165 P.2d 587

LUCERO v. HARSHEY et al.

No. 4915.

Supreme Court of New Mexico.

Jan. 25, 1946.

G. T. Watts and O. O. Askren, both of Roswell, for appellants.

Gino J. Matteucci and A. H. McLeod, both of Albuquerque, for appellee.

LUJAN, Justice.

Defendants below (appellants) state the case as follows: "The plaintiff, as administratrix of the estate of her deceased husband, Bernardino Lucero, filed her suit in the District Court of Bernalillo County, charging negligence on the part of the defendants in an automobile accident wherein Bernardino Lucero lost his life. The complaint is in the usual form of action under the wrongful death statute. (Tr. 1) Defendants answered by traversing the allegations of negligence and reckless conduct of defendants. (Tr. 4) And defendants answered further by way of new matter, setting up facts showing that the deceased caused his own death by his own negligent conduct; and facts showing that the deceased at least contributed to the accident by his own reckless conduct to the extent that the acts of deceased were the proximate cause of his death. The Answer further set up that the defendants took the last clear chance when confronted by the hazard of the road created by the deceased."

The plaintiff below (appellee) accepts the foregoing statement of the case except that she asserts that "The Complaint contains allegations to show that the defendant had the last clear chance and that appellant driver was guilty of reckless disregard of the rights of plaintiff's intestate, and that therefore the issues made by appellee are broader and more comprehensive than are usually set up in a pleading for wrongful death."

We find no refutation of this comment on appellants' statement of the case since there is no reply brief.

Briefly, the facts are that on or about September 23, 1944, during daylight, the decedent had one Francisco Garcia, with a team of horses hitched to a wagon, pull his automobile up on the highway, the car being headed in a westerly direction on the road, and being north of the center line

on such highway. The team and wagon were directly in front of the car and had just been uncoupled at the time of the accident. The point of impact was 490 feet from the crest of the hill to the east. Young Harshey, driving his father's truck loaded with sheep and other livestock, was traveling in a westerly direction on the highway. The defendant driver came over the hill and instead of stopping, as he could have done, or passing to the left of Lucero's car, as he should have done, drove to the right, and off the pavement, running into Lucero and also hitting the right front wheel of Garcia's wagon and the right horse of the team.

The following are among the specific findings of fact made by the court in support of its conclusions of law and judgment:

4. "That Highway 66, Bernalillo County, New Mexico, is a paved and traveled highway through mountainous country at the place of the accident.

5. "That a short time before the accident the car of the deceased, Bernardino C. Lucero, had gone dead and was entirely off Highway 66 on a side road, and shortly before the accident he, the said Lucero, caused his automobile to be pulled onto said highway by horses, where it was parked on the right-hand side of the road at the time Lucero was killed.

6. "That said act of pulling said disabled car from a place of safety, where it had stalled on a side road, onto said highway, and parking the same on the paved part thereof was negligence on the part of the deceased.

7. "That on the 23rd day of September, 1944, the defendant, Richard Thomas Harshey, drove and operated a truck in a careless and negligent manner, which caused the death of Bernardino C. Lucero; that at said time and place the said Richard Thomas Harshey did not act as a careful and prudent person, and if he had so acted, he could have avoided running into and injuring the said Bernardino C. Lucero.

8. "That at the time and place hereinabove stated Richard Thomas Harshey was operating his father's truck under the Family Purpose Doctrine, and any negligence of the son was the negligence of L. E. Harshey.

9. "That the proximate cause of the death of Bernardino C. Lucero was the negligence of the defendant, Richard Thomas Harshey, and the negligence of the decedent, Bernardino C. Lucero, in having his stalled automobile parked on the highway, did not proximately contribute to the accident which caused his death.

10. "At the time Richard Thomas Harshey had the last clear chance and could have avoided hitting the said Bernardino C. Lucero by either stopping his truck or proceeding to pass the stalled automobile by passing to his left on the paved portion of the highway, which he had room to do.

11. "That said defendant Richard Thomas Harshey had a range of vision of

490 feet before he hit the said Bernardino C. Lucero, which said vision was clear and unobstructed.

12. "That Bernardino C. Lucero was hit by the said Richard Thomas Harshey on September 23, 1944 at about the hour of 5:40 p.m., daylight saving time, and at such time it was daylight."

Appellants rely upon two points for reversal, as follows:

"(1) The Court erred in holding that Bernardino C. Lucero's negligence did not contribute proximately to his death, and that the negligence of the defendant was the sole proximate cause of the accident, because the facts are substantially directly to the contrary.

"(2) The Court erred in holding that Harshey did not exercise a last clear chance and therefore was negligent and that such was the proximate cause of the accident, because the facts are directly to the contrary."

The two points are argued together and amount to the same thing; viz., that the trial court erred in finding and concluding "That the death of the decedent was caused by the negligence of the said defendant, Richard Thomas Harshey, and was the direct and proximate result thereof."

We have studiously read the record of the testimony and we are convinced that the foregoing findings are supported by substantial evidence. In addition to this, the trial judge viewed the scene of the accident and made some experiments as to ability to stop a car on this particular stretch of highway which we may not ignore as of some value in support of the findings.

As to whether the concluding clause of Finding numbered 9, "and the negligence of the decedent, Bernardino C. Lucero, in having his stalled automobile parked on the highway, did not proximately contribute to the accident which caused his death", found its place there because the trial court was not satisfied from the evidence that the alleged negligence of the decedent arose to the dignity of contributory negligence as a defense to the primary negligence alleged in plaintiff's complaint; or, whether the court took the view that under the law of last clear chance such alleged contributory negligence, even if existent as a defense to the primary negligence of the defendants was relegated to the background by the intervening negligence of the defendants under the law of last clear chance save as a mere condition or remote cause—is not entirely clear. Nor does it become important to determine when we remember that, after all, the doctrine of discovered peril or last clear chance is but a phase of the doctrine of proximate cause and whether the judgment rests on the defendants' primary negligence or their supervening negligence as the proximate cause, either ground is in accord with the trial court's finding that their negligence was "the proximate cause of the

death of Bernardino C. Lucero" and fully supports the judgment.

In Thayer v. Denver & R. G. R. Co., 21 N.M. 330, 331, 154 P. 691, 695, it was decided: "In an action predicated upon the doctrine of 'last clear chance,' it must appear that the plaintiff was negligent, but that such negligence was not the proximate cause of the accident, but that the proximate cause thereof was the negligence or want of due care on the part of the defendant."

The problem is thus stated by Street in his scholary work entitled "Foundations of Legal Liability", discussing negligence and contributory negligence, at pages 126 and 136, Vol. 1.

"The subject of contributory negligence can perhaps best be approached along the lines of classification indicated by Lindley, L. J., in the case of The Bernina (1887): Said this learned judge: 'The cases which give rise to actions for negligence are primarily reducible to three classes as follows: 1. A, without fault of his own, is injured by the negligence of B; then B is liable to A. 2. A by his own fault is injured by B without fault on his part; then B is not liable to A. 3. A is injured by B by the fault more or less of both combined; then the following further distinctions have to be made; (a) if, notwithstanding B's negligence, A with reasonable care could have avoided the injury, he cannot sue B; (b) if, notwithstanding A's negligence, B with reasonable care could have avoided injuring A, A can sue B; (c) if there has been as much want of reasonable care on A's part as on B's, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A cannot sue B. * * *'

"From the foregoing cases illustrative of the principles stated in subdivisions (a) and (b) it is seen that wherever the court or jury can see that the harm complained of was proximately caused by the negligence of one of the parties, while the negligence of the other was only remotely connected with that harm, the person whose negligence is the proximate cause must be held responsible. If that person is the defendant then the plaintiff may recover; if that person is the plaintiff himself, then the action must fall. This principle is neatly and accurately summed up in the doctrine of 'the last clear chance', which is to the effect that whenever the respective acts of negligence on the part of the plaintiff and defendant are not actually concurrent, but one succeeds the other by an appreciable interval, the person who has the last clear chance to avoid the impending harm and negligently fails to do so is chargeable with the whole."

Annotations on the doctrine of last clear chance will be found in 92 A.L.R. 47 and 119 A.L.R. 1043, and we find no occasion for quotation or further discussion of this doctrine here. This is essentially a facts case. In Babbitt's Motor Vehicle Laws, 4th Ed., p. 1004, it is said:

"Questions as to the proximate cause, remote cause, sole proximate cause, and intervening cause are usually for the jury, or for the court sitting without a jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. Especially is this so where the evidence is fairly convincing as to what is the direct and proximate cause."

Likewise, the question of contributory negligence is usually for the jury, or for the court sitting without a jury. See Crocker v. Johnston, 43 N.M. 469, 95 P.2d 214; Silva et al. v. Waldie, 42 N.M. 514, 82 P.2d 282; Lopez v. Townsend et al., 42 N.M. 601, 82 P.2d 921; Chavez v. Worley, 48 N.M. 449, 152 P.2d 393; Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585.

We find nothing in the case at bar to take it out of the principles last above referred to and a careful consideration of the record satisfies us that each error assigned by the appellants is without merit. It follows that the judgment of the trial court must be affirmed, and the cause remanded with directions to the District Court to enter judgment in favor of the plaintiff (appellee) and against the defendants (appellants) and the sureties on their supersedeas bond, and

It is so ordered.

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

165 P.2d 812

STATE v. TALAMANTE.

No. 4911.

Supreme Court of New Mexico.

Jan. 30, 1946.

Joseph M. Montoya and Samuel Z. Montoya, both of Santa Fe, for appellant.

C. C. McCulloh, Atty. Gen., and Robert W. Ward, Asst. Atty. Gen., for appellee.

BRICE, Justice.

From a judgment imposing a sentence of death by electrocution, following a charge and conviction of murder in the first degree, the appellant (defendant) has appealed.

The two errors assigned are, (1) that the appellant was deprived of his constitutional right to a trial by an impartial jury; and (2) that he was deprived of the right to cross-examine the only witness who testified to having seen the alleged shooting of the deceased (defendant's wife) regarding his hostility toward defendant.

Raised for the first time in this court, it is contended by defendant that the jury was prejudiced against him by reason of which he was deprived of his constitutional right to a trial by an impartial jury. In support of this contention the appellant cites the record as follows:

Minutes showing impaneling and swearing of petit jury, the calling of special venire and reasons for discharging previous venire, to-wit: "At the regular fall term of the District Court for the First Judicial District within and for McKinley County, the district judge, William J. Barker, being present, a duly qualified jury was duly empaneled in accordance with the law. The said jury was sworn and were in the court room; that before the petit jury was called a shooting occurred in the court room, the shots apparently directed at Pete Talamante by one Lucy Ruiz; and after said shooting took place the district attorney joined by counsel for the defendant, by reason of said shooting, challenged the entire panel for cause, and the court thereupon dismissed the entire panel giving his reasons therefor. Later in the day the court called a special venire for the fall term and in the usual course a

petit jury was selected four days later, on to-wit, the 24th day of November, 1944, to try the Talamante case."

There does not appear in the record the proceedings to qualify the jurors, including the voir dire examination.

No objection, so far as the record shows, was made to any juror, or to the panel as a whole, or to any action of the court in connection with the impaneling of the second jury. It was accepted by the defendant, and there is not the slightest evidence in the record that would indicate the jury was not a fair and impartial one. If in fact the shooting that occurred in the court room affected the entire citizenship of McKinley County so that an impartial jury could not have been secured, the defendant should have raised the question and have supported the contention in the district court by evidence indicating that fact. Substantially the same question was decided adversely to the defendant in State v. Johnson, 37 N.M. 280, 21 P.2d 813, 819, 89 A.L.R. 1368. Johnson, a negro, was convicted of having murdered a young white woman. The evidence established that the victim had been raped by her assailant. This court stated:

"In oral argument, however, counsel for defense submits with great earnestness that to have brought his client to trial in early December, 1931, so close in point of time, upon the commission of a crime of the peculiar atrocity of this one, and in the very city where lay the scene of its commission, rendered it impossible for the defendant to have received a fair trial in the larger and truer meaning of that phrase. He argues that, no matter how damning or incriminating the evidence, a defendant asserting his innocence is entitled to trial by a jury selected in a vicinage free from the hot blood inevitably arising in a community which is the scene of such a crime.

"The record before us furnishes no basis for this argument. It discloses no motion for change of venue. Counsel seeks to explain his reason for not filing one. But, with a record before us barren of any hint or suggestion that the occasion for a change of venue existed or that any explanation of the failure to move for it was ever called to the attention of the trial court, it must be obvious to counsel that, under well-settled principles, we are in no position to consider the matter. The argument is all outside the record. Necessarily, cases must be decided in this court upon the record made below. * * *"

There is nothing in the record remotely suggesting that the jury was not a fair and impartial one, and we are not at liberty to so assume.

The second question is more difficult. The only eyewitness to the killing, other than the defendant, was one Jesus Angel who lived a short distance from the deceased's home. The witness' testimony regarding the killing of the deceased was substantially as follows:

"I lived at 1100 West Warren on the night of May 3, 1944. At about nine

o'clock that evening I was resting or sleeping. My wife woke me and said she had heard something like a shot outside. When I woke I heard another shot. My wife turned on the light on the porch. I got up and stood in the door and saw the deceased Antonia Talamante, fall, and I saw the defendant Pete Talamante right by her side. The light from the porch fell upon both of them. The defendant had a revolver in his hand and he shot again in the direction of the deceased, who at the time was lying on the ground. I have known Talamante three years. I sent my little boy to call the police. I never went outside to aid her. I sat on the bed again. I did not see what happened to the defendant Talamante. I saw the ambulance arrive and saw them pick up Antonia Talamante who was still complaining. I heard two shots fired, about five feet from my door."

On cross-examination the following appears in the record:

"Q. Have you ever had any difficulties with the defendant? A. No, sir.

"Q. Never any difficulties at all? A. No, sir.

"Q. Your wife used to be a friend of Pedro Talamante's did she not?

"Mr. Carmody: Objection, if the Court please, no evidence here regarding this witness's wife, nor has it any bearing whatsoever on this case. I see no materiality whatsoever as to anything between this witness's wife and the defendant.

"Court: Objection sustained.

"Mr. Atkins: Exception, if the Court please."

It is the sustaining of this objection to the question "Your wife used to be a friend of Pedro Talamante did she not?" which defendant asserts is error.

In a case involving the death penalty the trial court should be particularly careful in ruling out questions the answers to which may prove bias or prejudice on the part of so material a witness. No doubt defendant's counsel should have stated the purpose of the cross-examination, but we are of the opinion that this was supplied by the objection of the district attorney, who apparently had no difficulty in comprehending its purpose. His theory was that there was "no materiality whatsoever *as to anything between this witness's wife and the defendant.*" It would seem that the court was apprised by this statement that the intention was to show some relation between the witness and Talamante's wife, from which it might be inferred that the witness was unfriendly toward the defendant, and that the district attorney knew it. The effect of the ruling was to hold that "anything between this witness's wife and the defendant," irrespective of what the relationship might be, was immaterial. While the extent to which cross-examination may be allowed is largely within the discretion of the trial court, State v. Gilbert, 37 N.M. 435, 24 P.2d 280, it is nevertheless a valuable right and the discretion of the court is a judicial one; and the right cannot be so restricted as to wholly deprive a party of the opportunity to test the credibility of

a witness. Camp v. People, 84 Colo. 403, 270 P. 869; State v. Ford, 286 Mo. 624, 228 S.W. 480. It is said that the largest possible scope should be given to evidence attempted to be procured by cross-examination, the matter being left chiefly to the discretion of the trial court. 3 Wigmore on Evidence, 3d Ed., 944. The same author states: "The range of external circumstances from which probable bias may be inferred is infinite. Too much refinement in analyzing their probable effect is out of place. Exact concrete rules are almost impossible to formulate, and where possible are usually undesirable. In general, these circumstances should have some clearly apparent force, as tested by experience of human nature, or, as it is usually put, they should not be too remote. "Among the commoner sorts of circumstances are all those involving some intimate family relationship to one of the parties by blood or marriage or illicit intercourse, or some such relationship to a person, other than a party, who is involved on one or the other side of the litigation, or is otherwise prejudiced for or against one of the parties. * * *" See Henderson v. Dreyfus, 26 N.M. 541, 569, 191 P. 442.

We are of the opinion that the trial court erred in sustaining the district attorney's objection to the question stated.

The cause should be reversed unless we are satisfied that the error of the court did not prejudice the defense. It so happens that Angel's damaging testimony was corroborated by the testimony of the defendant himself. Defendant testified that just prior to the shooting he was served with process in a divorce suit. He then went to the house where his wife lived. He stated, "I asked her (his wife) what she wanted with those papers. Mrs. Jacques (a neighbor) grabbed me by the neck and I lost control and did not know what I was doing. I had been drinking since the 23rd of April. I had no intent to injure my wife."

On cross-examination he testified as follows: "Mrs. Jacques got me from behind with her arm around my neck. My wife was standing right in front of me. I did not see Joe Reyes (whom the defendant shot). I recall I was standing alone when I got control of myself and I was looking for the door and could not find it. I turned to the right and saw the big light at the porch (Angel's) and went towards the light. Then I saw the woman (his wife) that was running down the street. That was when I fired the shot because I wanted to stop and speak to her.

"Q. But you do remember shooting her? A. I recall that I did shoot.

"Q. Do you remember when she was lying on the ground and you pumped the bullet into her? A. Yes, I do remember.

"Q. You didn't think you would speak to her after you shot her to kill her, did you? A. She wasn't dead.

"Q. But you hoped to kill her, didn't you, then? A. No, sir, if I had hoped to kill her I could have killed her right there,

"Q. Where would you have shot her if you were going to kill her? A. I didn't have no intentions of killing her.

"Q. But where, if you had, would you have shot her? A. My intentions were never that way, and it isn't my intention.

"Q. But you stated, Talamante, that if you wanted to kill her you would have. If you had wanted to, where would you have shot her? A. I don't know, because I didn't have the intentions of killing anyone.

"Q. You stated on this stand that if you had wanted to, you could have killed. A. Isn't it true that if I was lying on the floor and you wanted to kill me, you could kill me right there?

"Q. Where would you shoot a person? A. You can die from mostly any wound in the body.

"Q. Where did you intend to shoot your wife? A. I want her to, I just wanted her to stop and wanted to talk to her.

* * * * * *

"Q. Your wife was stopped when she was on the ground there in front of the house, wasn't she? A. She was because she was lying down.

"Q. You could have talked to her then? A. I did speak to her.

"Q. And yet you fired a bullet into her body *just like that,* didn't you? (Our emphasis.) A. No, sir.

"Q. Didn't you admit that a moment ago? A. Yes, *but not that way.*" (Our emphasis.)

The substance of the damaging testimony of the witness Jesus Angel was that the defendant fired a shot toward the deceased while she was lying on the ground. He testified to no material fact regarding the shooting that was not admitted by the defendant himself, including the shooting at the deceased while she was lying at his feet upon the ground.

The object of the attempted cross-examination of Angel, we have assumed, was to show that he was unfriendly to the defendant; and if unfriendly the jury could take this into consideration in adjudging the weight to be given his testimony. It is admitted that defendant killed the deceased; that he fired the last shot at or toward her exactly as the witness Angel testified. Under such state of facts, we are of the opinion that the error of the trial court did not prejudice the defense.

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

MABRY, C. J., and SADLER, BICKLEY, and LUJAN, JJ., concur.

167 P.2d 353

HARMS v. COORS.

No. 4930.

Supreme Court of New Mexico.

March 23, 1946.

Jackson & Horan, of Albuquerque, for petitioner.

Simms, Modrall, Seymour & Simms, of Albuquerque, for respondent.

SADLER, Justice.

Petitioner seeks an order in prohibition restraining the respondent Judge of the Second Judicial District sitting in Bernalillo County from further proceeding in the condemnation suit pending on the civil docket of his court in said county wherein the State of New Mexico and others are plaintiffs and Irwin O. Harms, petitioner's husband and others, including the petitioner herein, herself, are defendants, bearing docket number 33,821. The suit is one by the State, for the Use and Benefit of the University of New Mexico and the regents thereof against numerous defendants involving several tracts of land of large aggregate acreage with the tract in which petitioner is interested forming only a small portion thereof.. Joined as defendants in the complaint filed were Irwin O. Harms and Faymae E. Harms who were alleged to be the owners of the tract in question.

Just how Faymae E. Harms, whosoever she may be, came to be made a party defendant does not satisfactorily appear. Since she was alleged to be an owner with Irwin

O. Harms of the tract of land in question and the only one having an interest therein with him is Anna Cornelia Harms, his wife, the petitioner herein, the most plausible explanation is that the person intended thus to be joined as a party defendant was the petitioner, Anna Cornelia Harms. Be that as it may, following notice of a hearing on the petition in condemnation, Claude S. Mann, an attorney of Albuquerque, entered an appearance on behalf of Irwin O. Harms and Faymae E. Harms in which appearance it was stated that they were the owners of the real estate alleged in the petition to belong to them.

On the date set for the hearing, to-wit, September 25, 1945, said attorney appeared, along with other attorneys representing various clients and challenged sufficiency of the petition in condemnation as well as plaintiffs' right to condemn the property described. The challenge was overruled and commissioners were appointed to assess damages. An order was thereupon prepared accordingly and signed by the respondent judge although not filed until October 10, 1945. In the meantime and on October 4, 1945, the order in question having previously been approved as to form through initialing by Claude S. Mann as attorney for Irwin O. Harms alone, said attorney filed a formal withdrawal of appearance for and on behalf of Irwin O. Harms and Faymae E. Harms.

