repealed) was: "If any person interested in any will shall appear within one year after the probate or rejection thereof, and, by petition to the superior court having jurisdiction, contest the validity of said will, or pray to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof." Repealed by chapter 156, pp. 642, 707, L. 1917.

In construing it in the Ingersoll Case the Supreme Court of Washington said: "The respondent invites us to follow the Illinois rule; the argument being that, the right of contest being purely statutory, the words of our statute 'any person interested in any will' should be construed as meaning a person having an interest at the time the will goes into effect; that an interest arising subsequently is not an interest in the will; and that a will cannot impair, destroy, or affect any property interest acquired after the death of the testator. This seems to us to beg the question, which is merely one of assignability and consequent survivorship. Looking beyond the mere surface of the thing, the heir of an heir has, on descent cast, exactly the same direct pecuniary interest that the deceased heir had. In either case, but for the will, the same property rights would have descended first to the heir, then to the heirs of the heir. We can see no sound reason, either in equity or in the words of the statute, for limiting the right to protect this interest by contest to the person in whom it is vested at the date of the testator's death. The nature of the interest is in no sense changed in passing from the heir to his successor. It is a property right in no sense purely personal to the heir of the testator, else it could not descend to the heirs of such heir even if there were no will. The statute does not in express terms, nor by necessary implication, fix a specific time

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when the interest shall accrue in the contestant. It does fix a limit of one year within which the contest shall be instituted. It seems to us, therefore, that any person acquiring an interest within that year, which but for the will would accrue to his pecuniary advantage, should have the right to contest the validity of the will within that time."

The following authorities support our conclusion to some extent: In re Davis' Will, 182 N.Y. 468, 75 N.E. 530; Brooks et al. v. Paine's Executor et al., 123 Ky. 271, 90 S.W. 600; In re Sheeran's Will, 96 Minn. 484, 105 N.W. 677; In re Langevin's Will, 45 Minn. 429, 47 N.W. 1133; Foster et al. v. Jordan et al., 130 Ky. 445, 113 S.W. 490; Davies v. Leete et al., 111 Ky. 659, 64 S.W. 441; Savage et al. v. Bowen et al., 103 Va. 540, 49 S.E. 668; In re Engle's Estate, 124 Cal. 292, 56 P. 1022; Blinn v. Pillsbury, 252 Mass. 197, 147 N.E. 674; In re Thompson's Will, 178 N.C. 540, 101 S.E. 107; Carthage Development Co., Inc., v. Cushman et al., 101 Misc. 57, 166 N.Y.S. 483; Judson et al. v. Staley et al., 163 App.Div. 62, 148 N.Y.S. 733; Brady v. McCosker, 1 N.Y. 214; Komorowski v. Jackowski, 164 Wis. 254, 159 N.W. 912; In re Baker's Estate, 170 Cal. 578, 150 P. 989; Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N.E. 177.

The basis of appellees' contention is decisions of the Supreme Court of the State of Illinois, followed by some other courts which we shall mention. The Illinois court in McDonald et al. v. White et al., 130 Ill. 493, 22 N.E. 599, 600, construed a similar statute of that state, in which the court said: "The interest must be a direct pecuniary interest affected by the probate of the will, for the reference is to an existing interest, and not to an interest which may be subsequently acquired, since in that event the language would have been, 'or if any one who shall, within three years, be interested and appear.'"

Another case relied on by appellees is Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N.E. 185, 187, 72 Am.St.Rep. 211. The will of Caroline T. Storrs was duly probated. After the probate, her son, George M. Storrs, died leaving a son, Emery A. Storrs (grandson of the testatrix). Emery A. Storrs brought this contest proceeding. The court said: "The present appellant, Emery A. Storrs, does not come within the definition of 'any person interested,' as used in the statute. He certainly had no interest at the time of the probate of the will. * * * The right to file the bill which existed in George M. Storrs did not descend to the appellant Emery A. Storrs. George M. Storrs had the bare right to establish title by successfully contesting the will. That right was not assignable, as was held in McDonald v. White, supra. If it was not assignable by a conveyance or written transfer, it could not pass by inheritance or descent. The right to dispose of property by will is always considered purely a creature of statute. U. S. v. Perkins, 163 U.S. 625,

16 S.Ct. 1073 [41 L.Ed. 287]; Kochersperger v. Drake, 167 Ill. 122, 47 N.E. 321, [41 L.R.A. 446]. No statute exists in this state, so far as we are advised, which authorizes the right to file such a bill to pass by descent, or to go to an heir by inheritance. * * * We are therefore of the opinion that the appellant Emery A. Storrs had no such interest, at the time of the probate of the will, as would entitle him, in view of the decisions above quoted, to file a bill to contest its validity at the date at which the present bill was filed, and that such right as his father, George M. Storrs, had to file such a bill, did not pass to him by descent."

For other decisions from the State of Illinois, see Staude v. Tscharner, 187 Ill. 19, 58 N.E. 317, Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N.E. 860, 130 Am.St.Rep. 180, and Selden v. Illinois Trust & Savings Bank (C.C.A.) 184 F. 872.

These decisions of the Illinois Supreme Court have been criticized in Chilcote v. Hoffman, supra; Dickson et al. v. Dickson et al., supra; Ingersoll v. Gourley, supra; and Crawfordsville Trust Co. v. Ramsey, supra. They have been followed by Ligon v. Hawkes et al., 110 Tenn. 514, 75 S.W. 1072; Cain v. Burger et al., 219 Ala. 10, 121 So. 17; Allen v. Pugh, 206 Ala. 10, 89 So. 470; Halde v. Schultz, 17 S.D. 465, 97 N.W. 369; Teckenbrock v. McLaughlin, 246 Mo. 711, 152 S.W. 38.

It would serve no useful purpose to give special consideration to each of these cases. The two lines of decisions are squarely opposed and cannot be reconciled. It is stated in 1 Page on Wills, § 549:

"If the heir or next of kin dies after testator, and before contest, it is held in most jurisdictions that the right of contesting such will passes to the heirs or next of kin of such deceased heir or next of kin, according to whether the property is realty or personalty." Crawfordsville Trust Co. v. Ramsey, 178 Ind. 258, 98 N.E. 177; Sheeran v. Sheeran, 96 Minn. 484, 105 N.W. 677; Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364, L.R.A.1918D, 575; Ingersoll v. Gourley, 72 Wash. 462, 130 P. 743; Blinn v. Pillsbury, 252 Mass. 197, 147 N.E. 674.

"In a few jurisdictions the right to contest does not survive. This result is generally reached by construing the statute which allows contest as restricted to the persons who had an interest at the time of the probate and were aggrieved thereby. Storrs v. St. Luke's Hospital, 180 Ill. 368, 54 N.E. 185, 72 Am.St.Rep. 211; Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 87 N.E. 860, 130 Am.St.Rep. 180; King v. King, 35 R.I. 375, 87 A. 180.

"In Tennessee it seems to be held that the right may pass to an heir or next of kin of the deceased heir or next of kin as one who could have inherited directly from testator. Ligon v. Hawkes, 110 Tenn. 514, 75 S.W. 1072."

These courts seem to base their conclusion upon the assumption that the con-

testant under the statute has a mere naked right to maintain an action to contest a will and nothing more; that the judgment in such proceeding does not directly involve property, and therefore such right to contest is not assignable and, not being assignable, could not survive. Storrs v. St. Luke's Hospital, supra. That therefore such actions are within the rule that the assignment of a mere right of action without property interest is void. 3 Pomeroy's Eq.Jur.(3d Ed.) § 1276; Gruber v. Baker, 20 Nev. 453, 23 P. 858, 9 L.R.A. 302; 3 Storey's Eq.Jur.(14th Ed.) § 1400.

The effect of a successful will contest is to establish the contestant's right to property; for he must be pecuniarily interested (usually as an heir at law), so that when the will is eliminated the laws of descent and distribution are effective to establish his title. Property rights are directly involved.

The assignment of the right to contest Mrs. Morrow's will is not a question in this case. The question is whether, upon the assignment of an inheritance by an heir at law, the remedies for the protection of the title to the property follow such assignment, either to the heir of an heir of a testator, as in this case; and to an assignee of the property by contract.