On October 11, 1945, the day following entry of the order aforesaid, Anna Cornelia Harms, the petitioner herein, who had not yet formally been made a party defendant, except in so far as she is privileged to treat herself a party as a matter of law under 1941 Comp. § 25-905, filed her application to be made a party defendant to the condemnation suit upon the ground that she was the owner of an interest in the Harms' property as joint tenant and asked to be permitted to file her answer. On October 17, 1945, the court acted on said application by causing the following order to be entered, to-wit:

"In this cause, this day coming on to be heard, upon motion of Anna Cornelia Harms by her attorney George Pullen Jackson, to be made a party defendant in this cause and be allowed to file her answer; and it appearing from all the pleadings in this cause and from the proof adduced in open Court, that said Motion should be granted;

"It is therefore ordered, adjudged and decreed by the Court, that Anna Cornelia Harms be, and hereby is, made a party defendant in this cause and is allowed five (5) days in which to file her answer.

"(Sgd.) Henry G. Coors, Judge".

Instead of answering in five days as in her application she had prayed permission of the court to do, before the expiration of three days the petitioner filed an affidavit of disqualification on, to-wit, October 20, 1945. The Harms defendants, husband and wife, the latter the petitioner herein, filed separate answers in the cause on October 26, 1945, raising the identical questions, the sufficiency of the petition in condemnation and the right of plaintiffs to condemn, which already had been passed on by the respondent judge on September

25, 1945, when the petition in condemnation was presented to him in conformity with the law, as already related. On October 31, 1945, the plaintiff filed a motion to strike the affidavit of disqualification which, after hearing, the court sustained. Thereupon the petitioner sued out an alternative writ of prohibition here.

Several challenges are interposed to petitioner's right to the writ. The more important ones are (1) that having secured an exercise of respondent's judicial discretion in passing upon the sufficiency of petitioner's application to be made a party defendant, the affidavit of disqualification is untimely; (2) that condemnation proceedings do not constitute a "civil action" within the meaning of that term as used in 1941 Comp. §§ 19-508 and 19-501, the former being the statute governing statutory disqualification of judges; and (3) that petitioner, Anna Cornelia Harms, whether considered as an intervenor in the condemnation proceedings, or as an added party defendant therein, was not entitled to disqualify the judge by statutory affidavit of disqualification. Since the last-mentioned challenge proves decisive, we need not determine the others.

In State ex rel. Lebeck v. Chavez, 45 N. M. 161, 113 P.2d 179, this court held that a person who had petitioned to intervene, but whose right to intervene had not been determined by trial court, was not a "party" to the action within statute providing that party to an action can file affidavit of disqualification of trial judge under 1941 Comp. § 19-508. The writer of this opinion in a special concurrence disagreed with this holding although agreeing with the result announced in so far as same rested upon the doctrine of waiver. The precise question over which we differed is not here involved. But the court went on to employ language casting serious doubt upon the right of an intervenor to employ the statutory affidavit of disqualification at all. The court said [45 N.M. 161, 113 P.2d 185]: "There is much authority to the effect that an intervener must take the suit as he finds it and is bound by the previous proceedings in the case. 'Consequently he cannot complain of the form of the action, or informalities or defects in the proceedings by the original parties, or of the jurisdiction of the court in which the plaintiff had a right to sue the defendants.' See Vol. 14 Standard Ency. of Procedure, page 330, and cases cited. However this may be, we have before us a much narrower question and therefore this other and broader one need not be decided."

The question then left undecided we now decide by holding that considerations controlling upon the right of intervention clearly reject as a right in the intervenor the benefit of a statutory disqualification of the judge. Some of them were commented on in State v. Chavez, supra. Intervention, as we know, may come at various stages of a pending suit or action. It is unthinkable that a tardy intervenor, even in a case where it would be an abuse of discretion to deny the right, upon being let in, could nullify prior proceedings and cause the matter to be commenced all over again before a different judge. We deny no fundamental

right in so holding since the right to disqualify on constitutional grounds, save as it may have been waived in a given case, still remains.

But, says petitioner, she is not an intervenor, having been brought in by virtue of 1941 Comp. § 19-101(19) rendering it compulsory to join as a party plaintiff or defendant any person having a joint interest in the subject matter of the suit or action. Whether this statute be mandatory or not in the matter of requiring joinder of petitioner as a party to the suit in question, a matter we do not determine, it certainly is no stronger on petitioner's right of joinder than 1941 Comp. § 25-905, giving unto any party in condemnation proceedings, having or claiming an interest in the property described in the complaint, whether named or not, the right to appear, plead and defend "in like manner as if named in the complaint." A party so seeking joinder as a defendant under either statute is enough like an intervenor, if indeed not technically such to bring him within the spirit of the court's comment in State v. Chavez, supra, on the right to file an affidavit of disqualification upon being let in the case. The statute was not available to petitioner.

It follows from what has been said that the alternative writ of prohibition was improvidently issued. It will now be discharged.

It is so ordered.

MABRY, C. J., and BICKLEY, BRICE, and LUJAN, JJ., concur.

168 P.2d 96

TURNER v. SANCHEZ.

No. 4922.

Supreme Court of New Mexico.

April 9, 1946.

[redacted]

[redacted]

[redacted]

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

W. T. Scoggin, Jr., of Las Cruces, for appellee.

BICKLEY, Justice.

The jury at the trial of this ejectment suit was instructed to find a verdict for the plaintiff, and from the judgment thereupon entered in the district court, defendant appeals.

The plaintiff's right to the possession of the lands in dispute was that of a purchaser at a tax sale.

The defendant's grounds of resistance to that right were that the description contained in the tax sale certificate and in the tax deed was insufficient to identify the land, and that the County Treasurer of Dona Ana County, N. M., who at the time of the sale and at the time of the issuance of the tax deed was Deputy County Treasurer and himself interested in the sale of the property and in acquiring title thereto and in fact the real party in interest, in consequence of which the deed for taxes was void, invoking 1941 Comp. §§ 76-636, 76-637; and that the land had been redeemed from the tax sale.

It cannot be doubted that a sufficient tender made at the proper time by the proper person will work a redemption, and it has been correctly held that a formal tender is not required where it would be useless. See Cooley Taxation, 4th Ed., Sec. 1574. See also Fernandez Co. v. Montoya, 42 N.M. 524, 82 P.2d 289, 118 A.L.R. 573; Kershner v. Sganzini, 45 N.M. 195, 113 P.2d 576, 134 A.L.R. 1290; Gammill v. Mann, 41 N.M. 552, 72 P.2d 12.

The facts upon which the defendant claimed his right to redeem are as follows:

The tax sale was conducted January 23, 1942, and the redemption period therefore did not expire until January 23, 1944. At least three adequate offers to redeem were made. There is no controversy as to the timeliness or sufficiency of the offers so far as formalities are concerned. The only objection to the offers to redeem was that the defendant was not a person having a right to redeem. A word should be said concerning the background of the plaintiff's claim of right to possession,

since we find that it is not unusual for courts to contrast the situation of the party claiming the right to redeem with that of his adversary, whose claim to a tax title is that of a stranger to the title and rests solely upon such rights as had inured to him by virtue of the purchase of a right to acquire title subject to the provisions of the statute authorizing redemption.

For the year 1940, the land was assessed to one Apolino Guerra, under a description alleged by defendant to be insufficient, and so asserted by the officer refusing to allow redemption. In view of the conclusion we reach, we do not pause to discuss this alleged defect, which is vigorously asserted by the appellant. The land was sold to the State of New Mexico for delinquent taxes in the sum of $2.15, and a certificate of sale was issued to the State under date February 14, 1942, and on that date was assigned to one R. M. Perry, who from the evidence, seems to not have been well known to the witnesses. On June 2d, 1943, Perry assigned the certificate to N. R. Dessauer for $35.00, and under date January 25, 1944, the County Treasurer issued a tax deed to Dessauer. Thereafter, on February 23, 1944, Dessauer conveyed the land to L. Tracy Fox, who at all times material to the proceedings, was either Deputy County Treasurer or County Treasurer, for a consideration of $100. Then Fox sold the land to a Mrs. Hoffman for $1250, and Mrs. Hoffman became alarmed about the defendant's assertions of title and right of possession, and told Fox that she would have to deed the land back to him, whereupon with the assistance of Fox, she negotiated a sale to the plaintiff James J. Turner, for $1500. The evidence shows that Mr. Fox manifested early interest in the transactions, which defendant claims was not consistent with his official duties. As to this claim of defendant, we express no opinion except that we do not find the tax deed was void on that account.

At all times material to this inquiry, defendant was in the actual, visible and hostile possession of the land involved, farming it after having obtained a deed from Henrietta M. Belknap, dated and acknowledged April 2, 1940. The objection to this deed as showing a legal or equitable right in the defendant to redeem was that the description contained therein did not serve to sufficiently identify the land as being the same as the land which had been sold for taxes. The trial court may have been right in refusing to admit this deed in evidence as a muniment of title, without a preliminary showing that the description in the deed with the aid of extrinsic evidence, embraced the land involved in the suit. Whether it afforded "color" of title may be a different question. However, the defendant produced another warranty deed to him as grantee, dated August 20, 1942, executed by "Corporation of Mesilla (also known as Mesilla Civil Colony Grant acting through the Board of Trustees thereof)." This conveyance recites:

"This conveyance being issued pursuant to authorization and direction of the Mes-

illa Civil Colony Grant, dated and entered upon the minutes of said Board, on August 20, 1942."

It was conceded by plaintiff that the description of the land in this deed was the same as the land in controversy and the only objection made thereto was that it was not shown that the lands described were not allotted lands. The court sustained this objection and refused to receive this deed in evidence, and this refusal is also assigned as error. The plaintiff relied and here relies upon Williams v. Lusk, 28 N.M. 146, 207 P. 576. In that case we held that the Corporation of Mesilla has no power of disposition over the lands of the Mesilla Grant not held in common, and held also that as a prerequisite to the validity of a deed from the incorporation of Mesilla, the party claiming under the deed must show that the lands which it purports to convey are a part of the lands held in common. That was good law in that case which was a suit to quiet title, involving who had title to the property, based solely upon muniments of title. But in that case and also in Romero v. Herrera, et al., 30 N.M. 139, 228 P. 604, it is indicated that such a deed, notwithstanding its infirmities, may afford color of title sufficient to support a claim of adverse possession. It has been asserted that deeds which are defective because of want of title or of authority to convey in the grantor, may be "color" of title. 1 Am. Jur. Adverse Possession, Sec. 196. Even void or voidable conveyances, or even fraudulent conveyances, will give "color" of title. 1 Am. Jur. Adverse Possession, Secs. 197, 198. See also Annotation, 88 Am.St.Rep. 701.

It seems to us that the narrow question in the case before us is: Does a person in actual, visible and hostile possession of land under color of title short of the prescriptive period come within the provision of 1941 Comp. § 76-713, declaring that: "Any person having a legal or equitable right therein" may redeem property sold for delinquent taxes?

Black on Tax Titles, Sec. 367, says:

"It has even been laid down in broad terms that anyone who is in possession of real estate under claim and color of title is entitled to redeem from a sale thereof for taxes."

See also Cooley Taxation, 4th Ed., Sec. 1565. A supporting argument employed by some of the decisions is that the redemption will inure to the benefit of the true owner, and the party paying cannot after the time for redemption expires, withdraw the money, and hence no good reason can be given why a claimant under an imperfect title should not have the power to redeem and let it inure to the true owner of the land. This plausible argument of convenience and justice has recently been employed by the Georgia Supreme Court in Crump v. McEntire, 190 Ga. 684, 10 S.E. 2d 186, where the court pointed out that a lawful sale of land for taxes may be perfected so as to accomplish absolute devolu-

tion of title to land unless the land is redeemed as provided by law. The court went on to say:

"The effect of redemption will not be a transfer of the inchoate title of the purchaser at tax sale, but will be to extinguish the tax sale, the title as before the sale in the defendant in fi. fa., subject to all existing liens of interests of others as against the defendant in fi. fa. * * * This being the effect, the purchaser, having received the redemption money, is not interested at all in what becomes of the property. As to all other persons who might have had a right to redeem, the redemption is in their interest, and consequently they are not adversely affected."

Just how this redemption will finally affect the title to the property involved is a question not presented by the record in the case at bar, but may arise when one asserting a title superior to that of defendant attempts to litigate the matter with the defendant Sanchez. The decisive question here is whether the right to redeem has been properly cut off.

Among the cases cited by Black and Cooley, are Shearer v. Woodburn, 10 Pa. 511; Whitaker v. Ashbey, 8 La.Ann. 117, 8 So. 394; Foster v. Bowman, 55 Iowa 237, 7 N.W. 513; Brown v. Day, 78 Pa. 129; Levick v. Brotherline, 74 Pa. 149; and Johnson v. Sowden, 25 Idaho, 227, 136 P. 1136, where it was decided:

"A 'party in interest,' within the meaning of Rev.Codes, § 1770, providing that redemption of the property sold at tax sale may be made by the owner or any party in interest within three years from the date of purchase, includes a party who was in possession of the property under claim of right at the time it was sold for taxes and who continued in the exclusive possession from that time until redemption was made, especially where the purchaser at the tax sale had no interest in the property except such as he acquired by tax certificate, and where the purchaser of such certificate has never been in possession of the property."

In Brown v. Day, supra, the court used a persuasive argument as follows:

"Now, clearly, a title such as would enable the possessor of it to recover against an intruder would be sufficient to enable the same party to pay the taxes on the land he can thus recover. In doing this he is performing a public duty and injuring no one, for the true owner is benefited by his act, and his title saved from a sale, while the subsequent purchaser from the treasurer had not then come into existence, and had then no rights to be affected. As the owner of even a defeasible title he ought to be permitted to protect himself by payment, for the true owner may never come, or may be barred by lapse of time, and the title may never be defeated."

Crump v. McEntire, Ga., 1940, supra [190 Ga. 684, 10 S.E.2d 189], is a useful decision in support of the conclusion we reach. It was there decided that a statute using the term "or other persons having an interest in such property" considered with the con-

text, contemplated as one having a right to redeem, a person having possession of the property at the time of the tax sale even though a stranger to the claim of title of the delinquent taxpayer, and whose possession is adverse to such claim of title. The court in support of the substantiality of possession as a right, employed the argument that bare possession of land will support an action for damages against any person wrongfully interfering with such possession, and that it may ripen into paramount title by prescription if continued adversely under color of title for the statutory period and that prior possession will support an action in ejectment against one wrongfully ousting the possessor. The court having in mind all of the rights of the possessor of land, decided:

"One in possession of realty, adversely to the claim of title of a defaulting taxpayer, has by virtue of such possession such interest in the land, within meaning of the act giving to persons other than the owner the right to redeem land sold at tax sale, as will authorize him to redeem the land from the purchaser at a sale for state and county taxes."

In Stewart v. Wheatley, 1943, 182 Md. 455, 35 A.2d 104, it was decided:

"Any right which amounts in law or in equity to ownership of all or any part of the land, or any right of possession which can be deemed an estate therein, makes the person an 'owner', in so far as it is necessary to give him the right to redeem from tax sale. Code Pub.Loc. Laws 1930."

In Sherrill v. Faulkner, 1940, 200 Ark. 1006, 142 S.W.2d 229, a principle frequently asserted was reiterated as follows:

"Almost any right at law or in equity, perfect or inchoate, or in possession or in action, or whether in the nature of a charge or incumbrance on the land, amounts to such an ownership as will entitle party holding it to redeem from tax sale."

It has been asserted, and we do not doubt, that one who has acquired title to land by adverse possession has a legal and/or equitable right in land sold for taxes sufficient upon which to predicate the right to redeem from a tax sale and we think the right also extends to one who may not yet have completed the prescriptive procedure, if he is in good faith on his way. Our law gives one the right to acquire title by adverse possession and this right is capable of protection by means of redemption from tax sale.

Fortunately, the trail has been blazed for correct construction of our statute. In Fernandez Co. v. Montoya, 42 N. M. 524, 82 P.2d 289, 118 A.L.R. 573, we decided:

"Statutes providing for redemption from tax sale are to be construed liberally in favor of the redemptioner."

And in Cox v. Shipe, 44 N.M. 378, 102 P.2d 1115, we held that the holder of a tax sale certificate not only has a right to pay delinquent taxes for other years on the property sold, but must do so as a condi-

tion precedent to receipt of tax deed by him, and also that a holder of tax sale certificate must redeem property sold from all outstanding tax sale certificates to avoid exposure of his own certificate to redemption by rival holder of certificate for another year's taxes. We indicated that a tax sale certificate did not vest title in the holder thereof, but only an inchoate right to complete title in certain contingencies. We quoted with approval, 61 C.J. 1245 at sec. 1690:

"As a general rule any person may redeem land from a tax sale who has an interest in the property which would be affected by the maturing of the tax title in the purchaser."

Now, under our tax laws, a person has a right to acquire title to land by adverse possession. He must found this right, among other factors, upon color of title and possession and the payment of taxes. It would seem that since payment of taxes is a factor, it is no far cry to say that he has such an interest as will permit him to redeem from a tax sale, since paying the redemption money is in itself a species of payment of taxes. See Clark v. Trammell, Ark., 186 S.W.2d 668, and Kershner v. Sganzini, supra. And furthermore, the failure of one in possession of land under color of title to redeem would entitle the tax title holder to take possession of the land (Hood v. Bond, 42 N.M. 295, 77 P.2d 180), which would interrupt and deprive the erstwhile possessor of an essential element in his quest to acquire title by adverse possession. The analogy is apparent. The holder of a tax sale certificate has an inchoate right only, so has the adverse claimant in possession of land a right inchoate, which if pursued and protected, may ripen into title.

We conclude that the tax deed upon which plaintiff relied in this ejectment action is a nullity and for the reasons heretofore stated, we must reverse the judgment of the District Court and remand the cause to enable appellant to redeem the land in question by paying to the proper officer the amount realized by the tax sale with interest as provided by law, and the payment of such taxes as may be properly required as a condition of such redemption.

The judgment is reversed, and the cause remanded for such further proceedings as may be proper in conformity with this opinion, with costs. And it is so ordered.

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

HUDSPETH, J., did not participate.

168 P.2d 100

HAMPTON et al. v. PRIDDY et al.

No. 4892.

Supreme Court of New Mexico.

April 10, 1946.

See also 49 N.M. 1, 154 P.2d 839.

R. A. Prentice, of Tucumcari, for appellants.

J. V. Gallegos and C. C. Davidson, both of Tucumcari, and H. A. Kiker, of Santa Fe, for appellees.

LUJAN, Justice.

This is an appeal from a judgment entered in separate contest proceedings initiated in the district court of Quay County by the appellants, T. W. Hampton and Clarence Massey, as contestants, involving the offices of Mayor and Councilman of the City of Tucumcari, following the municipal election held on the 4th

day of April, 1944. Hampton was nominated for Mayor and Massey for Councilman from the 2nd Ward on the Democratic ticket. The contestees in the contest, initiated as aforesaid, were appellee, Henry R. Priddy, nominated for the office of Mayor and Clarence E. Gamble, nominated for Councilman from the 2nd Ward, on the "Greater Tucumcari Ticket." The result of the election according to the initial canvass was as follows:

Mayor		Councilman	
Hampton	721	Massey	685
Priddy	724	Gamble	701

Certificates of election were duly issued to Priddy for Mayor and Gamble for Councilman based on the foregoing canvass. A subsequent recount as to these offices resulted in no substantial, certainly no material, change in the result. It showed:

Mayor		Councilman	
Hampton	718	Massey	680
Priddy	723	Gamble	700

The results of the recount come into the case before us solely as an admission of opposing counsel and not by reason of any evidence introduced at the trial. The contests were consolidated for trial below and after hearing the court awarded judgment in favor of the appellee Priddy for the office of Mayor and in favor of the appellee Gamble for the office of Councilman from the 2nd Ward, both nominees on the "Greater Tucumcari Ticket." These awards were contained in a single judgment. The appellants, who were the contestants below, prosecute this appeal, each complaining of the judgment so entered against him and they pray for a reversal thereof. While some thirteen separate errors are assigned, they are grouped for purposes of argument under two points, viz., (1) that the so called "Greater Tucumcari Party" was not a political party within the meaning of the governing statute and, hence, appellees' names, as its nominees, were not entitled to be printed on the ballot, nor should any votes cast for them have been counted, canvassed or returned, and (2) that at the date of said election, the appellee Clarence E. Gamble was not a resident of, but resided outside, the City of Tucumcari and, hence, was ineligible to be nominated and elected or to receive a certificate of election to the office of Councilman from the 2nd Ward in said City and that for the same reason the votes cast by him and his wife and three other named persons, all for contestees, were illegal and should not have been cast, counted or canvassed.

The ruling of the trial court on appellants' first point was made in acting on certain proposed findings of fact, one of which, at least, partakes more of the nature of a conclusion of law than a finding of fact. The proposals first made a declaration that "The Greater Tucumcari Party" was not a political party receiving more than fifteen per cent. of the total number of votes cast for the candidates for Governor in the last preceding election.

Then appeared a proposed finding in substance that the appellees were not nominated at or by a legally called and held political convention, and that the "Greater Tucumcari Political Party" had never filed in the office of the County Clerk of Quay County the rules governing the organization of said party, particularly with reference to the method of selecting nominees as candidates for public office.