"The only other question deemed worthy of consideration is whether any person other than the grantor can prosecute this right of rescission. If the plaintiff were a mere assignee of the cause of action, his right to sue would be gravely doubtful; but he is the representative of the estate to which it belongs and sues as such. Hence there is no shadow of maintenance and champerty, forbidding entry to courts of equity in so many cases, reported in the books. Nor is the cause of action one that dies with the person." White v. Bailey, 65 W.Va. 573, 64 S.E. 1019, 1022, 23 L.R.A.(N.S.) 232.

It is true that case is one to cancel a deed and equitable actions, except those strictly personal, usually survive, 1 C.J.S. 182, Abatement and Revival, and the cancellation of wills was not exercised by courts of equity, 2 Pom.Eq.Jur.(2nd Ed.) § 913; yet the wrong complained of affects property rights exclusively, and in no sense personal rights or torts; such actions usually survive. 1 C.J.S. 178, Abatement and Revival.

The Illinois courts base their decisions also upon their conclusion that the right and remedy are purely statutory, for which reason they are limited to the persons named in the statute. Assuming that the premise is true, it does not follow that the cause of action does not survive. The statute is remedial, and affects property rights solely, and such causes of action are usually held to survive.

Spiller v. Atchison, T. & S. F. Ry. Co., 253 U.S. 117, 40 S.Ct. 466, 473, 64 L.Ed. 810, was an appeal from an action brought for the recovery of amounts awarded in a reparation order made by the Interstate Commerce Commission under the Act of February 4, 1887 (24 Stat. 379). It was

claimed that the cause of action was not assignable because not so at common law, and the statute authorizing the suit on the commission's award did not provide that it could be assigned. The Supreme Court stated: "The provisions of the act giving redress, compensatory in its nature, to persons sustaining pecuniary injury through the violation of public duty by the carrier must receive a reasonably liberal and not a narrow interpretation. A claim for damages sustained through the exaction of unreasonable charges for the carriage of freight is a claim not for a penalty but for compensation, is a property right assignable in its nature * * * and must be regarded as assignable at law, in the absence of any expression of a legislative intent to the contrary." Sullivan v. Associated Billposters and Distributors of United States and Canada et al. (C.C.A.) 6 F.2d 1000, 42 A.L.R. 503, and note at page 520; Cooper v. Hillsboro Garden Tracts, 78 Or. 74, 152 P. 488, Ann.Cas. 1917E, 840.

But aside from the question of whether the cause of action survived under the common law, it does survive under section 105-1202 N.M.Comp.St.1929, which is: "In addition to the causes of action which survive at common law, causes of action for mesne profits, or for an injury to real or personal estate, or for any deceit or fraud, shall also survive, and the action may be brought, notwithstanding the death of the person entitled or liable to the same."

A will contest is a civil action. In re Morrow's Will, supra. If it is an action for deceit or fraud it survives under the terms of the statute, for "any deceit or fraud" is all inclusive. The charge is that the will was caused to be executed through "undue influence," which is a species of fraud, and would come within the statute. In re Slinger's Will, 72 Wis. 22, 37 N.W. 236; Gordon v. Burris, 153 Mo. 223, 54 S.W. 546; In re Mueller's Will, 170 N.C. 28, 86 S.E. 719; Sargent v. Roberts, 265 Ill. 210, 106 N.E. 805; Peacock v. DuBois, 90 Fla. 162, 105 So. 321; In re Powers, 176 App.Div. 455, 162 N.Y.S. 828; Pilcher v. Surles, 202 Ala. 643, 81 So. 585; Roche v. Roche, 286 Ill. 336, 121 N.E. 621; In re Duncan's Will, 154 Wis. 39, 141 N.W. 1002; Hopper v. Sellers, 91 Kan. 876, 139 P. 365.

Section 105-1202, N.M.Comp.St.1929, supra, was enacted in 1884, and is in the exact language of one of the statutes of Ohio, construed in Chilcote v. Hoffman, 97 Ohio St. 98, 119 N.E. 364, L.R.A.1918D, 575, in which the Ohio court stated:

"Section 11235, General Code, provides that: 'In addition to the causes which survive at common law (the) causes of action for mesne profits, or injuries to the person or property, or for deceit or fraud, also shall survive; and the action may be brought notwithstanding the death of the person entitled or liable thereto.'

"In construing this statute, the Court of Appeals said in its opinion in this case:

" 'A will contest is a proceeding unknown to the common law, and the right could

not therefore be a cause of action which would survive at common law.'

"It is wholly unimportant whether a will contest is or is not a proceeding unknown to the common law, for the principles of the common law readily adapt themselves to the changing nature of human affairs. Plandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102, 40 L.R.A.(N.S.) 360, Ann. Cas.1913A, 983.

"The language of section 11235, General Code, is sufficiently clear and comprehensive to include all causes of action that survived under the rules and the principles of the common law, regardless of the fact that the common-law court was not the forum in which to bring such action. Under the rule of the common law, the only causes of action that do not survive the death of either party are causes of action ex delicto. The right to contest a will is not a cause of action ex delicto, but comes clearly within the class that survives the death of either party, under the rule and the reason of the common law."

We held this in substance in Re Morrow's Will, supra.

We conclude that if appellants are heirs at law of Mary Jane Morrow, deceased, they are "persons interested," as contemplated by section 154-211, N.M. Comp.St. supra, though they succeeded to their father's interest (if any) in such estate after the probate of the contested will.

The second ground of demurrer here urged (as we view it for the first time) is in substance that under section 68-410, N.M.Comp.St.1929, supra, such property goes in equal shares to the children of Thomas E. Morrow and to the descendants of any deceased child of his; and if none, then to the father and mother of Thomas E. Morrow, if living, or if not, to the survivors if either be dead; and there is no allegation in the petition to the effect that Thomas E. Morrow left no child or descendants of a child, or that his father and mother were both dead; that by reason of such failure the petition does not state facts that would constitute them "persons interested," within the meaning of the statute. We find no record of this question being specifically raised in and acted upon by the court below.

The grounds stated and urged under this point below are as follows:

"Said contest petition does not state facts sufficient to constitute a cause of action or cause of contest because it does not appear that the contestants have or did have at the time of filing said contest petition any right or rights whatsoever to contest the will of Mary J. Morrow, deceased. The insufficiency of the allegations of the contest petition in this respect are as follows:

"(a) It does not appear that the contestants, or any of them, are heirs at law or next of kin of Mary J. Morrow, deceased, or are in any manner interested in the estate of Mary J. Morrow, deceased.

"(b) If, as seems apparent, the claimed interest of the contestants is based upon Section 68-410, New Mexico Statutes Annotated, Compilation of 1929, it does not appear that the contestants, or any of them, have sufficient interest to contest the will of Mary J. Morrow, deceased, because:

"(5) Even assuming the validity of Section 68-410, the contest petition does not allege facts sufficient to show that said section has any applicability in this case."

Appellants state that the ground of demurrer alleged complies with section 105-412, N.M.Comp.St.1929, is as follows: "The demurrer shall distinctly specify the grounds of objection to the pleadings; unless it does so, it may be disregarded."

And yet the statement is so general that the particular defect in the pleading was not mentioned. The object of the rule is to require the defects to be distinctly and specifically pointed out, and general statements and conclusions do not comply with it. While the demurrer points to a particular subject, it is general in regard to it. The claimed defect in the petition was the failure to allege that Thomas E. Morrow's father and mother had predeceased Mary J. Morrow, and that he had no living child or descendants of a deceased child; by reason of which it does not appear from the petition that appellants are heirs at law of Mary J. Morrow, or otherwise interested in the contested will, and the property by its terms devised and bequeathed. The grounds of objection to the pleading were not distinctly specified; only their legal effect. But we will treat the demurrer as properly raised in the district court.

The petition is incomplete in the particulars mentioned, but such facts may be inferred from the fact that it is alleged petitioners are "heirs at law" and "interested in the estate"; and could not be in the sense of the statute, if there had been children or descendants of children of Thomas E. Morrow, or if his father or mother had been alive. It is immaterial that the allegations of heirship and interest appear in what appellees designate "the preamble" to the petition; the essential thing is that it be alleged in the petition. Standing alone these would be conclusions (a matter yet to be considered), but in connection with the allegations of fact we have mentioned it may be inferred that Thomas Morrow and Mary J. Morrow died without living children or descendants of deceased children and that Thomas Morrow's parents predeceased her; for only in such case could they be heirs at law of Mary J. Morrow, deceased, or be interested in the estate by reason of the relationship alleged.