Counsel for appellants first call to our attention 1941 Comp. Sec. 14-1303, L. 1884, c. 39, Sec. 55, the material portion of which reads:

"* * * And all elections for municipal officers shall in all respects be held and conducted in the manner prescribed by law in cases of county elections."

Attention is then directed to 1941 Comp. Sec. 56-720, L. 1927, c. 41, Sec. 720, the election code of 1927, which, while expressly excepting certain elections, including municipal, from the act, provides, nevertheless, that in all municipal elections, the duties specified in said act as devolving upon the county clerk shall devolve upon the clerk of the municipality unless otherwise specifically provided. Finally, under this point, the method of nominating candidates by convention system as set out in Article 9 of Chapter 56, New Mexico Statutes Annotated (1941)—Sections 56-901 to 56-908 of 1941 Compilation—is pointed out as the method which should have been pursued by the "Greater Tucumcari Party" in order to get the names of its candidates on the ballot, since it was not a political party whose candidates received as many as fifteen per centum of the total number of votes cast for the candidates for Governor in the last general election by all political parties, whose nomination is provided for by the primary election laws of this state. See 1941 Comp. Sec. 56-908. The several omissions to comply with the provisions of this article, such as failure to file with the county clerk the rules governing the organization of the party as required by 1941 Comp. Sec. 56-903, and in other respects, are pointed out by appellants (contestants) and it is argued the names of appellees were wrongfully on the ballot and, hence, no ballots cast for them were entitled to be counted or canvassed.

The appellees argue with a vigor equalling that of appellants that the statute invoked is obviously inapplicable to municipal elections, reminding us that the provisions of 1941 Comp. Sec. 14-1303 rendering applicable to municipal elections the general election laws of the state, speaks of the manner of "holding and conducting elections," not the manner of nominating candidates. They mention arguendo, also, the fact that if counsel for appellants be correct in their contentions in this behalf—nominations by political parties—then throughout the years there have been few officers, other than de facto, in many municipalities in the state, since in most of them non-partisan rather than party tickets have been the rule and not an exception to the rule.

We are disposed to hold with appellees that the provisions of 1941 Comp. Secs. 56-901 to 56-908, L.1935, c. 58, are without application to a non-partisan ticket offered to the electors in a municipal election. Obviously as its whole context connotes, the act was never intended to discourage or apply to the long existing and salutary practice of offering non-partisan tickets in city, town and village elections. If in doubt about the matter, the heavy penalty imposed for non-compliance with its provisions would incline us to resolve the doubt against an application of the act which would discourage, if not prohibit, local non-partisan tickets. Section 6 of the Act, 1941 Comp. Sec. 56-906, reads:

"Any ballot containing the name or names of any candidate or candidates of any political party which has failed to comply with the provisions of this act shall not be cast, counted, canvassed or returned. (Laws 1935, ch. 58, § 6, p. 107.)"

This is contrary to the effect almost universally applied in such circumstances, 18 Am.Jur. 263, Sec. 131, under "Elections" and case note in 7 Ann.Cas. 839.

The legislature in enacting L.1935, c. 58, certainly gave the act no specific application to municipal elections. We do not feel disposed to do so by construction when the practical effect of so doing would be to outlaw non-partisan tickets in such elections. The statute relied on being without application to a municipal election, the appellants' first point must fail.

The second claim of error relied on relates to the residence of Clarence E. Gamble, one of the appellees, and that of four other persons, all of whom are claimed to have voted and had their votes counted for the said Gamble for Councilman and Henry R. Priddy for Mayor. The argument is that the land on which Gamble and the four other questioned voters resided lay outside the corporate limits of the City of Tucumcari, thus denying to Gamble the right to hold a municipal office therein and to him and four other persons named, any right to vote at a municipal election in said city.

The method by which appellants sought to meet the burden, clearly theirs, of establishing residence outside the city of contestee Gamble, and the other four persons and, hence, the illegality of the votes of all of them, as well as Gamble's ineligibility to hold the office of Councilman, was to introduce a plat bearing date, January 14, 1902, of the original town of Tucumcari showing the dedication of certain described congressional subdivisions, followed by a record of certain proceedings before the Board of County Commissioners of the County of Quay, in the Territory of New Mexico, on July 10, 1906, incorporating the Town of Tucumcari, embracing the lands shown on the above mentioned plat along with other lands. There was then introduced evidence showing the residence of the five questioned voters to be on described

lands other than those embraced in the incorporation proceedings aforesaid and evidence in the nature of an admission by Gamble in the form of tax returns that the land on which he lived was not within the outboundaries of the area included in the incorporated lands. Testimony to same effect in relation to places of residence of the four other persons whose votes were questioned was also brought out.

There followed the testimony of various persons, the tendency of which was to show that the owners of the three tracts of land on which the five persons named lived on election day, April 4, 1944, had never been dedicated by them and that without a dedication, such tracts could not have been incorporated into the City of Tucumcari after July 10, 1906. Consequently, the residents on such land were not legal voters on the day of election. So runs the argument.

Touching this phase of the case, the trial court found:

"The Court further finds there is no evidence in the record to show the territorial extent of the City of Tucumcari.

"The Court further finds there is no evidence to show the out-boundaries of the City of Tucumcari."

The view entertained by the trial judge is reflected by the following comment at close of the trial, to-wit:

"The motion to dismiss will be granted by the Court for the reason that I don't believe there is sufficient evidence to show that any of the contested votes were cast illegally because there is no evidence, as far as I can determine, to justify the Court in determining where the city limits of the City of Tucumcari extend to. The fact that there are certain annexation records introduced to indicate the limits of the City of Tucumcari in the year 1902 or 1906 is no help to the Court in determining where they are at the present time. There unquestionably have been many additions to the City of Tucumcari. And, further, it is very probable that the city limits extend considerably beyond the original dedication or plat of 1902.

"I believe the burden is on the Contestants to establish by a reasonable amount of evidence where the limits of the city are, and not place the Court in position of having to guess whether or not the contested voters lived inside or outside of the city limits."

Other means of annexing territory to a municipality than through dedication by the owner are recognized and have statutory sanction. See 1941 Comp. Sec. 14-601, Sec. 14-602 and Sec. 14-606. The evidence fails to show that one or the other of these means was not followed. The most that can be said of appellants' evidence on this issue is that it affords strong proof the land on which the questioned voters resided had not been annexed to the city by voluntary dedication. It does not exclude other recognized means of annexing territory to a municipality.

The questioned voters were all registered as voters within the city and had voted in previous city elections. The appellee Gamble had served on the city council for eight years immediately preceding the election in April, 1944. These important considerations were not to be ignored and the electors disfranchised save by proof which clearly established illegality of their votes. We are unable to say the trial court erroneously ruled on this issue.

Finding no error, the judgment of the trial court will be affirmed.

It is so ordered.

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

HUDSPETH, J., did not participate.

168 P.2d 850

STATE v. WILLIAMS.

No. 4936.

Supreme Court of New Mexico.

April 23, 1946.

Otto Smith, of Clovis, for appellant.

C. C. McCulloh, Atty. Gen., and Robert W. Ward, Asst. Atty. Gen., for appellee.

LUJAN, Justice.

Appellant was tried and convicted of operating a motor vehicle upon the highways of New Mexico while under the influence of intoxicating liquors and sentenced to serve a term of five months in the common jail of Curry County and to pay a fine of One Hundred and Fifty Dollars. In addition to the sentence and fine imposed by

the trial court, it ordered that his driver's license be taken up for a period of one year, and it is from this part of the judgment that this appeal is prosecuted.

It is urged by appellant that that part of the judgment deprives him of his liberty and property without due process of law in violation of Article II, Section 18 of the State Constitution; and, further, that the lower court was without authority to direct the defendant to surrender his license for the period specified therein.

There were no objections or exceptions taken at the time the judgment was rendered to that part now complained of, and the record does not disclose whether or not the trial court ever heard, considered or ruled upon these questions, hence they are not here for consideration.

There is no rule more firmly established by our law than that only such assignment of error can be presented to this court as were brought to the attention of the trial judge, so as to permit of their correction by him; questions of jurisdiction and fundamental errors excepted, neither of which are present in the case at bar. We said in State v. Harris, 41 N.M. 426, 70 P. 2d 757:

"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 these 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."

It would seem that these principles should apply with particular force where the court has suspended the operation of the jail sentence during good behavior and doubtless considered that such good behavior would embrace abstention from driving on the highways for the period of one year. The appellant accepted the suspended sentence without raising the points presented. He ought not to be permitted to eat his cake and have it too.

Furthermore since it is conceded by appellant that the conviction in the case at bar, if brought to the attention of the Commissioner, would call for the revocation of the license by the Commissioner, it would seem that the court's action in ordering "his (defendant's) driver's license be taken up for the period of one year" is at most a mere irregularity, and not prejudicial to defendant.

For the reasons given, the judgment of the district court will be affirmed. It is so ordered.

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

HUDSPETH J., did not participate.

168 P.2d 851

DAVIS v. SAVAGE et al.

No. 4905.

Supreme Court of New Mexico.

April 10, 1946.

Frazier & Quantius, of Roswell, for appellant and cross-appellee.

George L. Reese, Sr., of Roswell, for appellees and cross-appellants.

BICKLEY, Justice.

This is an action in ejectment commenced by plaintiff (appellant) against Mrs. Joan C. Waugh, and continued after her death against her personal representative, Margaret Savage, and Margaret Savage, individually; Melvine N. Robertson, Myrtle F. Stuchal and Peter Charles Viering, sole heirs of Mrs. Waugh, as substituted defendants (appellees and cross-appellants).

The defendants traversed the allegations of the plaintiff's complaint, and cross-complained, seeking to quiet title in them to the land involved.

The District Court concluded that the defendants' cross-complaint that they were the owners of the land, was without foundation, but concluded that defendants, through their predecessor in title, Mrs. J. C. Waugh, were mortgagees in possession of the real estate involved, and concluded as a matter of law that the plaintiff had no right to the possession of the premises, and gave the plaintiff thirty days from the 15th of December, 1944, in which to elect to pay the remainder due on mortgage given to Mrs. J. C. Waugh, deceased, within said thirty days, and in the event the plaintiff did not so elect to pay said amount, judgment should go for the defendants; and the plaintiff, through her attorney, having announced in open court that she declined to pay said amount, the court rendered judgment against plaintiff and in favor of defendants, in the ejectment action, and further adjudged that the cross-complaint of the defendants seeking to quiet title in them be dismissed.

Plaintiff appealed and defendants appealed from that part of the judgment dismissing defendants' cross-complaint to quiet title in the defendants.

The litigation arose out of the execution of senior and junior mortgages.

On December 13, 1921, Dan C. Savage and Margaret Savage, his wife, executed and delivered to Mrs. J. C. Waugh, their real estate mortgage deed to secure a promissory note in the amount of $1,700, bearing date November 28, 1921, and due and payable one year after date, and bearing interest at 8% per annum from date, said mortgage deed containing the familiar power of sale provision.

On November 22, 1929, the said Dan C. Savage and Margaret Savage executed what has been referred to by the parties as a *renewal* note and mortgage for $1,700 due one year after date and bearing 8% interest from date.

No payments were ever made upon the November 28, 1921 note except payments aggregating about $400, so that it appears from a little calculation that when the November 22, 1929 so-called renewal note was given, it was not for the amount due on the old note, lacking approximately $800 thereof. So far as the language of the 1929 note and mortgage is concerned, there is nothing to indicate that they are not new contracts.

On April 1, 1934, the said Dan C. Savage and Margaret Savage executed and delivered to C. H. Davis their promissory note and mortgage deed securing the same, for the principal sum of $930, bearing interest at the rate of 10% per annum until paid, due on or before the first day of April, 1936, and mortgaging the identical properties described in the mortgages to Mrs. J. C. Waugh, heretofore referred to.

These mortgages will hereafter be referred to as the 1921 Waugh mortgage, 1929 Waugh mortgage and the Davis mortgage.

The Davis mortgage contained the following recital: "This mortgage is given subject to two prior mortgages as follows: One mortgage to Mrs. J. C. Waugh, dated December 13th, 1921; for $1700.00. One mortgage to Mrs. J. C. Waugh, dated November 22nd. 1929, for $1700.00."

Nothing was paid on the Davis note except small sums on the interest due thereon. The Davis mortgage also contained a power of sale provision.

C. H. Davis died intestate prior to the commencement of this litigation, and his widow, Nina E. Davis, was appointed administratrix of his estate, and thereafter on the 22d of October, 1941, instituted a suit in the district court against Mrs. J. C. Waugh, Margaret Savage, et al., to foreclose the Davis mortgage. In this action, Margaret Savage filed her separate answer and Mrs. J. C. Waugh appeared in said cause by answer and cross-complaint seeking to foreclose her purported mortgage on the property, but subsequently filed a motion to dismiss her cross-complaint and filed her first amended answer, which was granted, and her amended answer was filed, to which a demurrer was interposed, and subsequently on the motion of the plaintiff in the action here for review, the defendant, Mrs. J. C. Waugh, was dismissed as a party defendant. Thereafter, and on March 23, 1942, Mrs. Waugh filed a petition of intervention in the Davis foreclosure suit to which a demurrer was filed. On May 19, 1942, Mrs. Waugh moved the court to dismiss her petition of intervention without prejudice, and on May 19, 1942, an order was entered by the court allowing the petition to be dismissed without prejudice, and thereafter the cause proceeded to final decree as to the other defendants and the Davis mortgage was foreclosed by said decree and such proceedings were had that the property was bought in at the special master's sale by the plaintiff in the cause here for review, Nina E. Davis.

Nothing was done by Mrs. J. C. Waugh to foreclose her mortgages prior to the Davis foreclosure proceeding.

On May 18, 1942, Mrs. J. C. Waugh, by her attorney G. L. Reese, Sr., under the power of sale contained in the 1921 Waugh mortgage, issued a notice of sale of the property involved herein, stating among other things that on June 24, 1942, the real property described in the notice would be sold at public auction to the highest bidder for cash for the purpose of applying the proceeds of such sale to the satisfaction of the indebtedness evidenced by the 1921 Waugh mortgage note. The trial court found that on the 24th of June, 1942, the real property involved was sold pursuant

to said notice of sale and bid in by Mrs. J. C. Waugh, for the sum of $3,000, said sale being made by her attorney G. L. Reese, Sr., for her, she being absent at such sale, and that a deed was issued by said attorney to the said Mrs. J. C. Waugh on the 25th day of June, 1942, and filed for record on June 29, 1942.

The trial court found that Mrs. J. C. Waugh, through her attorney, took possession of the real estate involved herein on the 20th day of May, 1942, by the service of a written notice upon Margaret Savage, who had theretofore been looking after said real estate and the rentals thereof; that Margaret Savage made no objection to the taking of possession of said premises by the said Mrs. J. C. Waugh; and that since said date, the said Mrs. J. C. Waugh had possession of said premises until her death on the 13th day of May, 1943, and that since the appointment of Margaret Savage as administratrix of the estate of Mrs. J. C. Waugh, she has had charge and possession of said real estate, and that the said Margaret Savage as administratrix for herself and the other heirs of the said Mrs. J. C. Waugh, deceased, is claiming possession by virtue of the sale and deed above mentioned.

We will first consider the appeal of the cross-appellants. They assign errors as follows:

(1) The court erred in its conclusion of law No. 1 appearing at Tr.R. 88 as follows: "That at the time of the purported sale on May 18, 1942, by Mrs. J. C. Waugh, under the 1921 mortgage, the right of action on said mortgage as well as the power of sale therein contained was barred by our statutes and such sale was a nullity."

(2) The district court erred in its conclusion of law No. 4 appearing at page 88 Tr.R. as follows: "The claim of the defendant that she is the owner in fee simple of the real estate in this action is without foundation and should be denied."

(3) The district court erred in dismissing the cross-complaint of the defendants to quiet title as shown by the final judgment of the court at page 128 Tr.R. as follows: "The cross-complaint of the defendants seeking to quiet title is dismissed. Defendants except."

The District Court doubtless based its decision complained of upon Ch. 10, Laws 1927, 1941 Comp. 27-119, as follows:

"Section 1. No lands, tenements, hereditaments, goods or chattels shall be sold under any power of sale contained in any mortgage, deed of trust or other written instrument of like effect, where an action or suit upon the indebtedness secured thereby is barred by the provisions of Chapter 68, New Mexico Code of 1915.

"Sec. 2. This Act shall not in any wise affect, limit or impair any right any person may now have to exercise a power of sale contained in any such mortgage, deed of trust or other written instrument of like effect, provided such right be exercised within two years after the date of the passage and approval of this Act."

And Ch. 139, Laws 1929, 1941 Comp. 63-407, as follows:

"Section 1. No real property or any interest therein shall be sold under or by virtue of any power of sale contained in any mortgage, mortgage deed, trust deed or any other written instrument having the effect of a mortgage, which shall have been executed subsequent to the time this Act shall go into effect.

"Sec. 2. All acts or parts of acts in conflict herewith be and the same are hereby repealed."

And the court doubtless had in mind also the six-year limitation applicable to actions filed on written instruments. 1941 Comp. 27-103.

Effort is made by cross-appellants to convince us that Ch. 10, Laws 1927, was repealed by Ch. 139, Laws 1929, and therefore has no application to the case at bar. The argument is that since the later enactment in section 2 thereof repealed "all acts or parts of acts in conflict herewith" and as they assert, the 1927 act was in conflict with the 1929 act, the earlier act is repealed by implication. We do not agree. In the first place, Ch. 10, Laws 1927, dealt with sales of "goods or chattels" as well as with lands under power of sale. Secondly, it dealt only with the period of time within which such power of sale provisions could be exercised and did not purport to prohibit the exercise of power of sale, whereas Ch. 139, Laws 1929, *prohibits* sale of *real property* by virtue of power of sale contained in mortgages "which shall have been executed subsequent to the time this Act shall go into effect." And this is so, apparently, whether the indebtedness secured by such real estate mortgage containing power of sale is barred by the statute of limitations or not.

Cross-appellants think Ch. 149, Laws 1931, 1941 Comp. 21-220, evidences a legislative understanding that Ch. 10, Laws 1927, had been repealed because it was therein provided that real property sold by virtue of a power of sale contained in a mortgage, could be redeemed by the mortgagor, etc., under conditions specified, within the twelve months after the date of sale. We do not think this lends any support to the argument of cross-appellants because it was merely a re-enactment of the substance of a portion of section 117-119 of the 1929 New Mexico Statutes Annotated, which had originally appeared in Laws 1889, Chapter 51, the only material difference being that the rate of interest was

reduced from 12% provided in the 1889 Act to 10% in the 1931 Act. Furthermore, the 1931 Legislature could reasonably have assumed that after the enactment of Ch. 10, Laws 1927, there might still be existing mortgages containing powers of sale which would have vitality in 1931 and thereafter, because the indebtedness secured thereby had *not* been barred by the statute of limitations.

It is a cardinal rule that repeals by implication are not favored and we deem it unnecessary to cite authorities. See Rader v. Rhodes, 48 N.M. 511, 153 P.2d 516, discussing repeals by implication.

For what it may be worth, we may say in passing that Ch. 10, Laws 1927, was carried forward into the New Mexico Statutes Annotated 1929 Compilation, and also into the 1941 Compilation, and that as late as the 1945 cumulative pocket part to the 1941 Compilation at page 91, the compilers refer to Sec. 27-119, Ch. 10, Laws 1927, in a cross-reference to Sec. 63-407, Ch. 139, Laws 1929.

We hold that this contention of cross-appellants is without merit.

Cross-appellants next urge that as to them, if not repealed, Ch. 10, Laws 1927, was unconstitutional and void as impairing the obligation of the contract made Dec. 13, 1921, which was the mortgage containing the power of sale which was sought to be exercised by proceedings thereunder, commencing with the notice of sale dated May 18, 1942, culminating in deed executed June 26, 1942. To maintain this position, cross-appellants are compelled to assert that this remedy of enforcing their security is a substantive right as distinguished from a remedy. They are also obliged to assert that although it has been firmly established that statutes of limitations governing court actions to enforce rights may be retroactively shortened, provided a reasonable time is afforded in the curtailing statute in which to assert the right, this power of sale being contractual could not be regulated by the Legislature, so that where no time limit for its exercise existed at the time of making the contract, it could not be modified so that this unspecified time could be limited so as to conform to the period allowed to foreclose mortgages by action or suit. In Section 2 of Ch. 10, Laws 1927, is what is commonly called a saving clause preserving the right to exercise a power of sale contained in a mortgage, provided such right be exercised within two years after the date of the passage and approval of the act, which was March 2, 1927. This would seem to be a reasonable and sufficient time after the passage of the act in which the mortgagee could move. It is possible to imagine some circumstances in which it might work out so that not much time would be left between the two years after the passage of

the act and the expiration of the time to foreclose the mortgage by court action. But however that may be, no hardship was visited by this act upon the cross-appellants' predecessor, Mrs. J. C. Waugh, or upon cross-appellants. As we have seen, the 1921 mortgage here in question was executed December 13, 1921, to secure a note dated November 28, 1921, due one year after date, so that action on the note became barred on November 28, 1928. The mortgagee, Mrs. Waugh, was charged with knowledge of the statute, so she had almost a year and nine months after the passage of the act in which to exercise the power of sale before the bar of the statute would fall athwart her privilege of commencing an action or suit upon the indebtedness over four years past due when Ch. 10, Laws 1927, was enacted.