"While to sustain a pleading utterly without facts is contrary to the whole theory of code pleading, a pleading which states a conclusion of law may not be subject to demurrer where it states the facts upon which the conclusion is based, and this, though the facts are defectively set out.

The true rule, it has been said, is that if substantial facts which constitute a cause of action are stated in the complaint, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are conclusions of law or are otherwise imperfect, the complaint is not subject to demurrer for insufficiency." 1 Bancroft's Code Pleading, § 45.

"The true doctrine to be gathered from the cases is, that if the substantial facts which constitute a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters which are set forth, although the allegations of these facts are imperfect, incomplete, and defective, such insufficiency pertaining, however, to the form rather than to the substance, the proper mode of correction is not by demurrer, nor by excluding evidence at the trial, but by a motion before the trial to make the averments more definite and certain by amendment.

"From the citations in the foot-note, it is clear that the courts have, with a considerable degree of unanimity, agreed upon this rule, and have in most instances applied it to defects and mistakes having the same general features, and have sometimes severely strained the doctrine of liberal construction in order to enforce it. Thus, if instead of alleging the issuable facts the pleader should state the evidence of such facts, or even a portion only thereof, unless the omission was so extensive that no cause of action at all was indicated, or if he should aver conclusions of law, in place of fact, the resulting insufficiency and imperfection would pertain to the form rather than to the substance, and the mode of correction would be by a motion, and not by a demurrer. It is virtually impossible, however, to lay down a dividing-line, so that on the one side shall fall all the errors which are venial, and on the other all those which are fatal." Pomeroy's Code Remedies (5th Ed.) § 443.

We do not arrive at the conclusion that the petition states a cause of action without some doubts; but following the rule of liberal construction in favor of the pleader, we hold that petitioners have alleged that they are heirs at law of Mary J. Morrow, and are interested as her heirs.

We feel constrained to say that from the fact the district court sustained the demurrer, appellants were called upon as a matter of duty to give grave consideration to the judgment of the court, and to resolve every doubt in favor of an amendment. It costs nothing and often saves disaster. The statute under which appellants assert their claim as heirs at law of Mary J. Morrow, deceased (section 68-410, N.M.Comp.St.1929), apprised them what good pleading required to be alleged.

While appellees agree that the cases of Parker v. Beasley, 40 N.M. 68, 54 P.2d 687, Williams et al. v. Kemp et al., 33 N. M. 593, 273 P. 12, and Michelet v. Cole, 20 N.M. 357, 149 P. 310, support the conclusion we have reached, they assert that

they are in conflict with Farmington v. Mumma, 35 N.M. 114, 291 P. 290, 291, and a number of other cases cited in that opinion. There is such apparent conflict, as will be seen by the following quotations:

"Our first inquiry must be as to what the demurrer admitted. We have held that *facts,* well pleaded, and only such, are admitted by demurrer, and that conclusions of law alleged to follow therefrom are not to be considered as material allegations or binding in any way upon the demurrant." Farmington v. Mumma, 35 N.M. 114, 291 P. 290.

"An objection to a complaint, or a cross-complaint, that it does not state facts sufficient to constitute a cause of action is good only when there is a total failure to allege some matter which is essential to the relief sought, and is not good when the allegations are simply incomplete, indefinite, or statements of conclusions of law or fact." Michelet v. Cole, 20 N.M. 357, 149 P. 310, 312.

The same apparent conflict runs through the authorities, illustrated by conflicting texts from standard books. We cite the following:

"A demurrer admits only such facts as are issuable and well pleaded, it does not admit the truth of an allegation of a conclusion of law, mere deductions or opinions, or matters of law; allegations which are unnecessary or are contrary to the facts of which judicial notice is taken; averments as to the legal effect of an instrument pleaded and which are inconsistent with its language; or averments as to the enactment and effect of a statute relied upon. * * *" 1 Bancroft's Code Pleading, § 173.

Compare this with section 45 of the same work, supra.

"* * * Examples similar to the foregoing might be indefinitely multiplied; but these are sufficient to illustrate the action of the courts, and to show how firmly they have adhered to the doctrine that facts, and not law, must be alleged, and that the averments of legal conclusions without the facts from which they have arisen form no issues, state no causes of action, admit no evidence, and do not even support a verdict or judgment,—in short, that they are mere nullities." Pomeroy's Code Remedies (5th Ed.) § 425.

Compare this with section 443 of the same work, supra.

It is thus stated in Corpus Juris:

"* * * Likewise, where, after reading into the declaration, complaint, or petition every reasonable intendment or admitting all the facts alleged, no cause of action is stated, a general demurrer for insufficiency will lie. All that is necessary, however, to sustain the pleading is that a cause of action can be reasonably inferred from the averments of the pleading. * * *" 49 C.J., title Pleading, § 489.

"The allegation of a conclusion either of law or of fact, instead of the facts upon which they are based, does not usu-

ally make a pleading bad on general demurrer. * * * However, a mere legal conclusion unsupported by essential averments of fact is ineffective as against a general demurrer to support a pleading. If a pleading contains bare conclusions only, or inaccurate conclusions from facts, which do not show a cause of action or defense, it is demurrable. * * * In certain jurisdictions a demurrer, on the ground of insufficient facts to constitute a cause of action or defense, will lie to a pleading alleging a conclusion instead of the facts on which it is based. * * * In certain instances particular pleadings have been deemed sufficient and held not subject to demurrer, even though based on conclusions of the pleader." 49 C.J., title Pleading, § 477.

Ruling Case Law states it as follows:

"It is a universal rule that a demurrer is an admission of the truth of all the facts properly averred in the pleading demurred to. It admits, however, only such facts as are well pleaded, and all intendments and inferences that may fairly and reasonably be drawn therefrom. And these facts will be construed in the light most favorable to the plaintiff. While facts averred in general terms are so admitted, this is not true as to mere recitals. A demurrer does not confess or admit a conclusion of law deducted by either party from the facts pleaded. * * *" 21 R. C.L. § 70, title Pleading.

"As pointed out in another paragraph a complaint, to be bad on demurrer, must be wholly insufficient; if to any extent, on any reasonable theory, it presents facts sufficient to justify a recovery, it will be sustained; and this is the rule however inartificially the facts may be stated. But a demurrer will be sustained where the complaint does not, under the tests applicable, state a cause of action; or if there is a departure in pleading in a matter of substance. * * *" 21 R.C.L. title Pleading, § 80.

The cases reflect every shade of meaning on the question, and are so numerous that it is impractical to attempt any extensive review, and anything less would be useless. It was the established rule of the common law that all objections to the form or substance of a pleading were to be construed strongly against the pleading; nothing was to be presumed or inferred in its favor or supplied by implication in order to sustain it.

This highly technical rule, often exercised with extreme harshness so that results depended as much on technical and precise pleading, as they did on a meritorious cause, gave way to the liberal construction provided for by the reformed procedure; generally by the following form of statute: "In the construction of a pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." Section 105-524 N.M.Comp.St.1929.

The cases reflect the extreme in both directions.

What should be alleged in a pleading is often mistaken for what must be alleged in order to state a cause of action within the liberal rule of construction.

The statute contemplates that facts, and not conclusions of law, shall be stated (section 105-404, Comp.St.1929); that no fact shall be stated not required to be proved, and these to be the ultimate, substantive facts which, if proved, will, under the applicable law, entitle the pleader to a judgment (sections 105-501 and 105-506, Comp. St.1929). But "with a view to substantial justice between the parties," the courts have so liberalized the statutes by construction, that the opposite extreme from the rule of the common law is often the result.

It is certain that mere allegations of conclusions of law state no cause of action or defense; that facts must be stated, and those facts must be such that they will constitute a cause of action. But those facts may be incomplete, stated imperfectly or defectively; yet will be sufficient as against a general demurrer, if a cause of action can be inferred from the matters stated, though some clarification or insufficiency is supplied by a conclusion, either of law or fact.

If the substantial facts constituting a cause of action are stated in a complaint or petition, or can be inferred by reasonable intendment from the matters stated, although the allegations are imperfect, incomplete, and defective, such insufficiency pertains to form and not substance, and the complaint or petition is not vulnerable to a demurrer. Pomeroy's Code Rem.(5th Ed.) § 443.