We do not think cross-appellants are in a very good position to urge this proposition. It is to be noted that Mrs. Waugh permitted the November 28, 1921 mortgage note to become barred by the six-year statute of limitations on November 28, 1928. And perhaps sensing the infirmities of the power of sale under the circumstances, she on Nov. 22, 1929, procured to be executed by Dan C. Savage and Margaret Savage a new note for $1,700, and on the same day procured the execution of a new mortgage on the identical real estate described in the December 13, 1921 mortgage. These later instruments have been referred to by the parties and by the trial court as a renewal note and mortgage. The word "renewal" has varying significations. It is said in the 4th Edition of Wood on Limitations in a note to section 86: "The renewal of a debt barred by limitation is a new contract; the consideration for the new promise is the old debt, and is sufficient." Citing Interstate Building & Loan Association v. Goforth, 94 Tex. 259, 59 S.W. 871; Poindexter v. Rawlings, 106 Tenn. 97, 59 S.W. 766, 82 Am.St.Rep. 869; Bowman v. Rector, Tenn. Ch.App., 59 S.W. 389. The 1929 mortgage was executed with all of the formalities of the old one, acknowledged and placed of record. Although the old debt had been barred nearly a year, the maturity date of the new note was one year after the date thereof. It has none of the aspects of a mere admission in writing that the 1921 note was unpaid. It is not a promise to pay the old note. The new note promised to pay $1,700, the same amount as the principal sum mentioned in the old note, but it does not promise to pay the unpaid interest which had accumulated (about $800) on the old note, but promises to pay "Seventeen Hundred Dollars with interest at the rate of 8% per annum, from date until paid." It may have been in a sense a renewal note in that the old unpaid note would be a supporting consideration for the new note, but it did not

purport to be an extension of the old note and mortgage. The note and mortgage dated November 22, 1929, were new contracts for the purpose of considering the bearing of Ch. 10, Laws 1927, and Ch. 139, Laws 1929, thereon.

In considering the revival of causes of action upon the indebtedness by acknowledgment that the debt is unpaid, or the promise to pay the same, it is generally regarded as immaterial whether the acknowledgment precedes or follows the bar. But there is a distinction as to the effect upon the remedy. In Wood on Limitations, 4th Ed., section 81, it is said: "The distinction between the acknowledgment of a debt before and one after the statute has run consists merely in its effect upon the debt and the remedy. An acknowledgment or promise made before the statute has run, vitalizes the old debt for another statutory period dating from the time of the acknowledgment or promise, while an acknowledgment made after the statute has run gives a new cause of action, for which the old debt is a consideration."

And in Note 6 to this section, Wood says: "A promise to pay a debt after it is barred constitutes a new cause of action, and suit must be brought upon the promise and not the original debt." Citing Bain v. Sawyers, 14 Ky.Law Rep. 857; Rodgers v. Byers, 127 Cal. 528, 60 P. 42.

Wood on Limitation, 4th Ed., Section 230, says: "So long as the debt which a mortgage is given to secure is kept on foot, the mortgage lien remains in full force. Therefore, any acknowledgment or promise of the debtor sufficient to prevent the statute from running against the debt, equally prevents the statute from running upon the mortgage; and, as we have seen, such also is the effect of a part payment, either of principal or interest made upon the mortgage. But where the rights of subsequent mortgagees intervene, or where the mortgagor has sold the premises, an acknowledgment or payment afterwards, made by the mortgagor after the statute bar has become complete, does not revive the mortgage so as to defeat any of the rights of such subsequent mortgagee or grantee. But so far as his own interests are concerned, he may revive the mortgage by such acts, but not so as to impair or defeat the rights of other parties who, previous to such acts, acquired an interest in the premises."

It seems to us that upon the same reasoning, it is proper to hold that where the interests of the public have intervened, as manifested by a statutory declaration of public policy, and it would be improper to allow a revivor which is not contrary to law as to the indebtedness to serve the purpose to revive the mortgage and give life to the power of sale therein, so as to defeat the public policy of the State, which

had become manifest previous to such acts of revival or of attempted revival, even if it could be said that the old debt had been revived.

Mortgages conferring power of sale have been recognized in New Mexico at least since 1889 when the legislature regulated the matter of redemption from sale thereunder. See 1941 Comp. 21-220. However, such powers have been looked upon with varying degrees of favor and disfavor. The right to exercise power of sale provisions has been withdrawn in a number of states. See Patton on Titles, Sec. 234, citing code provisions and decisions of Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas and Oregon. As we have seen, the right to exercise such power was withdrawn partially by Ch. 10, Laws 1927, and completely by Ch. 139, Laws 1929, as to mortgages executed subsequent to the effective date of that act.

In Baca v. Chavez, 32 N.M. 210, 252 P. 987, 989, decided January 15, 1927, we held that execution of power of sale in mortgage was not barred by limitation barring suit or action on the debt or security. In the course of the opinion, we said: "It is urged, not without reason, that the same policy served by refusing the aid of the courts, after the debtor has sat by for the statutory time, would be served by barring execution of a power of sale. It is said, also not without force, that the result we arrive at serves in such a case as this to defeat the policy of the statute. But these considerations are for the lawmakers."

It did not take the law makers long to announce their distaste for the interpretation we had been compelled to announce—less than two months. See Ch. 10, Laws 1927. The reason for the legislative action is none of our concern, but we are disposed to agree with the observation of the North Dakota Supreme Court in Scott v. District Court of Fifth Judicial District, 15 N.D. 259, 107 N.W. 61, 64, that: "The object of limitation laws is to prevent agitation of stale demands when, by reason of lapse of time, evidence by which to establish the cause of action or defense may be lost or difficult to procure. The reason for such laws is just as applicable to a mortgage containing a power of sale as to any other."

The mortgagor might desire to enjoin the exercise of the power of sale on the ground that he had valid defenses to the claim of indebtedness or otherwise, and perhaps could do so, in a proper case. But the same elements which would put him at a disadvantage, because the demand was stale, in an action to foreclose the mortgage in court, would militate against him if he sought to enjoin the execution of the power of sale. So we think the action of the 1927 Legislature to limit the exercise

of powers of sales in mortgages to the same period that the mortgage could be foreclosed by suit or action finds a great deal of support in reason and precedent.

Statutes rendering the Statute of Limitations available as a bar to the exercise of the power to foreclose have been held not to impair the rights of the mortgagee under pre-existing contracts. We find it convenient to quote from "Annotation—Constitutional provision against impairment of obligation as applied to rights or remedies of mortgagee." 79 L.Ed. 303, at page 307, as follows:

"In Graves v. Howard, 1912, 159 N.C. 594, 75 S.E. 998, Ann.Cas.1914C, 565, an act of the legislature declaring that the power of sale in a mortgage shall be inoperative when the right to bring action to foreclose is barred by the Statute of Limitations was held not unconstitutional as impairing the obligation of the contract when applied to mortgages in existence at the time the statute went into effect, as the change affected only an existing remedy, and a reasonable time was given for the exercise of the power before the statute worked a bar, the right to sell under the power not expiring under the statute for more than five years after its enactment, which was an ample protection of the rights of the parties.

"In Scott v. District Ct., 1906, 15 N.D. 259, 107 N.W. 61, a statute in effect subjecting the mortgagee's right to exercise the power of sale to the right of the mortgagor forever to prevent that method of foreclosure, so as to enable the latter to plead and prove, in an action to foreclose, any defense or counterclaim he may have, the intent of the law being to enable the mortgagor and those claiming under him to prevent any foreclosure under the power of sale whenever an action to foreclose could not be successfully maintained for any reason, was held not to be unconstitutional as impairing the obligation of the contract when applied to mortgages existing at the time the statute went into effect, as it did not materially change the previously existing remedy to the detriment of the mortgagee. The court said: 'To the extent that the law in question indirectly renders the Statute of Limitations available as a bar to the exercise of the power, it grants the mortgagor a right which did not exist before; but it is too plain to require discussion that the obligation of the contract was not hereby impaired.'

"In Kreyling v. O'Reilly, 1902, 97 Mo. App. 384, 71 S.W. 372, it was held that a statute providing that no suit under a power of sale to foreclose any mortgage or deed of trust executed to secure any obligation to pay money or property shall be had or maintained to foreclose any such mortgage or deed of trust heretofore executed after the expiration of two years

after the passage of this act was held not unconstitutional as impairing the obligation of contracts upon the ground that it reduced the time within which mortgages executed before its passage could be foreclosed after the debts secured by them were barred. The court stated: 'Two years were allowed by the act within which deeds of trust and mortgages previously executed might be enforced by suit. That was a reasonable time, and puts the act outside of the constitutional inhibition against the enactment of state laws which impair the obligation of contracts.' "

And the Supreme Court of Arizona in Schwertner v. Provident Mut. Building-Loan Ass'n, 17 Ariz. 93, 148 P. 910, held: "Civ.Code 1913, par. 4113, providing that all mortgages, notwithstanding any provision contained therein, shall be foreclosed by action, is remedial and valid, though changing the remedy, so long as it does not impair the obligation of contracts."

The court quoted from Scott v. District Court, supra, to repel the contention that a statute to compel foreclosures in court was unconstitutional in that it impaired the terms of a contract as follows: " 'The power of sale was a mere remedy, subject to the control of the Legislature. The fact that the contract stipulated for this cumulative remedy did not make it any more sacred than any other remedy. It was merely one of the means by which the obligation evidenced by the mortgage contract could be enforced. It was not the contract obligation which the Constitution forbids the impairment of'—citing authorities."

In State v. Circuit Court, 1933, 61 S.D. 356, 249 N.W. 631, it was decided:

"Statute, restricting conditions under which mortgage foreclosure by advertisement might be had, held not invalid as impairing obligation of pre-existing mortgage."

"Statute changing remedy does not impair obligation of contract so long as there remains sufficient remedy on contract which secures all substantial rights of parties."

As to statutes of limitations generally, it is said: "A statute of limitations will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right." Wood on Limitations, page 75.

It is recalled that under the doctrine of Baca v. Chavez, supra, and the usual power of sale contained in mortgages, no time limit was set for their exercise. Again at page 76 of Wood on Limitations, it is said: "It is now settled that the Legislature may prescribe a limitation for the bringing of suits *where none previously existed,* and may shorten the time within which suits to enforce existing causes of action may be commenced, if a reasonable time, under the circumstances, be given

by the new law for commencing suit before the bar takes effect." (Emphasis supplied.)

Chapter 10, Laws 1927, is in the interest of uniformity and is a statute of repose and deemed by the legislature to be vital to the public welfare and did not offend the constitutional provision invoked by cross-appellants. Furthermore, as we have pointed out, Chapter 139, Laws 1929, prohibiting the exercise of powers of sale in mortgages intervened before the mortgage dated Nov. 22, 1929 was executed. If this be considered as a mortgage executed subsequent to the effective date of that act, the power of sale contained therein could not be exercised. If, on the other hand, the mortgage dated November 22, 1929 could be treated as a revival of the debt mentioned in the mortgage dated December 13, 1921, it could not serve to extend the time for enforcing the lien of the December 13, 1921 mortgage, because in the meantime, the remedy of foreclosure under power of sale had been withdrawn by the Legislature. The so-called renewal mortgage with respect to the remedy must be deemed to have been made subsequent to the time Chapter 139, Laws 1929, went into effect. Assuming that the later note and mortgage could have the effect to revive a debt barred by the statute of limitations, it could not give a remedy for the foreclosure of the security through power of sale in the face of a contrary public policy. In other words, if the November 22, 1929 mortgage was not in all respects a new mortgage, it must be regarded as at most, an attempt to vitalize a power of sale which time and circumstance had outlawed, and as this attempt was subsequent to the 1929 prohibitory act, it would be within the spirit of the prohibition. It is settled law that contracts opposed to public policy cannot be enforced. In the case at bar, the stipulation for the power of sale in the November 22, 1929 mortgage was made subject to the conditions imposed by existing law.

Other propositions unconvincingly urged by cross-appellants in support of their appeal have been considered, but we find it unnecessary to discuss them.

From all of the foregoing, we hold that the portion of the judgment appealed from by cross-appellants must be affirmed.

We come now to a consideration of the appeal of the plaintiff.

It will be remembered that the court denied relief to plaintiff in her ejectment suit because the defendants were "mortgagees in possession" and because plaintiff refused to pay the amount due on the senior mortgage.

Appellants' basic contentions briefly stated are:

1. Appellees did not urge in the district court that they were mortgagees in possession.

2. The senior mortgage relied upon by the appellees had been satisfied and released.

3. If the mortgage had not been satisfied and released, it was unenforceable because of the statutes of limitations and the laws of New Mexico, and therefore the mortgage lien was extinguished and the defendants could not be mortgagees in possession.

We hold that the decision of the trial court that the defendants were mortgagees in possession was within the issues presented during the trial, even though it may not have been presented by the original pleadings. We do not find that the appellant satisfactorily presented to the trial court the objection now raised to the trial court's authority to consider and determine the issue as to whether defendants were mortgagees in possession.

The claim of appellant that the mortgage and the mortgage debt had been satisfied, rests upon the circumstance that following the death of Dan C. Savage on January 1, 1940, his widow, the defendant Margaret Savage, found in his bank box a Satisfaction of Mortgage which purported on its face to satisfy and release the mortgage in favor of Mrs. J. C. Waugh, the original defendant in this action, and that such Satisfaction of Mortgage had been in the possession and control of Margaret Savage since that date. This instrument purported on its face to satisfy the mortgage bearing date the 22d of November, 1929, and was executed and acknowledged the 9th day of August, 1934.

As to this circumstance, the trial court found: "That nothing whatever was paid for said Satisfaction, but it was given at the time the maker thereof was in Roswell on a visit when it was contemplated by the parties that a new mortgage would be given in place of the one the Satisfaction purported to release, but the said transaction was never carried out; that is, no renewal was ever executed, and there was no consideration whatever for said release and it was never effective."

We have carefully considered the testimony and we conclude that this finding is supported by substantial evidence. The fact that the alleged satisfaction of mortgage was not recorded, whereas the mortgage it purported to satisfy was of record, notwithstanding that it is a statutory duty of the mortgagee when the debt is paid, to cause the satisfaction of mortgage to be entered of record, under penalty for failure to do so, 1941 Comp. 63-404, 63-405, and the interest which the mortgagor has in seeing that such recordation is accomplished if in fact the debt has been paid, lends support to the testimony given in the case.

The trial court made a finding of fact as follows: "That the said Mrs. J. C.

Waugh, through her said attorney took possession of said real estate above described on the 20th day of May, 1942, by the service of written notice upon the said Margaret Savage who had theretofore been looking after said real estate and the rentals thereof, copy of said notice being attached hereto and made a part hereof; that said Margaret Savage made no objection to the taking of possession of said premises by the said Mrs. J. C. Waugh; and that since said date the said Mrs. J. C. Waugh had possession of said premises until her death as above stated; and that since the appointment of the said Margaret Savage, administratrix of the estate of the said Mrs. J. C. Waugh, has charge and possession of said real estate since her said appointment and qualification as such administratrix, and that the said Margaret Savage, as such administratrix, for herself and the other heirs of the said Mrs. J. C. Waugh, deceased, is claiming possession by virtue of the sale and deed above mentioned." and made the following conclusion of law: "That having taken possession of said property as mortgagee prior to the foreclosure sale of plaintiff in this action as well as the sale under the 1921 mortgage, she is still actually a mortgagee in possession, and the defendant in this action is entitled to hold such possession until the amount due under such mortgage less any rents and profits received since she went into possession are paid or tendered to her by the plaintiff herein."

In Jones on Mortgages, 8th Ed., sec. 886, it is stated:

"A mortgagee can not be divested of possession until payment. Even where a mortgagor can not be divested of his possession without a foreclosure and sale, if the mortgagee, or any one standing in his place, has with the assent of the mortgagor obtained possession, neither the latter, nor any one claiming under him, can, by an action of ejectment or otherwise, recover possession until the debt is paid. * * *

"It is not essential to the status of a mortgagee in possession that possession should have been taken under the mortgage, nor with the consent of the mortgagor. It is enough if the possession be peaceably and legally acquired. The mortgagor's consent may be shown by circumstances.

"To be legal, the possession must have been taken in good faith, free from deceit, fraud, or wrong, and without violation of any contract relation with the mortgagor."

Again at sec. 1543, Jones says: "Although the right to proceed by action on the mortgage is barred, still, if the mortgagee can obtain rightful possession of the premises, he may retain them until the debt is paid." See also 37 Am.Jur., Mortgages,

§§ 794, 795, 796, 797 and 798, and Jasper State Bank v. Braswell, 130 Tex. 549, 111 S.W.2d 1079, 115 A.L.R. 329 and Annotation; and see Kaylor v. Kelsey, 91 Neb. 404, 136 N.W. 54, 40 L.R.A.,N.S., 839.

We gave recognition to the substance of these principles in Pershing v. Ward, 34 N.M. 298, 280 P. 254, 256, employing the expression "mortgagee in possession" and concluding: "Whenever the plaintiff wishes to redeem and resume possession, we assume he will find himself forced to offer to do equity by paying his debt to the defendant, whatever it may be instead of pleading the statute of limitations."

Appellant calls our attention to the statement found in Jones on Mortgages, 8th Ed., Sec. 1543, as an exception to the rule as follows: "But after the expiration of the time within which a mortgage may be enforced by foreclosure, the mere entering into possession by the mortgagee, without objection on the part of the mortgagor, does not restore the mortgage to efficacy, or entitle the mortgagee to the rights of a mortgagee in possession."

And to the same effect appellant quotes from Faxon v. All Persons, 166 Cal. 707, 137 P. 919, 924, L.R.A.1916B, 1209, italics supplied by appellant as follows: "* * * it appears clear to us that no such claim can properly be made upon an entry based upon proceedings for the enforcement of the lien instituted after the lien has been extinguished. The lien, together with all its incidents and appurtenances, being absolutely at an end, can no longer serve as a sufficient basis for the institution of any proceeding looking to its enforcement, or for the *conclusion that one entering under any such proceeding entered 'under color of the mortgage.'* * * * To confer any right of possession under the rule, the proceeding must at least have been based upon an *existing mortgage, not upon one that is dead and no longer a foundation for any enforceable right. We are satisfied* that the defendant *cannot* be held to be a *mortgagee in possession.*"

This argument of appellant and his citations deserve our attention, to ascertain whether they are persuasive here.

Our research discloses that in Banning v. Sabin, 45 Minn. 431, 48 N.W. 8, cited by Jones to the text relied upon by appellant, the Minnesota Court reached its conclusion substantially as supported by Jones upon the theory that where the right to foreclose the mortgage had become barred by lapse of time, the mortgage was in effect extinguished. The court cited Archambau v. Green, 21 Minn. 520, in which the court said that the denial of all remedy is *practically* an extinguishment of the mortgage. That decision in turn cited Burwell v. Tullis, 12 Minn. 572, 12 Gil. 486, where the court said that: "When a remedy is denied for its (mortgage lien) en-

forcement it is at least practically gone," and that it would no longer be a cloud on the title of the landowner. The significance of these references will appear when we contrast the views there expressed with judicial and legislative understanding in New Mexico.

In the California case of Faxon v. All Persons, etc., supra, the court reached the same result as the Minnesota court and said that a party could not be held to be a "mortgagee in possession" within the rule, because a California statute provided: "A lien is extinguished by the lapse of the time within which, under the provisions of the Code of Civil Procedure, an action can be brought upon the principal obligation." Civ.Code, § 2911, and reached the conclusion that: "To confer any right of possession under the rule, the proceeding must at least have been based upon an existing mortgage, not upon one that is dead and no longer a foundation for any enforceable right."

These views have a strong appeal to reason, but we may not adopt them in view of our decision in Baca v. Chavez, 32 N.M. 210, 252 P. 987. We there said that it had long been established here that the statute of limitations does not discharge the debt, but that it merely bars the remedy. We then proceeded to hold that the execution of power of sale in mortgages is not barred by limitation barring suit or action on the debt or security. Shortly thereafter, as we have seen, the 1927 Legislature nullified a portion of our decision in that case by asserting in Chapter 10, Laws '27, in effect that execution of power of sale in mortgages *is* barred by limitation barring suit or action on the debt or security.

Then the 1929 Legislature in Chapter 139 of the Laws of that session, passed a law prohibiting the sale of real property under the power of sale contained in mortgages. But neither enactment went so far as to declare that upon the lapse of time within which an action or suit upon the indebtedness secured by a mortgage could be commenced or when a power of sale contained in a mortgage could not be executed, that the lien of such mortgage is extinguished. We see no more reason to say that the mortgage lien is dead and extinguished and no longer a foundation for *any* enforceable right merely because it cannot be foreclosed by an action in court and cannot be foreclosed under a power of sale, than it would have been for us to have said in Baca v. Chavez that the effect of the bar of the statute of limitations is to extinguish the debt. Thus, being unable to conclude that the mortgage lien has been extinguished, even though unenforceable in a court action, or by exercise of the power of sale, we do not find the Minnesota and California cases cited supra persuasive.

It may be suggested in passing that the italicized portion of Chapter 34, Laws 1945, indicates a legislative understanding that a real estate mortgage even though unenforceable by foreclosure because barred by the statute of limitations is nevertheless a cloud on the title of the landowner, which is contrary to what is asserted arguendo by the Minnesota Court in Burwell v. Tullis, supra. Even this 1945 statute which of course is not controlling in the case at bar, does not declare that the liens therein mentioned are extinguished, but undertakes to declare that under some circumstances the owner or holder of such mortgage lien may be estopped from asserting any rights thereunder in a suit to quiet title against the holder of such mortgage lien.