But this rule does not mean that such pleadings are approved. The Code requires that facts constituting a cause of action shall be stated in ordinary and concise language (section 105-404 N.M.Comp.St.1929), and this means more than an "imperfect, incomplete and defective" statement of the facts. It means that every ultimate fact required to be proved to establish a cause of action should be definitely and certainly stated so that inferences from facts stated would not have to be drawn nor resorted to in support of a pleading.

We first admonish the bar that: "* * * It is undoubtedly difficult to discriminate between these two conditions of partial and of total failure; and it is utterly impossible to frame any accurate general formula which shall define or describe the insufficiency, incompleteness, or imperfectness of averment intended by the codes, and shall embrace all the possible instances within its terms. By a comparison of the decided cases, some notion, however, may be obtained of the distinction, recognized if not definitely established by the courts, between the absolute deficiency which renders a pleading bad on demurrer or at the trial, and the incompleteness or imperfection of allegation which exposes it to amendment by motion; and in this manner alone can any light be thrown upon the nature of the insufficiency which is the subject of the present inquiry." Pomeroy's Code Remedies (5th Ed.) § 442.

We then advise that the rule we have quoted, from section 442 of Pomeroy's Code Remedies (5th Ed.) as "the true doctrine," has been the rule in this jurisdiction since Michelet v. Cole, supra. Other cases decided since, and cited by appellees, can, we believe, be distinguished upon consideration of the pleadings involved. It is asserted that the general allegations of heirship are but conclusions of law; and such allegations did not supply the failure to plead the nonexistence of those who, if existing, would be preferred heirs by virtue of section 68-410, N.M.Comp.St., supra. It is held that a general allegation of heirship standing alone is a conclusion of law (see annotations 110 A.L.R. 1239), but it is also held to be a conclusion of fact; and in connection with facts showing necessary relationship, it is sufficient as against a demurrer, whether a conclusion of law or fact. Physio-Medical College v. Wilkinson, 108 Ind. 314, 9 N.E. 167; Gfroerer v. Gfroerer, 173 Ind. 424, 90 N.E. 757; Dibble et al. v. Winter, 247 Ill. 243, 93 N.E. 145.

"The demurrer takes the point that the bill does not sufficiently show that the complainants are the heirs at law and next of kin of Mittie Boutwell, deceased, and, therefore, show no right to maintain this bill. We are of the opinion, and so hold, that the bill sufficiently shows that the complainants are the sisters and sole heirs at law and next of kin of Mittie Boutwell, deceased, and, as such, are the distributees of the estate of said decedent. The averment of the bill that they are the sisters and sole heirs at law or next of kin of Mittie Boutwell is not the statement of a mere conclusion of the pleader, as argued by counsel for appellants." Boutwell v. Drinkard, 230 Ala. 212, 160 So. 349, 353.

To the same effect are Howison v. Oakley, 18 Ala. 215, 23 So. 810; Catsro's Ex'rs v. Armesti, 14 Cal. 38; Sharpe v. Autry, 183 Ga. 282, 188 S.E. 354; Ricknor v. Clabber, 4 Ind.T. 660, 76 S.W. 271; Cummings v. Keach, 146 Kan. 157, 68 P.2d 1089, 110 A.L.R. 1235; Bender v. Van Allen, 28 Misc. 304, 59 N.Y.S. 885; Judson v. Staley, 163 App.Div. 62, 148 N.Y.S. 733; Tuthill v. Debovoise, 164 App.Div. 728, 150 N.Y.S. 387; Garrett v. Weinberg, 50 S.C. 310, 27 S.E. 770; Heaton v. Buhler, 60 Tex. Civ.App. 423, 127 S.W. 1078; Martin v. Martin, 95 Va. 26, 27 S.E. 810; Gillett v. Robbins, 12 Wis. 319, 320.

The district court erred in sustaining appellees' demurrer to appellants' petition.

Appellants filed in the district court a document entitled "Admission of Estoppel," in which it was stated that the rights and interests of Anna Doogan in the estate of Mrs. Morrow "and under the said will" had been appealed to that court from the probate court and adjudicated in her favor; that the time to appeal to this court from the order of adjudication had expired before the petition of contest was filed; "that therefore her rights under said will are not reviewable in this contest, but have become final." This document closes in these words: "These petitioners, therefore, ad-

mit themselves now, and at the time of filing of said petition of contest, estopped from questioning the rights and interests of the said Anna Doogan in the said estate, as mentioned and described in the will."

It is contended by appellees that this "admission of estoppel" is such a recognition of the will as that appellants are now estopped to deny its validity. While the record does not show the reasons for the filing of this document they are recited at length by appellees; but without this, it may be inferred that it was done for the purpose of eliminating Anna Doogan as an adversary.

We do not understand from this document that appellants admit the validity of the provisions of the will devising and bequeathing property to Anna Doogan. It is based upon an assumption that as no appeal had been taken from the order in which her rights under the will had been determined that appellants were estopped by the judgment from questioning her title to property that had been adjudged to be hers by the district court. Of course, as appellees contend, the will stands or falls as an entirety; but as we read this document, that question is not involved. Anna Doogan is a party, and a necessary one, to this contest, regardless of the document filed. The will is contested as a complete document and not "piecemeal" as appellees contend. It is not admitted that any part is valid. If we could find in the document any support for appellees' statement "that the contestants have taken the position that *the will* is valid as to Anna Doogan and have consistently maintained that position ever since," the question would indeed be serious; but we do not find any such admission on the part of appellants. Their "admission of estoppel" is that they are estopped by judgment; and its purpose is immaterial if it did not concede the validity of any part of the will, or recognize "the rights of Anna Doogan under the will."

We are not at liberty to determine the legal effect of the so-called "admission of estoppel," except as it affects the issues of this case; and to that extent it has been construed. We can appreciate the concern of counsel, but its effect on the title of the property claimed by Mrs. Doogan is not within the issues.

It is asserted by appellees that section 68-410, Comp.St.1929, supra, applies only in cases of intestacy; while the appellants contend that the provision, "If a deceased person is a widow or widower and leaves no issue," then such property goes (as in this case) in equal shares to the brothers and sisters of such spouse, etc., having no qualification in the statute, none was intended; that the property descends by operation of law without authority on the part of the widow or widower of the deceased person to devise or bequeath it by will.

This statute must be construed in connection with other statutes.

Section 38-109, Comp.St.1929, is as follows: "If the intestate leave no issue,

the whole of his estate shall go to his wife; if he leaves no wife, the portion which would have gone to her shall go to his parents. If one of his parents be dead, the portion which would have gone to such deceased parent, shall go to the surviving parent."

This statute is not repealed or in any way amended or qualified by the Act of 1927 (Comp.St.1929, § 68-410), supra. When Thomas E. Morrow died the whole of his estate went to his wife.

Section 154-101 Comp.St.1929, is: "Any person of the age of twenty-one years or upwards, and in sound mind, may dispose by will of all his property, except what is sufficient to pay his debts and what is given by law as privileged property to his wife or family."

Construing the three statutes together, it was evidently intended by the Legislature that Mrs. Morrow should inherit the property of her deceased husband in the absence of a will, and that it should be hers absolutely. If it was her property (and we hold that it was), she had the right to dispose of it by will. We therefore conclude that it is only in case of intestacy that the property in question, or any portion of it, descends to the appellants under the terms of section 68-410, supra. If the will was in fact the will of Mrs. Morrow, appellants have no interest in the property devised and bequeathed by it. It is not her will if it expressed the will of another and not hers, by reason of the exertion of undue influence over her in its making and execution.

We conclude that appellants' petition states a cause of action; that the appellants are persons interested in contemplation of section 154-211, N.M.Comp.St.1929, supra; that the cause of action was for fraud as contemplated by section 105-1202 of the statute, supra; that under the principles of the common law the cause of action survives; that the appellants are not estopped to prosecute this suit; that Mary J. Morrow took the property in question as heir of her husband, and could dispose of it by her will and testament to the exclusion of the appellants.

The motion for a rehearing will be overruled.

The cause will be reversed and remanded to the district court with instructions to overrule appellees' demurrer to appellants' petition, permit amendment of pleadings as the parties may be advised, and proceed with the trial of the case not inconsistent herewith.

It is so ordered.

HUDSPETH, C. J., and BICKLEY and ZINN, JJ., concur.

SADLER, J., not participating.

[redacted]