Appellant asserts that the defendants are not mortgagees in possession and urges that language in the mortgages to the effect that if the mortgagors do not pay the debt secured when due the mortgagees or their agent or attorney "are hereby authorized and empowered to take possession of said granted real estate and premises, and, after having given notice of the time and place of the sale * * * expose at public auction and sell * * * the said granted premises and real estate, etc." means that the mortgagees may only take possession for the purpose of making the sale, and since the sale was prohibited by our statutes, Ch. 10, Laws 1927, and Ch. 139, Laws 1929, the possession was not lawful. We cannot agree to this. Wiltsie on Mortgage Foreclosure, sec. 823, says: "Where there has been a breach of a condition authorizing foreclosure, possession of the property by the mortgagee or trustee is not necessary to authorize him to exercise the power of sale. The mortgagee's or trustee's possession of the property is not a condition precedent to the sale under a power in a mortgage or trust deed expressly giving him the right to take possession or providing that it shall be his duty on request or his right to take the property into his possession and sell it. Neither is it where the instrument provides that 'upon default of payment of the debt secured the trustee shall immediately take possession, and, having given notice, sell the land conveyed,' because such provisions are intended simply to confer upon the trustee the right of possession, and not to make such taking of possession a condition precedent to the exercise of the power of sale."

In Baca v. Chavez, supra, we held: "Power of sale construed as not requiring entry or demand for possession as condition precedent to giving notice of sale."

We take these pronouncements into consideration in construing the language of the mortgages heretofore quoted. Since possession is not necessary in order to exer-

cise a power of sale, under all of the circumstances of the case at bar, we are disposed to give the covenant for possession in the mortgagee a construction which would authorize the mortgagee to take possession for a purpose other than to exercise the power of sale, as well as for the latter purpose. And taking notice also of judicial holdings that the conjunctive "and" may be construed in the sense of "as well as" (see Vol. 3, Words and Phrases, Permanent Edition, p. 398), we are not inclined to the view advanced by appellant.

In addition to authorities heretofore cited, defining the term "mortgagee in possession" we select a definition from the late case Wilhite v. Yount-Lee Oil Co., Tex.Civ.App.1940, 140 S.W.2d 293, 296: "'A mortgagee in possession,' in fact or strictly speaking, is a mortgagee who takes possession of the mortgaged land by virtue of the contract between him and the mortgagor. 41 C.J. 217. Having thus entered, with the consent and in recognition of the rights of the mortgagor, his possession (in the absence of a repudiation of the relationship) is not hostile to the debtor; and therefore will not ripen into a limitation title. It is the right of a mortgagee in possession to retain possession until his debt is paid. Such character of right has in some states been extended to, and the term 'mortgagee in possession' is frequently used as a convenient phrase to describe the condition of one who has peaceably and lawfully acquired possession of the mortgaged premises under such circumstances as that equity will require payment of the debt a prerequisite to being dispossessed by the mortgagor, as where he purchases and enters under and in reliance upon an irregular or void foreclosure sale."

And in Ponca City Building & Loan Co. v. Graff, 189 Okl. 410, 117 P.2d 514, the Supreme Court of Oklahoma decided: "Where building and loan association foreclosed a mortgage, bought in the mortgaged realty at foreclosure sale, and took possession thereof, and the court thereafter set aside the proceedings and the sale thereunder, the possession of the building and loan association became that of a 'mortgagee in possession', and as such the building and loan association was entitled to remain in possession until payment of the debt, or until the case was concluded by a new judgment and foreclosure sale."

In the case at bar the record shows that the mortgagee, Mrs. J. C. Waugh, took possession of the mortgaged land by virtue of the contract between her and the mortgagors. The possession was peaceably and legally acquired; Mrs. Waugh, the mortgagee, by retaining possession through the abortive proceedings to sell the land under the power of sale foreclosure did not thereby lose her status as a mortgagee in possession.

Other contentions made by appellant we have carefully considered, but find unnecessary to discuss.

From all of the foregoing, we conclude that the judgment must be affirmed, and it is so ordered.

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

HUDSPETH, J., did not participate.

168 P.2d 864

LOVELACE v. HIGHTOWER.

No. 4885.

Supreme Court of New Mexico.

May 1, 1946.

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George A. Shipley, of Alamogordo, and H. Hudspeth, of Carrizozo, for appellant.

John E. Hall, of Albuquerque, for appellees.

BRICE, Justice.

Plaintiff-appellant (hereinafter referred to as plaintiff) sought to enjoin defendant-appellee (hereinafter referred to as defendant) from interfering with plaintiff's use of an alleged public road or highway across the lands of the latter. Judgment was for defendant, and this appeal followed.

Plaintiff plead, and relied upon, two causes of action. In the first he alleged the establishment of the road or highway in question by the acceptance of a federal grant by means of use by the public while the land was unappropriated public domain, by authority of 43 U.S.C.A. § 932, which provides: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

For his second cause of action plaintiff alleged that the road was established by prescription after the land in question was filed upon and patented by defendant's predecessor in title, through use by the public for a period of time sufficient to give a prescriptive right in the public as against the private owner. All material issues were controverted by the answer and in addition it is alleged that if a public road had in fact been established, it had since been abandoned by non-user. The passage, or line of travel, contended for by plaintiff, will be referred to as the "passage," "highway," or "road," without implying that it was in fact a prescriptive road, public or private.

The road, it is alleged, traverses the ranch and lands of defendant, which comprises some 17 or 18 sections of land

in Lincoln County. It enters near the northeast portion, crossing it in a southwesterly direction, following generally along a shallow and non-precipitous depression, or drainage area, sometimes known as Largo Canyon.

The court's findings are as follows:

(1) There has not been continuous use by the public of the road in question in its entirety, nor as to any or all parts thereof as it crosses lands of defendant, for a period of ten years prior to all of the times that Homestead Entries were made as to said lands; and this applies whether homestead entries as to the lands patented in 1923, above described, were made three or five years prior to the issuance of patents thereto.

(2) For the period of ten years subsequent to the time when all of defendant's lands came into private ownership under patents there has not been, by the public, continuous, open, uninterrupted, peaceable, notorious nor adverse, use of the road in question in its entirety, nor as to any or all parts thereof as it crosses the lands of the defendant, nor with the knowledge of defendant or of former owners; and this applies if it can be said that the period of prescription as to patented lands starts as of the time of homestead entries (though the court does not so hold in law).

Then follow the court's conclusions of law, to-wit:

(1) One method of accepting a grant for a public road on the public domain under Section 2477, Rev.St. of U.S., 43 U.S.C.A. § 932, is by continuous use thereof by the public; and the required length of time of such use is ten years in New Mexico.

(2) When homesteads are made on lands of the public domain the lands covered by such homesteads cease to be public domain, such that after the time that a homestead entry has been duly made any use of the road by the public over lands included in such entry is ineffectual to constitute a grant under said United States Statute.

(3) What is necessary and essential to establish a public road by prescription is such as is set out under Finding of Fact No. 2 above.

(4) As to other matters heretofore set out as matters of law, the court makes them as its conclusions of law.

(5) The court concludes that plaintiff's relief prayed for should be denied and that his action herein should be dismissed.

The word "highway" as ordinarily used means a way over land open to the use of the general public without unreasonable distinction or discrimination, established in a mode provided by the laws of the state where located. Ball v. Steph-

ens, 68 Cal.App.2d 843, 158 P.2d 207. In New Mexico highways are defined as follows: "All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways." Sec. 58-101, N.M.Sts. 1941.

Highways can be established only as provided by the statute quoted (Board of County Com'rs v. Friendly Haven Ranch Co., 32 N.M. 342, 257 P. 998), unless they can be established by a prescriptive user.

The Federal statute involved is as follows: "The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted."

This is an offer to dedicate any unreserved public lands for the construction of highways, to become effective when accepted; Atchison, T. & S. F. R. Co. v. Richter, 20 N.M. 278, 148 P. 478, L.R.A. 1916F, 969; Moulton v. Irish, 67 Mont. 504, 218 P. 1053; Bishop v. Hawley, 33 Wyo. 271, 238 P. 284; although there is authority which holds that it is a grant in presenti, taking effect when accepted as of the date of the grant (1866), Tholl v. Koles, 65 Kan. 802, 70 P. 881; City of Butte v. Mikosowitz, 39 Mont. 350, 102 P. 593. It is immaterial here which construction is correct. It is an offer to dedicate land that must be accepted to become effective under either holding. State ex rel. Shelton v. Board of Com'rs of Bernalillo County, 49 N.M. 218, 161 P.2d 212.

The only question we need consider is whether a highway can be established by dedication under the federal statute and state laws by public user for a period of time less than ten years, if at all. It is asserted that it can be established only by a user of ten years. But we are of the opinion that if in this state a highway can be established over public land by public user alone (that is, if the offer to dedicate can be accepted by the public without some action by the public authorities), the continued use of the road by the general public for such time and under such circumstances as to clearly prove an acceptance of the offer by it, the highway is established, whether the time of user is six months or fifty years. The time of user is competent evidence on the question of acceptance or non-acceptance by the public, but so is the amount and character of user, or any other evidence tending to prove or disprove acceptance.

It is a general rule that acceptance of an offered dedication of land for a highway may be established by proof of

affirmative acts of taking possession by public authorities or by general use by the public, provided the use is sufficient to constitute acceptance. Wilson v. Williams, 43 N.M. 173, 87 P.2d 683; City of Cincinnati v. White's Lessee, 6 Pet. 431, 8 L.Ed. 452; Irwin v. Dixion, 9 How. 10, 11, 13 L.Ed. 25; Corning v. Aldo, 185 Wash. 570, 55 P.2d 1093; McCue v. Berge, 385 Ill. 292, 52 N.E.2d 789; City of Santa Clare v. Ivancovich, 47 Cal.App.2d 502, 118 P.2d 303; Calhoon v. Pittsburgh Coal Co., 128 Pa.Super. 582, 194 A. 768; North Beach v. North Chesapeake Beach Land & Improvement Co., 172 Md. 101, 191 A. 71; La Chappelle v. Jewett City, 121 Conn. 381, 185 A. 175; City of McCook v. Red Willow County, 133 Neb. 380, 275 N.W. 396; Keiter v. Berge, 219 Minn. 374, 18 N.W.2d 35.

The Supreme Court of the United States has said that such user "ought to be for such a length of time that the public accommodation and private rights might be materially affected by an interruption of the enjoyment." City of Cincinnati v. White's Lessee, supra [6 Pet. 439].

A highway may be established in New Mexico by dedication, Sec. 58-101, N.M.Sts.1941, supra, and acceptance, State ex rel. Shelton v. Board of Com'rs of Bernalillo County, supra.

No question of *implied dedication* is involved. The United States as a landowner has made an offer to dedicate unappropriated land for highways, if accepted as authorized by this state's law, the easement for its use as a public highway was created exactly as though the dedicator was an individual landowner. If mere public user is a sufficient acceptance of an offered dedication, the ten year statute of limitation is not remotely applicable. Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536, cited in support of the trial court's holding, involved a private way over private land that had never been dedicated for such use, and has no application to the facts of this case. If Mrs. Hester had offered to dedicate a way across her property for the use of Sawyers and he had accepted it by entering the land and constructing a road, the ten year statute of limitation would not have been involved.

The courts of a majority of the states which have had the question for consideration have held that the general rule applies to the offered dedications of highways under the federal statute involved here. Schwerdtle v. Placer County, 108 Cal. 589, 41 P. 448; Streeter v. Stalnaker, 61 Neb. 205, 85 N.W. 47; Lindsay Land & Live Stock Co. v. Churnos, 75 Utah 384, 285 P. 646; Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262, 70 L.R.A. 1027; City of Butte v. Mikosowitz, supra; Ball v. Stephens, supra; Corning v. Aldo, supra; Leach v. Manhart, 102

Colo. 129, 77 P.2d 652; Tholl v. Koles, supra; Van Wanning v. Deeter, 78 Neb. 282, 110 N.W. 703; Nicolas v. Grassle, 83 Colo. 536, 267 P. 196; Hatch Bros. Co. v. Black et al., 25 Wyo. 109, 165 P. 518; Bishop v. Hawley, 33 Wyo. 271, 238 P. 284; Montgomery v. Somers, 50 Or. 259, 90 P. 674; Moulton v. Irish, supra; Murray v. City of Butte, 7 Mont. 61, 14 P. 656.

We adopted the general rule in Wilson v. Williams, supra; but the trial court appraised that case as having adopted an exception originating as dictum in opinions of the Washington Supreme Court, in which it was held that the offered dedications over public lands required user for the prescriptive term of ten years to constitute acceptance. A history of this departure from the general rule of accepting a dedication by public user will be helpful.

In Smith v. Mitchell, 21 Wash. 536, 58 P. 667, 668, 75 Am.St.Rep. 858, a construction of the federal statute, 43 U.S. C.A. § 932, involved was before that court for the first time. The question was whether a prescriptive right could attach during a period while land was held under a pre-emption or homestead claim and subsequent to patent by the United States. The land was patented in 1880 but the grantor had been in possession as a settler since 1874. The road was first used as a public highway in 1872 and so continued without interruption until 1882 when the land was fenced and a gate placed by the pre-emptor across the highway. It was not kept locked and the public used the road until 1897. The court stated: "* * * In this state the establishment of highways by prescription is recognized (State v. Horlacher, 16 Wash. 325, 47 P. 748), and roads may be established by use as well as by proceedings under the statute. It is a well-known fact that many of the public highways in this state had their inception in adverse user, which ripened into prescription. The act of congress already referred to does not make any distinction as to the methods recognized by law for the establishment of a highway. It is an unequivocal grant of right of way for highways over public lands, without any limitation as to the method for their establishment, and hence a highway may be established across or upon such public lands in any of the ways recognized by the law of the state in which such lands are located; and in this state, as already observed, such highways may be established by *prescription, dedication, user,* or proceedings under the statute. * * * Our conclusion upon this branch of the case is that the congressional grant includes and embraces any mode that is recognized for the establishment of the public highways, and carries with it whatever is necessary to make it effectual." (Our emphasis.)

There was a 10 year user subsequent to the pre-emptor's settlement on the land. The holding seems to be that the use from 1872 to 1897 created a prescriptive right in the public.

In City of Seattle v. Smithers, 37 Wash. 119, 79 P. 615, 616, the question was whether the user of a public road over private land for the period of limitations for quieting title became a public user by prescription. The court stated: "The lower court was evidently of the opinion that, before a road could become a public highway by prescription, public work or money must have been expended thereon, under the provisions of section 3846, * * * because a finding was made to the effect that no work has been done on the road at public expense. But this statute does not apply to roads which have been used adversely for a period of time sufficient to constitute a road by prescription without public expense thereon. It applies to cases only where public work, and money have been expended. In such cases seven years' user is made sufficient, in other cases the prescriptive period is coextensive with the period of limitation for quieting title to the lands. Wasmund v. Harm [36 Wash. 170, 78 P. 777], supra. The purpose of this statute was evidently to lessen the prescriptive period when public work and money had been expended. It does not affect the rule in those cases where no public work has been done. This being the effect of the statute, it follows that the findings of the trial court show a public highway by prescription."

It will be noted that Washington's seven year limitation statute applies to roads *adversely* used for that period of time, provided public work is done and public money is spent thereon.

In Okanogan County v. Cheetham, supra, the Washington court, after holding that the grant was one in praesenti (afterwards overruled by the same court), stated: "* * * Respondent contends that, as her homestead entry was made before this strip had been used as a highway for the period of 10 years, and before the county commissioners had adopted the resolution referred to, she had rights paramount to those seeking to use said strip as a highway, and that the action of the public in using said roadway and the action of the county commissioners in adopting said resolution were insufficient to deprive her of the right of control over said strip of land. * * * But questions quite similar claimed the court's attention in the case of Smith v. Mitchell, 21 Wash. 536, 58 P. 667, 75 Am.St.Rep. 858, the main distinction between that case and this being that in said case the road in question had been in use for a period of 10 years prior to the homestead entry, while here it was only seven."

The court again held that the congressional act provided for a grant in praesenti and quoted with approval from Wells v. Pennington County, 2 S.D. 1, 48 N.W. 305, 39 Am.St.Rep. 758, as follows: "'As to the intent of Congress in this enactment granting the right of way to cross the public lands, there can be no reasonable doubt. The object of the grant was to enable the citizens and residents of the states and territories where public lands belonging to the United States were situated to build and construct such highways across the public domain as the exigencies of their localities might require, without making themselves liable as trespassers. And when the location of the highway and roads was made by competent authority or by public use, the dedication took effect by relation as of the date of the act; the act having the same operation upon the lines of the road as if specifically described in it.'"

The Washington court continued: "As to user by the public constituting an acceptance of a dedication for highway purposes, the Cyc. vol. 13, at page 465, says: 'An offer of dedication, to bind the dedicator, need not be accepted by the city or county, or other public authorities, but may be accepted by the general public. To deny this would be to deny the whole doctrine of dedication. The general public accepts by entering upon the land and enjoying the privileges offered; or, briefly, by user. Except when user is relied on to raise a presumption of dedication, *the duration of the user is wholly immaterial.*" (Our emphasis.)

Washington's seven year statute is as follows: "All public roads and highways in this state that have been used as such for a period of not less than seven years, and are now so used, where the same have been worked and kept up at the expense of the public, are hereby declared to be lawful roads and highways within the meaning and intent of the laws now existing governing public roads and highways in this state." Rem.Rev.Stat.Wash. § 6494.

This statute was in force at the date the Cheetham case was decided. On that date a highway could "be established by prescription, dedication, user, or proceedings under the statute." Smith v. Mitchell, supra.

We conclude from the Washington decisions up to that time, that because of the seven year limitation statute no highway could be established by public user alone except in cases of dedication, or by adverse user for a period of ten years over private land, thus creating a prescriptive right. But as held in the Cheetham case, the general rule regarding the acceptance of a dedication by public user was not affected by this statute.

In Vogler v. Anderson, 46 Wash. 202, 89 P. 551, 552, 9 L.R.A.,N.S., 1223, 123

Am.St.Rep. 932, the doctrine advanced by the appellee here was first announced, though unnecessary to a decision of the case. The Washington court stated: "This court reversed that decision (Okanogan County v. Cheetham), holding that continuous user for a period of seven years was sufficient to establish the way as a public highway. But it was not said, or intended to be said, that a user for any lesser period than seven years would be sufficient for that purpose. On the contrary, to hold that a lesser period would suffice in this state would violate the terms of the grant made by Congress. The grant is for a right of way to establish a public highway, *and a public highway must be established in some of the ways provided by statute before the grant takes effect.* If the road is established under the statute providing for their establishment by the board of county commissioners, it takes effect when the commissioners lawfully establish the road; but, if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription. The shortest period allowed by statute to establish a highway by user in this state is seven years (citing statute) and no user, short of this period, can therefore be held to be an acceptance of the grant contained in the act of Congress cited. As the use in the case at bar had continued for at most but two years before the appellants entered upon the land, no right by prescription had been acquired, and the court erred in holding the way in dispute to be a public highway." (Emphasis ours.)

The statement "but, if the road is established by adverse user, it takes effect when the adverse user ripens into a right by prescription" could not properly apply to highways established under the federal statute. The user is not adverse, nor is the right a prescriptive one.

As the land involved in the Vogler case was subject to the federal statutory dedication, and mere acceptance by the public, according to prior decisions, was sufficient to make the grant effective, the cases of Smith v. Mitchell, supra, and Okanogan County v. Cheetham, supra, were in effect overruled by limiting the establishment of highways to "some of the ways provided *by statute* before the grant takes effect." There was no statute providing for such establishment by public user alone; but strange to say it was inferentially held that a *prescriptive right* could be acquired by a public adverse user for ten years, though no statute so provided.

In Stofferan v. Okanogan County, 76 Wash. 265, 136 P. 484, it was reiterated that the federal statute was not a grant in praesenti. It was contended by the landowner that a highway under Washington law could only be established in the

manner provided by the statutes of that state, as specifically held in the Vogler case, citing also Tucson Consol. Copper Co. v. Reese, 12 Ariz. 226, 100 P. 777. The Washington court stated that under Arizona law "no road could be established except under a statute," [76 Wash. 265, 136 P. 487] (exactly the holding in the Vogler case), then said: "The appellant contends that, since the act of Congress referred to is not a grant in praesenti, it can only be available by the establishment of the road by the county commissioners upon application by petition of at least 10 householders of the county residing in the vicinity of the proposed road, as provided * * * citing in support of that view Tucson Consol. Copper Co. v. Reese, 12 Ariz. 226, 100 P. 777; but in that case it was held that, under the laws of Arizona, no road could be established except under a statute similar to that contained in the sections of our statute above cited. In this state, however, we have repeatedly held that roads may be established by prescription by the use by the public for a period of not less than 7 years, where the same have been worked and kept up at the expense of the public, as provided in (citing statute), or, where not so kept up at the public expense, simply by continued use by the public for a period coextensive with the period of limitation for quieting title to land, which is, in this state, 10 years."

It thus appears that the Washington court, without citing authority or in fact giving any reason for its holding, concluded that if a highway was not established over public land under a statute it could only be established by continuous use by the public for a period of 10 years "coextensive with the period of limitation for quieting title to land." No reason is given for this holding, nor is it claimed that the tendered dedication by the United States government placed the public in any different position than if the dedication of private lands had been tendered by an individual landowner.

This continued to be the rule until the recent decision in Corning v. Aldo, 185 Wash. 570, 55 P.2d 1093, 1095. In that case the Washington court, without referring to Stofferan v. Okanogan County, supra, and Vogler v. Anderson, supra, reaffirmed the doctrine of Okanogan County v. Cheetham, supra, and that, it seems, is the present rule of the Washington supreme court.

The controversy in the Corning case was over a 20 foot strip of land used as a roadway. The court stated:

"We rest our decision herein upon two grounds: (1) That, under the evidence disclosed by the record, a public roadway was created by dedication and acceptance, and (2) that the title to the 20-foot strip

in the gully never vested in the appellants at all.

"Prior to the time that appellants contracted to purchase the land, their grantors had, by a written instrument, dedicated the 20-foot strip here in question to public use by granting to the general public the right and privilege to use the same forever for public roadway purposes. * * * Pursuant to the dedication of the 20-foot strip by its owners, the public continued to use the same, as it had previously done, for the purposes indicated. That use has continued to the present time.

"Dedication originates in the voluntary donation of the owner or seller, and, when the intention of the owner to dedicate is clear, manifest, and unequivocal, whether by a written instrument or by some act or declaration of the owner manifesting his clear intent to devote the property to public use, it becomes effective for that purpose. Shell v. Poulson, 23 Wash. 535, 63 P. 204. There can be no question in this case that the dedication of the 20-foot strip for use by the general public for roadway purposes was intentional, clear, and unequivocal.

"User by the public following dedication constitutes an acceptance of the dedication. User, if actual and continuous, *need not be for any fixed time,* because it is not a matter of prescription merely, but one of *acceptance of the grant.* Okanogan County v. Cheetham, 37 Wash. 682, 80 P. 262, 70 L.R.A. 1027. In the present case, we have an actual and continuous user from the beginning to the present. We have, then, intentional dedication followed by actual and continuous user. A roadway thereby became established." (Our emphases.)

While the Corning case did not involve public land, the Cheetham case (the only supporting authority cited) was such a case. In principle, the status of the landowner who makes a dedication is immaterial. The same rule that permits an acceptance by public user of a dedication made by an individual should apply to the United States as a landowner. Only acceptance by the public authorities or by user is necessary to establish a highway. The 10 year statute of limitation as applied to ways established by prescription is not a factor in establishing highways by dedication.

The following decisions of the Montana Supreme Court have been cited in support of the trial court's conclusions: Butte v. Mikosowitz, supra; Montana Ore Purchasing Co. v. Butte & B. Consol. Min. Co., 25 Mont. 427, 65 P. 420; Warren v. Chouteau County 82 Mont. 115, 265 P. 676, and State ex rel. Darsie v. Nolan, 58 Mont. 167, 191 P. 150. There should be included the following which are not cited: Murray v. City of Butte, 7 Mont.

61, 14 P. 656; State v. Auchard, 22 Mont. 14, 55 P. 361; Barnard Realty Co. v. City of Butte, 48 Mont. 102, 136 P. 1064, and Moulton v. Irish, supra.

The question here presented was first raised in Murray v. City of Butte, supra. In that case the Montana court stated: "Section 2477, Rev.St.U.S. [43 U.S.C.A. § 932], reads as follows: 'The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.' This law is a grant to the public of an easement for the purpose therein mentioned; and it has been decided by this court that such a law is 'the highest evidence of title.' See Northern Pac. R. Co. v. Majors, 5 Mont. 111, 2 P. 322.

"The law, then, was a grant of an easement for a public use.

"In the case of City of Cincinnati v. White's Lessee, 6 Pet. 431 [8 L.Ed. 452], and 10 Curt.Dec. 179, is a leading case upon the question of dedication of land for public use. It is there held: 'There is no particular form of ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, *and the fact of its being used for the public purposes intended by the appropriation.*' See, also, Smith v. Town of Flora, 64 Ill. 93.

"* * * Sec. 2477 was a grant by the government of an easement, and defendant sought to prove an acceptance prior to the location upon which the patent was based. If such an acceptance of the grant of the easement could have been established, it would have been valid against the government, and therefore valid against the subsequent grantees of the government, who must take the land in question, subject to any easement which was valid against the government at the time of the location." (Emphasis ours.)

The rule laid down by the Montana cases is well stated in City of Butte v. Mikosowitz, supra [39 Mont. 350, 102 P. 595]. "We think the evidence offered on behalf of the city, touching the character and extent of the use made of the disputed ground, was ample to go to the jury. In answer to a special interrogatory the jury found that the strip had been used by the public generally as a roadway for 5 years or more, prior to July 1, 1895. The evidence was sufficient to establish a road by prescription, if the land over which it passed had been the subject of private ownership. The purpose of the congressional grant or dedication is to enable the public to acquire a roadway over public lands. The method by which the roadway is to be established is not specified; and it must be held, therefore, that the Congress intended that any acts by which the public might acquire a public roadway over private property, other than by pur-

chase, would be sufficient to constitute an acceptance of this grant or dedication."

From 1895 to 1913 a Montana statute provided in substance that a highway could not be established by user alone. Warren v. Chouteau County, 82 Mont. 115, 265 P. 676.

There are statements in some of the cases herein mentioned, and particularly State ex rel. Darsie v. Nolan, supra, to the effect that the federal dedication could not be accepted by a public user for a term less than that required to obtain title to private real estate by prescription; and the appellee cites them in support of this theory. But the Montana court in a recent case stated that such was not its intent. In Moulton v. Irish, supra [67 Mont. 504, 218 P. 1055], it was stated: "We do not wish to be understood as holding that the continuous use of a road by the public for five years prior to July 1, 1895, was necessary to establish a public highway over unappropriated public lands in order to meet the requirements of the statute. Murray v. City of Butte, 7 Mont. 61, 14 P. 656; Hughes v. Veal, 84 Kan. 534, 114 P. 1081."

It is stated in Hughes v. Veal, cited by the Montana court [84 Kan. 534, 114 P. 1083]: "A long user by the public is not necessary to an effectual acceptance of a dedication where the owner (the United States in this instance) has given consent, and is holding out a standing offer to dedicate land for a highway. Where there is consent by the owner, the length of time of the public use is not important, for upon an acceptance by use the rights of the public to an easement immediately passed and vested. Schwerdtle v. County of Placer, 108 Cal. 589, 41 P. 448."

And that seems to be the present holding of the Montana court.

In Maynard v. Bara, 96 Mont. 302, 30 P.2d 93, 95, the question of whether a highway had been established was an issue. It was said that under the facts, the judgment could be sustained only upon the theory of prescription or common-law dedication; that prior to July 1, 1895 a highway could be established by prescription, but after that date and until 1913 it could not be so established, "unless the use was accompanied by some action on the part of the public authorities having jurisdiction of the subject, tantamount to a declaration that the particular road was a public highway," citing State ex rel. Darsie v. Nolan, supra. It was then stated that in 1913 the law was amended so that its status was similar to that existing prior to July 1, 1895. The Montana court then cautiously stated: "It is unnecessary, as we shall presently see, for us to determine the exact status of the law as to the establishment of a highway by prescription subsequent to 1913." So far

as we are advised this particular question has not been before the Montana court since Moulton v. Irish, supra; but the question was settled in that case adversely to the holding of the district court.

The appellee cites a number of cases having reference to prescriptive rights of individuals over private lands, such as Hester v. Sawyers, supra; Pope v. Alexander, 36 Mont. 82, 92 P. 203, 565; Burling v. Leiter, 272 Mich. 448, 262 N.W. 388, 100 A.L.R. 1312; Jensen v. Gerrard, 85 Utah 481, 39 P.2d 1070; Sullivan v. Mefford, 143 Iowa 210, 121 N.W. 569, and some other cases having no reference to the establishment of public highways over public or private lands, not material to the questions presented here; and they are not reviewed.

Tucson Consol. Copper Co. v. Reese, supra, is cited by the appellee. It holds that a statute of Arizona prohibits the establishment of a highway by use alone. We have no such statute, and hold that a public highway can be established in New Mexico by use alone. The case is not applicable.

The North Dakota cases cited are controlled by a statute which provides that 20 years public user is required in that state to establish a highway by use alone. Obviously these cases are not authority here.

The trial court erred in its conclusion that it required a public use for ten years to effect an acceptance of the offered dedication of a highway over unreserved lands of the United States, under 43 U.S.C.A. § 932, for which the decree must be reversed in part.

The appellant asserts by his second cause of action that he and the general public had used and traveled the road in question for more than twenty years prior to the bringing of this suit; that said use for all this time had been continuous, uninterrupted, adverse to all others and under a claim of right.

The trial court found as follows: "For the period of ten years subsequent to the time when all of defendant's lands came into private ownership under patents there has not been, by the public, continuous, open, uninterrupted, peaceable, notorious nor adverse, use of the road in question in its entirety, nor as to any or all parts thereof as it crosses the lands of the defendant, nor with the knowledge of defendant or of former owners; and this applies if it can be said that the period of prescription as to patented lands starts as of the time of homestead entries (though the court does not so hold in law)."

We stated in Board of County Com'rs v. Friendly Haven Ranch Co., supra, regarding a road that had been used by the public generally for forty years: "* * * The court found that there is a road at

the place in controversy, which has been traveled by the public generally for a period of more than 40 years. There is no finding as to the character of the use made of the road by the public, whether it was adverse under claim of right, or whether it was merely permissive. The proof shows that the road was privately constructed and maintained, and tends to show that the use made of the road by the neighbors and the public was permissive at all times. No dedication of the road to public use is shown. Under such circumstances, it would seem clear that no public road exists at the place involved. * * *The proposition is not open to debate, and all the courts agree that in order to establish a highway by prescription the public use must be adverse, uninterrupted, continouus, and under claim of right."

We need not go into the question of whether a highway may be established by prescription. Meek v. Love, 197 Ark. 394, 122 S.W.2d 606. It is the general rule that usage by the general public continued for the length of time necessary to create a right of prescription if the use had been by an individual, will be sufficient provided such usage is open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continued for a period of ten years with the knowledge, or imputed knowledge of the owner. Hester v. Sawyers, supra.

We have read the voluminous testimony, and find in it substantial evidence to support the court's second finding. It would serve no useful purpose to review it here. It is conflicting to a high degree, but it was the function of the trial court to determine the facts.

The trial court did not err in holding that a highway had not been established over appellee's land, as claimed by appellant, after title, or inchoate title, had passed from the United States.

It should be stated that if a highway as claimed by appellant was established while the land was the unreserved property of the United States, the fact it thereafter passed into private ownership did not affect the rights acquired by the public by its acceptance of the offered dedication. Korf v. Itten, 64 Colo. 3, 169 P. 148; Red River, etc., R. Co. v. Sture, 32 Minn. 95, 20 N.W. 229; Duffield v. Ashurst, 12 Ariz. 360, 100 P. 820; Ball v. Stephens, supra; Nicolas v. Grassle, 83 Colo. 536, 267 P. 196.

It is to be regretted that the cause cannot be remanded for new findings, but inasmuch as the judge who tried the case below died soon thereafter, we can only remand it for a new trial of the first cause of action, and defenses as pleaded.

The decree is affirmed as it affects the second cause of action, and reversed and

remanded to the district court with instructions to set aside its decree and grant a new trial of the issues in the first cause of action, and thereafter enter a decree not inconsistent herewith.

It is so ordered.

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

HUDSPETH, J., did not participate.

169 P.2d 238

LOYD et al. v. SOUTHWEST UNDERWRITERS et al.

No. 4909.

Supreme Court of New Mexico.

Jan. 28, 1946.

Rehearing Denied June 8, 1946.

Edwin Mechem and Thos. B. Rapkoch, both of Las Cruces, for appellants.

W. C. Whatley and R. C. Garland, both of Las Cruces, for appellees.

MABRY, Chief Justice.

Appellants Odell Loyd and Murle Lou Loyd entered into a contract with Marvin Mitchell and Lillie Mitchell, his wife, by which the Mitchells agreed to sell and appellants agreed to purchase a quarter of section of land in Luna County together with a certain piece of personal property for the total price of $4,000, $1438 of which was to be paid in cash and the balance to be paid in four equal instalments of $640.50 each, the deferred payments to be evidenced by four promissory notes. The contract provided that the $1438 was to be deposited with appellees, Southwest Underwriters of Deming, New Mexico, a copartnership, the Mitchells, by their contract, warranting and agreeing that they "owned the property free and clear of all liens and encumbrances" excepting a mortgage on the real estate in the sum of $600, which they assumed and agreed to pay. The Mitchells agreed to furnish an abstract of title showing good and merchantable title and providing that should they not be able to give a good and merchantable title to the premises, the $1438 down payment which was to be deposited with appellee Underwriters was to be returned to appellants and the contract then to become null and void. The Mitchells agreed to furnish an abstract of title within thirty days of

the date of the contract and appellants were to have sixty days from that date to have completed the examination thereof to determine whether the Mitchells had a good and merchantable title to the premises, subject to the mortgage above referred to.

The down payment was deposited with the Southwest Underwriters and abstract of title was furnished within the time agreed upon, from which it was disclosed, by an examination, also made within the sixty days, that aside from the $600 mortgage indebtedness due, that one Leroy Pelayo had a one-sixteenth interest in the land which had not been acquired, and which had not yet been acquired at the time of the suit, some fifteen months after the making of the contract. Appellants, without joining the Mitchells, sued the escrow agent, the Southwest Underwriters, and Josephine K. Smith, manager of the agency, for the return of the $1438 so deposited as representing the initial payment so made. Upon trial appellees moved the court to dismiss and the cause was dismissed for the reason the Mitchells were not made parties to the suit, the court holding that they, the vendors under the contract, were necessary parties to a final determination of the issues; appellants declined to amend their pleadings to bring in the Mitchells as parties defendant, elected to stand upon their complaint, judgment was entered dismissing the cause and this appeal follows. The right of the Mitchells to intervene, or the right of the appellees, as defendants, to interplead them, neither of which was done, is conceded. Appellants say that under the circumstances the Mitchells have no interest in the deposit, and are not necessary parties. Appellees contend that it was not their duty to interplead them, in any event.

Whether the Mitchells, objecting to the return of the deposit, should have been made parties defendant, and whether in fact appellants had a cause of action, must be determined from a consideration of the terms of the contract of sale. It is desirable that the entire contract be set out and noticed in this connection.

"This Contract, made and entered into this 23rd day of July, A.D. 1943, by and between Marvin Mitchell and Lillie Mitchell, his wife, the parties of the first part, and Odell Loyd and Murle Lou Loyd, the parties of the second part.

"For and in consideration of the sum of Four Thousand and No/100ths Dollars ($4,000.00), the parties of the first part agree to sell and the parties of the second part ageee to buy that certain property located in the Village of Deming, County of Luna, State of New Mexico, and more particularly described as follows, to-wit:

"The southwest quarter (SW¼) of Section Twenty-Seven (27), in Township Twenty-Six (26) South, of Range Nine (9) West of the New Mexico Meridian, New Mexico, containing one hundred sixty (160) acres, more or less, also One

Peerless Pump Serial No. 15370, complete with Chevrolet Motor.

"Parties of the Second Part agree to pay the sum of Four Thousand and No/100ths Dollars ($4,000.00) in the following manner, to-wit:

"The sum of Fourteen Hundred Thirty-Eight and No/100ths Dollars as of the date of this contract and same is hereby deposited in escrow with the Southwest Underwriters, of Deming, Luna County, New Mexico, to be distributed as hereinafter stipulated. The remainder of Twenty-Five Hundred Sixty-two and No/100ths Dollars ($2562.00) is to be paid in four (4) equal installments of Six Hundred Forty and 50/100ths Dollars ($640.50) with interest at the rate of six per cent (6%) from date hereof, the first installment to become due and payable on August 1st, 1944, 2nd installment on August 1st, 1945, 3rd installment on August 1st, 1946, and 4th installment on August 1st, 1947, all according to the terms and conditions of the four promissory notes attached hereto and made a part of this contract.

"Parties of the First Part Warrant that they own the said property above described free and clear of all liens and encumbrances excepting a mortgage in the amount of Six Hundred Dollars ($600.00) dated January 22, 1943, made payable to Lona Pelayo Nugent, due at the rate of $300.00 annually with interest at six per cent (6%) beginning January 1st, 1944, which said parties of the first part assume and agree to pay in accordance with the stipulations hereinafter recited herein.

"Parties of the First Part Agree to furnish an Abstract of Title to the said property within the next (30) days and it is understood and agreed that parties of the second part shall have possession of the said Abstract of Title for examination by their attorney, which said examination shall be made within the next sixty (60) days from date hereof. Should the said Attorney find from his examination that parties of the first part have a good and merchantable title to the said premises subject to the said mortgage herein described, then said parties of the first part shall cause the said Abstract of Title to be brought down to date showing the Release of the said Mortgage.

"The Southwest Underwriters of Deming, New Mexico, is hereby named as trustee for the parties hereto and a copy of this contract, together with warranty deed and bill of sale, has been filed with the said Southwest Underwriters. All payments of principal and interest as provided herein shall be paid to the said Southwest Underwriters.

"It is Understood and Agreed between the parties hereto that the said sum of Fourteen Hundred Thirty-eight and No/100ths Dollars ($1438.00) shall be deposited with the Southwest Underwriters for parties of the first part to be held in escrow until such time as the said Abstract of Title shall have been examined,

attorney's opinion given and a clear and merchantable title vested in parties of the first part. It is also Understood and Agreed that the parties of the first part now have a crop on the said premises which the parties of the second part agree to harvest, That parties of the second part are to be given immediate possession of the said premises but should the parties of the first part not be able to give a good and merchantable title to the said premises, then parties of the second part will give up said premises, retain the proceeds from the crop and the said sum of $1438.00 in escrow with the Southwest Underwriters shall be returned to parties of the second part and this contract shall become null and void.

"Parties of the First Part assume and agree to pay all taxes and assessments due for and during the year 1943.

"It is Further Understood and Agreed between the parties hereto that when the Abstract of Title has been examined and good and merchantable title has been proven, the said escrow holder is directed to pay to the said parties of the first part, the said sum of $1438.00 which has been held in escrow as being the down payment on the purchase of the premises described.

"It is Further Understood and Agreed that the Peerless Pump described herein is not to be removed from the said premises during the term of this contract. Parties of the First Part reserve and retain all farm implements now located on the property herein described, and have permission to remove the same after the title to said premises has been determined.

"It is Further Understood that upon payment being made in full the said trustee is authorized and empowered to deliver warranty deed, bill of sale, and abstract to parties of the second part. Should the payments not be made in accordance with this contract after the expiration of the grace period hereinafter stipulated, parties of the first part may declare this contract null and void. In this event, after written notice to the parties of the second part and at the option of the parties of the first part, deed, bill of sale and abstract shall be returned to parties of the first part and this will conclude the trust of the said trustee. All payments received by the said trustee shall be credited to parties of the first part.

"It is Specifically Understood that time is of the essence of this contract and that should the parties of the second part fail to pay any installment of either principal or interest or taxes within sixty (60) days of the due date thereof, then this contract at the option of the parties of the first part may be declared null and void. In this event, all previous payments made shall be construed as rental or liquidated damages and parties of the second part waive any right to recover the same. In the event of forfeiture, parties of the second part agree to give immediate possession upon demand.

"This Contract Shall be binding upon the heirs, administrators and assigns of all

parties hereto in the same manner as upon the principals themselves.

"In Witness Whereof, we have hereunto set our hands and seals the day and year in this contract first above written."

[redacted] If it may be said that the escrow agent, by the terms of the contract, under which it undertook to act, had resting upon it prior to the time of suit a clear directive to return the deposit upon the failure of the Mitchells to furnish an abstract showing a good and merchantable title, the trial court was in error, since the Mitchells, the vendors, were not necessary parties to the suit. While on the other hand, if it may be said that the Mitchells had, as claimed by appellees, a "reasonable time" in which to clear the property of encumbrances and of the outstanding one-sixteenth interest in the land, no duty rested upon the escrow agent to return the money until the question of whether such reasonable time had elapsed should be determined, and the Mitchells would be necessary parties to the suit. Reasonable time for vendor to perfect title is a question of fact, not law. Smith v. David, 168 Ga. 511, 148 S.E. 265.

[redacted] The rules governing the alternate situations mentioned above are not disputed by the parties. The one applicable to the first situation described is thus stated in 30 C.J.S. Escrows § 16, page 1220:

"Generally, a person having no interest in the matter in escrow is not a necessary party to a suit for its recovery. Accordingly, the depositor may sue the depositary for return of the deposit on nonperformance of the conditions by the obligee without joining the latter as a party defendant. So, also, in an action against a depositary for refusal to deliver a deed to the grantee on the performance of the conditions prescribed in the escrow agreement, the grantor need not be joined as a party defendant; and the grantee may sue a third person to whom the depositary has wrongfully delivered the property without joining the depositary or the grantor as parties."

We find this language employed by the text-writer in American Jurisprudence:

"It is the well-established rule that where the conditions are fulfilled and the depositary fails or refuses to deliver, the remedy, either in law or equity, lies against him, but not against the grantor. Notwithstanding the general rule, however, in many instances both the depositary and the other party to the escrow agreement have been joined as defendants in an action brought at law or in equity, apparently for the reason that in many cases, fulfilment of the conditions as a cause of the depositary's failure is at issue." 19 Am.Jur. 453, Sec. 33.

And see Ann. in 95 A.L.R. 299; J. and V. Liberty Inc. v. Columbia Trust and Savings Bank, 121 Or. 289, 254 P. 1016.

Counsel do not disagree upon what the rule would be if this be a case where a definite time limit is set for the perform-

ance of the contract to furnish a good and merchantable title. They do differ upon the question of whether this be such a case. Appellants say that under the terms of the contract the absolute duty to return the money arose when, upon the primary examination of the abstract, only one examination being contemplated, it was shown that an outstanding interest in the land was in Leroy Pelayo (who was then, and at the time of the trial, a prisoner of war of the Japanese); that they were purchasing upon the representation that the Mitchells, at the date of the contract, "owned" the property free and clear of such outstanding claims. Their contention, we may assume from their reasoning, is that they were not purchasing with the condition that they would have to wait for months, or years, to have the title, represented at the time to be free and clear of any such undivided interest, cleared up and made good.

Appellees, on the other hand, say that the contract should be interpreted as giving vendors a reasonable time within which to make a good title. The contract in question is not as artfully drawn as it might have been, but we must take it as we find it and determine therefrom the intention of the parties thereto.

The escrow holder's liability is both "fixed and limited" by the contract under which it undertakes to perform the impartial function of stake-holder. Davisson v. Citizens' National Bank et al., 15 N.M. 680, 113 P. 598, 599. In that case, the holder of the escrow was held not entitled to return the purchase money over the objection of the vendor even though no abstract approved by purchaser's attorney was presented on or before the date "settlement was to be made" between the parties. As this court there pointed out, "There happened no condition, as set forth in the Memorandum, upon the fulfillment of which or failure to fulfill the bank was directed to return the papers to either party." The memorandum agreement under which the bank was acting in that case read: "Check enclosed to be held in escrow until September 10th, when final settlement is to be made. Deed and abstract to be placed in escrow with this. Abstract to be forwarded to the Citizens' Bank and Trust Company, Arkadelphia, Ark., for examination. No money to be paid over until abstract is approved." Clearly, in that case there was no direction to return the deposit to the purchaser under any circumstance. That case affords neither side to the controversy much aid.

It is to be noticed that the Mitchells warranted that they "owned" the property described, subject only to the $600 mortgage mentioned, at the time the contract was entered into. It will be seen that they did not own the property at that time, nor at the time of trial some fifteen months thereafter, since there was an outstanding interest in one Leroy Pelayo.

From the facts pleaded it must be assumed that it would, in any event, require considerable time to get full title to the

property; but we have the undenied allegation of the answer to the effect that the vendors "can and will overcome the only objections made by the said examining attorney to the said title." Appellants contend, simply, that since the vendors did not tender good title earlier, it is now too late. By denying paragraph five of the complaint without further pleading in clarification by answer (as was done as to the point of the part ownership in Pelayo), it might be said that an issue is made of whether the pump and equipment contracted to be sold with the land are the property of the Mitchells; and so we take no further notice of the alleged failure of the title in the Mitchells to this personal property.

And yet, unless the contract provides, either expressly or by necessary implication, that it shall become null and void *if the abstract to be furnished within thirty days does not show marketable title,* a "reasonable time" within which to furnish such title would be allowed, even absent the conventional and frequently employed stipulation to that effect. In such event, the Mitchells would be necessary parties.

Upon examination of the contract as a whole, we are constrained to the view that it was never the intention of the parties that no opportunity would be given to perfect title, if at first found defective. In one part of the contract, if viewed apart from the whole context, it might be said we find language showing an intention to have the one and only examination of the abstract (the one to be made within sixty days from date of contract) final and conclusive upon the question of good title; and yet, when we examine other language of the instrument, thereinafter to be found, wherein it is stipulated that "but should the parties of the first part not be able to give a good and merchantable title to the said premises, then * * * and the sum of $1438.00 in escrow with the Southwest Underwriters shall be returned to the parties of the second part and this contract shall become null and void," we see there is no limitation as to time for making and giving a good title, and the "reasonable time" rule would control. The contract reads: "Should the parties of the first part not be able to give a good and merchantable title to the said premises" but it does not add—"within the time hereinbefore specified for the furnishing and examination of abstract of title," nor does it employ language of like import, making time of the essence in this particular. Had the present contract so provided, in the absence of a waiver, there would be no place for the operation of the "reasonable time" rule which, under many circumstances, is given a very liberal interpretation. And further on in the contract, we find this language: "When the abstract of title has been examined (it does not say: "Within the time hereinbefore provided"), and good and merchantable title has been proven, the said escrow holder is directed to pay to the said parties of the first part the sum of $1438.00 which has been held in escrow * * *."

There is ample authority to the effect that the vendor, in the absence of a contrary contractual commitment, may have a reasonable time to perfect title. Martinson v. Morton Farmers' Mutual Ins. Ass'n., 217 Iowa 335, 251 N.W. 503; Smith v. Biddle, 171 Ark. 644, 286 S.W. 801; Foster v. Elswick, 176 Ark. 974, 4 S.W.2d 946, 57 A.L.R. 1244; Ward Real Estate v. Childers, 223 Ky. 302, 3 S.W.2d 601. Whether special circumstances, absent here, imposing undue hardship would alter application of the rule, we do not attempt to say.

In another place in the contract we find the parties stipulating that the sum of $1438 is to be deposited with Southwest Underwriters "to be held in escrow until such time as said abstract of title shall have been examined, attorney's opinion given, and a clear and merchantable title vested in the parties of the first part." Nothing there which would indicate that time is of the essence or that the attorney's opinion to be given and the vesting of a clear and merchantable title should be limited by any particular period of time.

But for the clause theretofore set out in the contract providing "that parties of the second part shall have possession of said abstract of title for examination by their attorney, which said examination shall be made within the next sixty (60) days from date hereof," there would be nothing upon which appellants could base their claim; and, as we have heretofore noticed, viewing the whole context, it cannot be said that the parties intended to limit the time for the perfection of title to the sixty day period allowed for the primary examination of the abstract to be tendered.

"If the contract is silent in respect of the condition of time or fails to indicate a distinctive purpose of the parties to make it an essential consideration and if there are no circumstances to manifest its importance, a court of equity does not regard time as of the essence. * * * If time becomes material to the rights and interests of the parties to any substantial degree, it will be regarded as of the essence. It must affirmatively appear, however, that the parties regarded time as of the essence of the agreement." 12 Am.Jur. 863, Sec. 308.

It is to be noticed that in the third from the last paragraph of the contract time is made of the essence of the contract, and, this, appellants aver, would lend support to their contention that it was the intention of the parties that title should be perfected and a clear and merchantable title tendered within the sixty day period. We do not agree with this construction. There can be no doubt that this conventional contractual clause was intended only for the benefit of the vendor who, at his option, upon the failure of the vendee "to pay any installment, * * * or taxes within sixty days of the due date thereof" could declare the contract null and void.

It is to be conceded that "time-of-essence" clauses frequently apply to both the vendor and vendee, and yet, cases of con-

struction arise, as here, where such language of the contract taken in connection with the whole subject-matter thereof, indicates a more limited operation of the time-of-essence provision. See Williams v. Shamrock Oil and Gas Co., 128 Tex. 146, 95 S.W.2d 1292, 107 A.L.R. 269, where a contention somewhat like appellants here make was there unsuccessfully urged. The Texas court in that case held that such clause was placed in the contract "in such setting as to evidence that it was intended to have reference alone to the covenants" of the purchaser. See also Newton v. Hull, 90 Cal. 487, 27 P. 429, and Greene v. Riordan, 97 Cal.App. 462, 276 P. 141.

Absent an express stipulation which would make the time for the tendering of a good and merchantable title of the essence, "or unless there is something connected with the purpose of the contract and the circumstances surrounding it which makes it apparent that the parties intended that the contract must be performed at or within the time named," the tendency of modern authority at law as well as in equity is to hold that time is not ordinarily of the essence of the contract. 12 Am. Jur. 861, Sec. 306. We attach no significance to that feature of the contract as having any reference to the time within which a good and merchantable title must be tendered.

Since we construe the contract as one under which the vendors would have a reasonable time for the perfection of title, and this issue of what is a reasonable time being a question of fact, as we have said, the Mitchells, the vendors, became, and are, necessary parties to a complete determination if the suit and the trial court was correct in dismissing for want of such necessary parties.

It does not make for a different result that the Mitchells could have been impleaded by appellees, or could have themselves come into the suit by intervention or otherwise. And, the fact that the court could, "of its own initiative," have added the name of the Mitchells as parties defendant, section 19-101, rule 21, 1941 Comp. Laws, does not change the picture. Appellants were resting their case upon the theory that the Mitchells had no interest whatever in the controversy; that it was unimportant that, if given time, the vendors could thereafter perfect title. Appellants had advised the court, as the judgment recites, that they elected not to amend and bring in the additional parties, but desired to stand upon their complaint as written, and "to insist upon the cause preceding to final trial and determination with the present parties defendant only". Naturally, under this circumstance, plaintiffs having the control of the lawsuit, it could not be said that the court's discretion under the rule just mentioned ought to have been moved in plaintiff's behalf by adding additional parties defendant. When it appears that the vendors are necessary parties and the complainants (appellants) refused to amend to bring them in, the court had no authority to determine the issues involved and the cause was properly dis-

missed. Finding no error the judgment is affirmed, and it is so ordered.

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

169 P.2d 551

ELLIS et al. v. SOUTHERN PAC. CO.

No. 4399.

Supreme Court of New Mexico.

June 3, 1946.

H. Vearle Payne, of Lordsburg, for appellant.

E. Forrest Sanders, of Lordsburg, for appellees.

LUJAN, Justice.

The judgment to be reviewed is one awarding damages to the plaintiff below, who is appellee here, on account of personal injuries suffered in a fall in alighting as a passenger from one of defendant's trains while making a scheduled stop at the railway station of Duncan, Arizona.

The only ground of negligence set up in the complaint is the failure on defendant's part to provide a footstool for use by passengers in alighting, thus leaving an unsafe distance between the last step on the coach and the surface of the station platform to be negotiated by passengers in alighting from the train. The defendant fell in attempting to step from the coach to the platform and suffered personal injuries on account of which the jury awarded her damages in the sum of $1500. The defendant prosecutes this appeal from such judgment presenting two fundamental grounds for reversal (1) that no negligence on defendant's part was established; and (2) that, granting there was such negligence, the plaintiff's contributory negligence bars recovery. Both contentions were urged in support of a motion for directed verdict which the trial court denied. Thus we have the matter squarely presented whether the court erred in the view it took of the evidence either as to negligence or contributory negligence.

It must be accepted as a fact established by the verdict that the plaintiff fell, as claimed, and suffered the injuries to which she testified. There is no claim that the verdict is excessive. We have then but to consider whether the court below, under the evidence adduced, should have declared as a matter of law that there was no negligence; or, if or granting that there was, on undisputed facts, the plaintiff was guilty of contributory negligence barring recovery. Now, for the controlling facts.

The plaintiff, whose husband joined her as a co-plaintiff in the complaint filed, boarded the defendant's train at Lordsburg, New Mexico, about 8:30 o'clock in the forenoon of July 31, 1944, having purchased a ticket for Duncan, a station just over the state line in Arizona. The train arrived there at 10 o'clock on the forenoon of the same day. It was a bright, sunny day and all of the passengers on the coach occupied by plaintiff alighted before she did and, apparently, without difficulty. In alighting she carried her overnight bag in her right hand, her purse and knitting bag under her left arm and was holding to the handrail to her left with her left hand. The conductor was standing a short distance away opposite the exit from the coach and to one side with his back turned toward the plaintiff but she did not call upon him for assistance in alighting. On the contrary, upon reaching the bottom step of the car, she paused momentarily, looked down, mentally gauging the distance to the platform but misjudging same, and then stepped straight forward, rather than letting herself down while retaining a hold on the handrail and fell on her hands and knees, dropping her luggage as she fell.

The plaintiff's eyesight is good and at the time of her injury she was 44 years of age, in good health and with no apparent

physical infirmity. When she boarded the train at Lordsburg she observed that the lower step on the coach was "pretty high," although admitting that she got off on a different side from that on which she boarded the same. Photographs of the coach identified as the one on which the plaintiff traveled from Lordsburg to Duncan on the day in question showed it to have four steps between the floor of the coach and the surface of the station platform. The plaintiff herself was quite confused as to the number of steps on the coach, first stating it had three steps and later that there were two only, finally admitting that she took no note of the number of steps as she descended from the coach. Exact measurements made by witnesses for the defendant fixed the distance from top of the bottom step to top of the rail as 15½ inches and the ball of the rail was from 1 to 1½ inches above the surface of the platform, thus establishing the distance from the surface of the bottom step to the surface of the platform as 17 inches at the most, according to this positive and rather convincing testimony introduced by the defendant.

The plaintiff points out certain testimony introduced by her as tending, although doubtfully, to establish the distance as slightly more than as shown by actual measurements taken by the defendant. As indicated, the sufficiency of plaintiff's evidence to overcome that of the defendant showing the distance in issue to be 17 inches is questionable but assuming it to be so, or that if not that, nevertheless, it was negligence on defendant's part to fail to provide a footstool to enable passengers to negotiate safely a distance of 17 inches on alighting, an assumption vigorously challenged by defendant's counsel, there still could be no recovery if the plaintiff's negligence contributed proximately to cause the injuries of which she complains. And her own testimony does establish convincingly that it did so contribute. The trial court erred in failing so to instruct the jury.

The rule applicable generally on the carrier's duty to furnish a footstool or portable box is stated in 13 C.J.S. Carriers, § 728, page 1365, as follows:

"In the absence of circumstances rendering such assistance necessary, a carrier is not required to furnish a boarding or an alighting passenger with a portable box or footstool; but where the car step is unreasonably high, the carrier should furnish a box or footstool to facilitate the boarding or alighting of a passenger, and should exercise due care to see that such box or stool is in a safe condition, and is placed or used by its employees in a safe manner. The carrier is not, however, an insurer of a passenger against injuries sustained by

him in using a step box or footstool to board a train."

See also on the question, Roberts v. Kurn, 231 Ala. 384, 165 So. 77; Texas Midland R. Co. v. Frey, 25 Tex.Civ.App. 386, 61 S.W.442; Hagerstown & F. R. Co. v. Wingert, 133 Md. 455, 105 A. 537 and Annotation in 20 A.L.R. 914.

But assuming, without deciding, that defendant was negligent, a doubtful assumption, we are compelled to resolve in its favor the contention that plaintiff also was negligent in a respect that helped bring about the injuries on account of which she has recovered judgment.

The testimony which convicts her of negligence has been detailed above. Carrying her overnight bag in her right hand and with the muscles of her left arm flexed to retain underneath it her purse and knitting bag while holding to the handrail with her left hand, and noting the absence of a footstool, but misjudging the distance to the platform, she deliberately stepped straight forward from the coach, encumbered with all this baggage, fell and was injured. The conductor was within easy call, with his back toward her, as she admitted, but she made no request for assistance. She was in good health with nothing in her physical condition to suggest the need for assistance. Her eyesight was good and it was broad daylight. Upon boarding the train at Lordsburg, from an opposite side to be sure, she had noted the exceptional height of the lower step from the station platform.

Under the circumstances, due care for her own safety suggested either that she request assistance of the conductor who stood nearby, or that she deposit some of her baggage on a step or in the vestibule of the coach until she had alighted. That she was not unmindful of the risk appears from her own admission that she paused at the bottom step before attempting to negotiate the distance unassisted. If she had resolved the apparent risk in favor of her own safety rather than showing a willingness to take the chance involved, she would not have suffered injury. The plaintiff was contributorily negligent and there can be no recovery. Boyce v. Brewington, 49 N.M. 107, 158 P.2d 124; Dominguez v. Southwestern Greyhound Lines, 49 N. M. 13, 155 P.2d 138; Dahl v. Minneapolis, St. P. & S. S. M. R. Co., 57 N.D. 538, 223 N.W. 37; Trudnowski v. New York Central R. Co., 220 App.Div. 503, 221 N.Y.S. 686; Yazoo & M. V. R. Co. v. Skaggs, 181 Miss. 150, 179 So. 274; Lattimer v. Texas & P. R. Co., Tex.Civ.App., 106 S.W.2d 727. In Trudnowski v. New York Central R. Co., supra, the court said [220 App. Div. 503, 221 N.Y.S. 690]:

"Not only is there failure of proof of any negligence on the part of defendant, but, from her own version of the transac-

tion, it would seem that plaintiff's injuries were due to her own lack of precaution. She had traveled upon railroad trains from time to time, and must be presumed to have known something of the dangers incident to such travel, and of the necessity of using reasonable care to protect herself. She says that, with one small child in her arms and holding another by the hand, she walked off the car without attempting to see whether, as she stepped therefrom, she would be in a place of safety or otherwise. That she relied upon the presence of a stepping box may explain, but is no excuse for, so glaring a lack of ordinary care. Nearly all the passengers had left the car before her; it does not appear that the train was about to start; she was in no wise hurried, and had full opportunity to 'watch her step' for possible danger. Whether her failure to do this arose through haste, through inattention, or unwarranted assumption of safety is of no importance; it is sufficient to say that by the exercise of ordinary caution she could have avoided the accident, and defendant is not required to compensate her for the consequence of her own neglect. Creenan v. International R. Co., 139 App.Div. 863, [124 N.Y.S. 360]; Smith v. Brooklyn Heights R. Co., 129 App.Div. 635, 114 N.Y.S. 62; Race v. Union Ferry Co. of New York, 138 N.Y. 644, 34 N.E. 280."

The language of the court just quoted is peculiarly applicable to the facts of the case before us. Apparently, the only distinction to be drawn in the important facts is that in the quoted case the injured plaintiff did not look at all but acted instead upon the unwarranted assumption that a footstool was there, while here she did look, noted the absence of one, paused momentarily in an apparent state of indecision as to whether to alight without calling for assistance, resolved in favor of doing so and was injured in carrying out her resolution. Her only explanation for the fall suffered is that she misjudged the distance. Even so, the defendant should not be penalized for this and other negligent acts and omissions of plaintiff which contributed proximately to the injuries suffered.

In an effort to save her judgment the plaintiff has thrown a dragnet into the record, seeking to find some ground of negligence litigated, even if not pleaded, as a basis for recovery. The grounds thus relied on must fail for lack of evidence either on the issue of negligence itself or upon that of causal connection. Although there was some testimony from a witness for plaintiff to controvert defendant's proof, both documentary in the form of photographs and verbally in testimony of witnesses, that surface of the platform was smooth and even, the plaintiff does not so much as suggest in her testimony that the fall was due to stepping on an uneven surface. Indeed, the only fair in-

ference from her testimony is that she started falling before either foot touched the surface of the platform. She does not claim that she stepped in one of the so called "pot holes," the presence of which was testified to by a witness for plaintiff.

Nor is there the slightest evidence that there was anything wrong with the handrail used by plaintiff in descending from the coach or that the steps were defective in any respect. Her own testimony as to her age, good health and physical condition rebuts the implication that her appearance suggested the need of assistance. Cf. Southern R. Co. v. Laxson, 217 Ala. 1, 114 So. 290, 55 A.L.R. 389. The claim of actionable negligence in other respects than that pleaded must be denied.

Other questions are presented and argued but the view we take of the issue of contributory negligence renders their consideration unnecessary. It follows from what has been said that the judgment of the trial court should be reversed and the cause remanded to the district court with a direction to set aside its judgment and enter one for the defendant. It will have its costs here and below.

It is so ordered.

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

HUDSPETH, J., did not participate.

BRICE, Justice (dissenting).

I am of the opinion that the testimony does not justify the majority's conclusion that the appellee was guilty of contributory negligence, as a matter of law. The only testimony regarding the manner of her alighting from the car was that of the appellee herself, and it is as follows:

"Q. How were you holding your baggage? A. Well, I had my overnight bag in my right hand, and my purse and other bag (knitting bag) under my left arm and I was holding to the rail with my left hand. * * *

"Q. Did you notice whether or not there was any footstool or anything else between the ground and the last step for you to step on? A. There wasn't any footstool, no. * * *

"Q. Then what happened? Did you try to step to the ground? A. Well, I just stepped and I fell to my hands and knees.

"Q. Do you know what caused you to fall there? A. Well, I don't know, I just didn't judge my distance. * * *

"Q. Were you watching where you were stepping? A. Yes, I certainly was. * * *

"Q. I understand, when you fell, you lost hold of everything? A. I held on until I fell. When I fell, of course, it was so high, naturally, when I fell, I dropped all my bags.

"Q. You dropped all of your bags when you fell? A. Yes, sir. * * *

"Q. When you got to that last step, did you pause or did you just step right off? A. I kind of paused and looked down.

"Q. You paused and looked over the distance to the ground, did you? A. I thought I saw the distance. * * *

"Q. Did you turn loose of this handrail or grab-iron over here when you fell? A. Yes, sir, when I fell, I did."

The testimony amounts to this: The appellee, with an overnight bag in her right hand and her purse and knitting bag under her left arm, went down the car steps holding to the handrail with her left hand. Still holding to the rail, she stepped forward toward the ground and fell to her hands and knees. It is obvious that she held on to the rail until her body in falling pulled her away from it. There is nothing to indicate that holding the knitting bag and purse under her arm was the cause of her fall. She seemed to be extraordinarily careful. She paused and looked down and thought the distance was a little long, but believed she could negotiate it. The majority conclude that the distance was 17 inches or less.

The fact is she left the car exactly as the ordinary passenger leaves it. She held to the handrail and stepped down facing from the car, without turning her back or turning sideways. Passengers do not ordinarily turn sideways or step down backwards when descending from a car. If there had been a footstool on which to alight, she necessarily would have stepped "straight forward." Her negligence it seems, from the majority opinion, was in her act of stepping "straight forward" and in not letting "herself down while retaining a hold on the handrail." Her testimony shows that she held to the hand rail until she fell.

If she did "deliberately step straight forward from the coach," but was exercising the care that passengers ordinarily use under similar circumstances, she was not guilty of negligence; and whether she did or not was for the jury to say. This court should not say as a matter of law that appellee was guilty of contributory negligence.

The conclusion of the majority renders it useless for me to consider the question of appellant's negligence.

171 P.2d 308

HAHN v. SORGEN.

No. 4944.

Supreme Court of New Mexico.

June 27, 1946.

James J. McNamara, of Clovis, for appellant.

Richard F. Rowley, of Clovis, for appellee.

BICKLEY, Justice.

Plaintiff-appellee filed her action against defendant in the District Court of Curry County, New Mexico, praying that her title to an undivided three-eighths interest in certain lands in said county be quieted.

Defendant-appellant denied that plaintiff had any title, pleaded the source of his title and prayed that it be quieted against plaintiff.

Plaintiff-appellee replied denying certain legal conclusions in the Answer and the case stood at issue.

It is conceded that this review presents but one question: Does an adopted child inherit from the adopting parent or parents as does a natural child in the State of New Mexico?

The trial court decided this question in favor of the plaintiff and entered Judgment quieting her title as prayed in her complaint. From this Judgment, defendant appeals.

The facts were stipulated and are undisputed. In 1908, Joseph Zulek and Louise M. Zulek, husband and wife were residents of Richardson County, Nebraska, and at that time and place legally adopted the plaintiff. The adoption decree specified that the adopted child "shall have the right of inheritance * * * the same as a child born of their body in lawful wedlock."

In 1938, Joseph Zulek died testate in California, being at that time a resident of that state. His Last Will and Testament was duly probated in California and ancillary proceedings were had thereon in New Mexico.

At the time of his death, the property herein involved was owned by Joseph

Zulek and Louise M. Zulek, his wife, as community property. In his Will, Joseph Zulek devised and bequeathed to Louise M. Zulek, his wife, all his property except one lot in Culver City, California. No mention of the adopted daughter was made in the Will and no notice of any kind was given her in the ancillary proceedings in the Probate Court of Curry County, New Mexico, nor was she named as an heir in said proceedings. Appellant acquired the Land in question from Louise M. Zulek.

Appellant's sole Assignment of Error is as follows:

"The Court erred in holding that plaintiff, an adopted child, had a right of inheritance from her adopting father."

Our pretermission statute, 1941 Comp. § 32-107, recites:

"If any person make his last will and die, leaving a child or children, or descendants of such child or children, in case of their death, not named or provided for in such will, although born after the making of such will, every such testator, so far as shall regard such child or children, or their descendants not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees, and legatees shall refund their proportional part."

The question then is whether the word "child" in this statute includes in its meaning an adopted child so that such adopted child would inherit from a testate parent.

The answer is to be found in a consideration of our statutes and decisions. The application of these statutes, they being enacted in favor of humanity, should be liberally construed. In re Gossett's Estate, 46 N.M. 344, 129 P.2d 56, 142 A. L.R. 1441. See also 1 Am.Jur., Adoption of Children, §§ 5 and 6.

It is a familiar rule of statutory construction that an interpretation of a statute will never be adopted which will render the application thereof absurd or unreasonable. In cases of adoption solicitude is for the welfare of the child, and not primarily for the convenience of the person adopting. The beneficent public policy involved in adoption statutes has made of them an essential part of the jurisprudence of the United States. 1 Am. Jur., Adoption of Children, § 3, note 2.

It is said in the American Jurisprudence, Adoption of Children, in § 59:

"The statutes authorizing adoption proceedings commonly give the adopted child the status of a natural child of the adoptive parent, and provide that it shall be capable of inheriting the property of such parent

in the same manner as a natural child. Under such statutes it necessarily follows that the child will inherit such property on the death of the parent intestate * * *. The right of an adopted child to inherit from its adopting parents is not affected by the circumstance that the Statute of Descent and Distribution does not refer to adopted children. That Statute must be understood as merely laying down general rules of inheritance, and not as completely and accurately define (ing) how the status is to be created which gives the capacity to inherit; it does not undertake to prescribe what is necessary to constitute the legal relation of parent and child. And in view of the rights usually conferred on an adopted child by the adoption statutes, it is generally held that an adopted child is within the meaning of the word 'children' as used in a statute of descent and distribution. The use of the word 'issue' in the Statute of Descent and Distribution, therefore, does not limit the right of inheritance to natural children, if the Court can say that the word is used in the sense of 'child' or 'children'."

See also Annotation in 105 A.L.R. 1176, at page 1181, where decisions are assembled showing that generally an adopted child is within contemplation of statutory provisions relating to pretermitted children.

Since in this case the property involved was the community property of Mr. and Mrs. Zulek, Sec. 31-109, 1941 Comp., would control its devolution. This section recites:

"Upon the death of the husband one-half of the community property goes to the surviving wife and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition goes one-fourth to the surviving wife and the remainder in equal shares to the *children* of the decedent and further as provided by law." (Emphasis supplied.)

With these preliminary observations in view we pass to the inquiry as to the history of our statutes relating to adoption of children.

The earliest enactment which has come to our attention is Chapter 31, Laws 1869–70. The title to this Act is

"An Act Establishing a system of Legitimizing or Adoption of children or heirs in this Territory."

Section 5 of this Chapter, which was carried forward into C.L.1897 as Sec. 1492, was as follows:

"And those persons adopted or legitimized as children or heirs by virtue of this act; shall be considered under the law as legitimate children in regard to their duties and obligations toward the persons that have adopted or legitimized them, and in respect to them, it being understood that they shall always be subject to be disinherited for the same legal reasons, as are now legitimate (legal) heirs."

In Dodson et al. v. Ward, 31 N.M. 54, 240 P. 991, 993, 42 A.L.R. 521, we said:

"In Barney v. Hutchinson, 25 N.M. 82, 177 P. 890, we said that a child adopted in 1880 by J. W. Barney and Annie C. Barney, his wife, was, on the death of Annie C. Barney, intestate, entitled to share in her estate as though he were her son.

"The court said that the statute of adoption then in force was chapter 31, Laws of 1869–70. The section we have quoted from C.L.1897 was section 5 of that act. The other provisions quoted herein were enacted in 1893 (Laws 1893, c. 32), so the court, in Barney v. Hutchinson, supra, doubtless considered the status of the adopted child as being fixed by section 5 of chapter 31, Laws of 1869–70. Since this last-mentioned act was not repealed until 1915, we must consider it here. A consideration of that section shows that it was the legislative intent that an adopted child should inherit from the person adopting it, else the Legislature would not have said that—

"'They shall always be subject to be disinherited for the same legal reasons as are now legal heirs.'

"We have no fault to find with the decision in Barney v. Hutchinson, supra."

We have just now noticed the title to the Act and provisions of Sections 1 and 2, which recite:

"That any persons in this Territory, that hereafter may desire to legitimize or adopt *as heir,* any child or children may do so subject and under the provisions of this act." (Emphasis supplied.)

Section *2* provided:

"Any person may adopt or legitimize as child or heir any child or children, etc."

These expressions add support to the view stated in the quoted portion of Dodson v. Ward, supra. While there are many advantages which may accrue to an adopted child short of the right to inherit this early Act used the word "heir" and "child" interchangeably and regarded adopting a child as adopting an heir.

It is suggested by appellant and we intimated in Dodson v. Ward, supra, that the foregoing statute was repealed prior to the death of the adoptive father in 1938. So far as we know the assumed repeal was accomplished, if at all, by the circumstance of its omission from the Code of 1915. See Code 1915, page 1665.

In order to give this circumstance a proper appraisal, we note that the Compilation of 1897 in the Chapter on "Adopting and legitimizing" Sec. 1488–1508 contained all of the provisions of Chapter 31, Laws 1869–70 as well as the provisions of Chapter 32, Laws 1893 which was entitled:

"An Act in Relation to and Providing the Manner of the Adoption of Children."

The 1897 Compilation Commission were admonished in Sec. 3 of its Authority, Laws 1897, p. 80.

"To make a careful and accurate compilation of all the General Laws of the Territory of New Mexico which shall be in force on the first day of April, A. D. 1897."

It is evident that the Commission determined that the provisions of Chapter 31, Laws 1869–70 were not repealed by Chapter 32, Laws 1893 or otherwise.

The circumstance of the omission by the compilers of the 1915 Code of the provisions of Chapter 31, Laws 1869–70, may be accounted for as follows: Said Chapter dealt with both adopting and legitimizing. The 1915 compilers doubtless took notice that subsequent to the 1897 Compilation, the Legislature of 1889 enacted Chapter 90 of the Laws of that session which provided in Section 21 thereof, 1915 Code, Section 1850, that:

"Illegitimate children shall inherit from the mother and the mother from the children; they shall inherit from the father whenever they have been recognized by him as his children, but such recognition must have been general and notorious, or else in writing. And they shall inherit only when the father has no legitimate children."

So it may have been thought that there was no longer any need for that portion of Chapter 31, Laws 1869–70, which made legitimizing by court proceedings an essential in order to fix the status of illegitimate children to be the same as legitimate children and furthermore said Section 21 of Chapter 90, Laws 1889, probably modified Section 5 of Chapter 31, Laws 1869–70, see L.1897, Sec. 1492, so as to place a limitation on the right of an illegitimate child to inherit from its putative father; and, too, the 1915 compilers of the Code may have been of the opinion that the language of Section 10 of Chapter 32, Laws 1893, see L.1897, Sec. 1505, authorizing the probate judge to make an order "declaring the child to be adopted by the applicant and thenceforth to be regarded and treated *in all respects* as the child of the person adopting," (Emphasis supplied) to be the equivalent of what was recited in C.L.1897, Section 1492, Sec. 5, Chapter 31, Laws 1869–70, insofar as the status of adopted children is concerned. If such was the compiler's thought it is not unreasonable, for how could an adopted child be "regarded * * * in all respects as the child of the person adopting," if such child did not, like other children of the person adopting, have the right of inheritance? We cannot read into the recital in this statute last quoted additional words so as to give it a meaning that an adopted child is to be regarded in all respects as any other child of the person adopting "except that he does not inherit." If the

Legislature of 1893 (Ch. 32) had intended a reversal of the public policy evinced in Sec. 5 of Chapter 31, Laws 1869–70, which policy was in accord with the general policy existing in our sisterhood of states they would doubtless have used language plainly evidencing that intention. It is also significant that this 1893 Act did not carry a repealing clause.

We find nothing in Chapter 5 of Laws of 1925, 1941 Comp. §§ 25-201 to 25-203, inconsistent with the provisions of Chapter 32, Laws 1893 as herein construed except that jurisdiction of adoption cases is by the 1925 Act transferred to the District Courts and certain procedural provisions added. No earlier statutes are expressly repealed and the principle that repeals by implication are not favored needs no citation of supporting authority.

Other arguments in support of the view we here adopt are: We have held in Re Gossett's Estate, supra, that our statutes on Descent and Distribution properly construed mean that the word "child" includes an illegitimate child whom a father has recognized as his child as required by statute to make him an heir of the father. Much of the reasoning in that case would lead to the same result as to an adopted child.

Subsequent to the enactment of the controlling statutes relating to the adoption of children our Legislature has enacted laws indicating a legislative understanding that adopted children occupy the same legal status and are entitled to the same consideration as those born in wedlock. Some instances are: By the Laws of 1921, c. 179, 1941 Comp. § 34-101, an adopted child is grouped with lineal descendants in determining the amount of the decedent's estate which is exempt from inheritance taxes, and in the same Act there is imposed an inheritance tax upon estates passing to "* * * parent or parents, husband, wife [or] lineal descendants [or] legally adopted child * * *."

In the instance of Adoption of Adults, Laws 1933, c. 18, 1941 Comp. § 25-212, et seq., the right of inheritance is given "as now provided by law, of a natural child of such adopting person." No reason is presented to the mind in support of the theory that the Legislature in this 1933 Act was introducing something novel and intended to grant the right of inheritance to adopted adults on the assumption that such rights had previously been withheld from adopted minors. Rather to the contrary, it would seem that the Legislature sought to accomplish harmony in the provisions relating to adopted children and their rights and thus expressly accorded to adopted adults the same rights as then existed in adopted children.

Another instance of the legislative thought that an adopted child should be

treated "in all respects" as a natural child is found in the Workmen's Compensation Act. In 1941 Comp. § 57-912 which defines terms used in the Act, it is said in subd. (k) "as used in this section, the term 'child' includes * * * adopted children."

From all of the foregoing we conclude that the word "child" in our pretermission statute includes any child that would inherit from an intestate parent and that the statutes of Descent and Distribution used the word "child" as including an adopted child. Finding no error in the judgment, it is affirmed. It is so ordered.

BRICE, LUJAN, and HUDSPETH, JJ., concur.

SADLER, C. J., did not participate in this decision.

171 P.2d 312

HEIRICH et al. v. HOWE.

No. 4920.

Supreme Court of New Mexico.

June 27, 1946.

Noble & Spiess, of Las Vegas, for appellants.

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

LUJAN, Justice.

Mrs. Grace Evelyn Heirich and her husband, E. W. Heirich (appellants), both residents of the State of California, filed their petition in the district court of San Miguel County, New Mexico, on October 31, 1944, to adopt one Dorothy Elizabeth Howe. Marjorie Rickard Howe (appellee) a resident of San Miguel County and State of New Mexico, on November 14, 1944, prayed the Court leave to intervene, setting forth that her petition is pending and was pending prior to the one filed by appellants. By leave of court, appellee instituted her protest, alleging among other things, that appellants were not residents of this State and prayed that their petition be denied.

The lower court specifically found that appellants were non-residents and therefore dismissed their petition.

From the order of dismissal appellants prosecute this appeal, relying upon the following points for reversal.

"1. That the trial court erred in dismissing the petition of Mrs. Grace Evelyn Heirich and E. W. Heirich to adopt Dorothy Elizabeth Howe by reason of the fact that the said petitioners were not residents of the State of New Mexico.

"2. That the trial court erred in dismissing the petition in the above entitled cause for lack of jurisdiction by reason of the fact that the petitioners were not residents of the State of New Mexico.

"3. That the trial court erred in concluding that the court was without jurisdiction to entertain the petition of Grace Evelyn Heirich and E. W. Heirich because they were not residents of the County of San Miguel and State of New Mexico.

"4. That the trial court erred in dismissing the petition of Grace Evelyn Heirich and E. W. Heirich for the reason that the petition shows said petitioners to be residents of the State of California."

The question to be determined is, do the several district courts of the State have jurisdiction to entertain petitions filed by non-residents to adopt minor children.

The power to adopt children is a creation of statute, unknown to the common law, which may prescribe the conditions under which an adoption may be legally effected. In re Cozza, 163 Cal. 514, 126 P. 161, Ann.Cas.1914A, 214; Rahn v. Hamilton, 144 Ga. 644, 87 S.E. 1061.

The proceeding is a special one, and the jurisdictional requirements of the statute must be strictly followed. See In re McGrew, post.

As to the application of the statutes where jurisdiction is not involved it has been properly asserted that the modern rule tends to such construction as will promote the welfare of children. See 2 C.J.S., Adoption of Children, § 7.

It will be interesting to note that prior to the general adoption Act hereinafter referred to, adoptions in this State were effected by special acts of the Territorial Legislative Assembly in each individual case. See Maria Fermina Leonor, January 18, 1857, under Adoptions, Chapter 1, Local and Special Laws of 1884, page 872.

In 1869–70, the Territorial General Assembly passed the first statute authorizing the adoption and legitimization of children by any person in the then territory.

The pertinent sections of Chapter 31, of the above laws reads as follows:

Section 1. "That any persons in this Territory, that hereafter may desire to legitimize or adopt as heir, any child or children may do so subject and under the provisions of this Act."

Section 2. "Any person may adopt or legitimize as child or heir any child or children, person or persons by filing a declaration to that effect in the office of the Judge of Probate *in his respective county,* manifesting in the same their reasons for so doing, and such declaration shall be acknowledged and signed by him in the presence of the said probate judge, * * *" (Emphasis supplied.)

We think, even this old act implies that the phrase "any person in this Territory," means any person living in this Territory, particularly in view of a policy existing generally, though, not universally, of requiring the adopting person to be an inhabitant or resident of the State.

Twenty-three years thereafter the Territorial Legislative Assembly passed Chapter 32, Laws of 1893, Code 1915, § 13 et seq., authorizing the adoption of minor children by any adult person or charitable institution.

Section 1. "Any minor child may be adopted by any adult person or charitable association or incorporation organized and existing for the custody, care, maintenance and education of orphan, illegitimate, abandoned and other children entrusted to its custody and care without any reward or recompense for such custody, care, maintenance and education, in the cases and subject to the rules prescribed in this chapter."

Section 7. "The person, association or corporation seeking to adopt a child, must file a petition *in the probate court of the county in which such person resides,* or corporation or association has its institution and home for the custody and care of such child, which petition shall state fully the facts and circumstances entitling applicant to adopt such child. * * *" (Emphasis supplied).

The Act of 1893 extended the authority of adoption of minor children to charitable institutions and limited the same to adult persons, and the above act by strong implication, if not expressly, limits the adoption of children to persons and institutions residing in this State.

By Chapter 5, Session Laws of 1925, 1941 Comp. § 25-201, the Legislature vested the district courts with exclusive jurisdiction in adoption matters and restricted the adoption of minor children to residents of the State.

Counsel for appellants refer to the last mentioned enactment in their brief as follows:

"Let us look at Section 25-204, Comp. 1941 and remember that this section must be construed together with Section 25-201; 'Any minor child may be adopted by any adult person or charitable association or [organization] * * *.' It will be noted this section extends the right of adoption to 'any adult person,' without limiting such

adult persons to those who are residents of the State of New Mexico. This section does not and cannot be construed as limiting the right to adopt to residents of New Mexico or to residents of the county in which the application is filed. It is a familiar rule of statutory construction that a statute will not be construed as repealing an existing law unless no other construction can be placed on such statute. If the language of Section 25-201 is to be treated as limiting the right of adopting persons to those who are residents of the county and state, then we must construe it as repealing Section 25-204 and as creating a single class of persons capable of adopting in the State of New Mexico. Repeals by implication are not favored. Such a construction, as we shall show, are (is) neither necessary nor reasonable."

The trouble with this argument is that appellants give too much significance to the language quoted from 1941 Comp. § 25-204, which was Sec. 1 of Chapter 32 Laws of 1893 heretofore quoted and none at all to Sec. 7 of that Act, which we have also quoted. Counsel for appellants overlooked Sec. 7 of the 1893 Act, perhaps because it does not appear in 1941 Comp. and the compilers' note to Sec. 25-209 says that said Section 7 was superseded by Section 25-201. This comment of the compilers may be justified insofar as jurisdiction and place of filing petitions are concerned, but Sec. 7 of the 1893 Act is important historically as showing that the 1925 Legislature when enacting Chapter 5 of the laws of that session by the use of the phrase "any resident of the State may petition the District Court for the County in which he resides for permission to adopt any minor child not his own * * *" was not introducing a new requirement of residence of the petitioner inconsistent with Sec. 1 of Chapter 32 Laws of 1893 when properly understood in the light of the provisions of Sec. 7 of that Act, but was merely preserving a residential requirement already existing in the earlier laws relating to adoption. We agree with so much of appellants' argument heretofore quoted, stating:

"That a statute will not be construed as repealing an existing law unless no other construction can be placed on such Statute."

We find nothing in Chapter 5 Laws of 1925, 1941 Comp. §§ 25-201 to 25-203, inconsistent with Chapter 32, Laws 1893, Code 1915, § 13 et seq., as herein construed except that jurisdiction of adoption cases is by the 1925 Act transferred to the District Court and certain procedural provisions added. No earlier statutes are expressly repealed and the principle that repeals by implication are not favored needs no citation of supporting authority. See also Hahn v. Sorgen, 50 N.M. 83, 171 P.2d 308, for further discussion relating to these statutes.

The express words used in the statute obviously mean that the adopting per-

son must have an actual residence in the State and not merely a theoretical one. We are, therefore, of the opinion, that the Act is mandatory and that the provisions of the Act limit the jurisdiction of the Courts to proceedings instituted by residents of the State.

It is to be observed that Section 2 of the 1925 Act, 1941 Comp. § 25-202, provides that "no petition shall be finally granted until the child shall have lived six (6) months in the proposed foster home." We do not think this means a home outside of this State, since this section contemplates some observation by the court and its agent of the child's surroundings, and it is difficult to see how this could be satisfactorily done where the foster home is not within this State.

In construing their adoption statute which reads in part as follows: "Any inhabitant of this state not married, or any husband and wife jointly, may petition the superior court of their proper county for leave to adopt * * *," the Supreme Court of the State of Washington in the case of Knight v. Gallaway, 42 Wash. 413, 85 P. 21, 22, held that the lower court had no jurisdiction to entertain a petition for the adoption of a child by persons not inhabitants of the county in which the application was made.

And in Re McGrew (Appeal of Gilbert), 183 Cal. 177, 190 P. 804, 805, the court held that under a statute similar to ours, the court of the county in which the person desiring to adopt the child resides is the only court which has jurisdiction to declare and order an adoption. The court said:

"The statute provides that one who desires to adopt a child may, 'for that purpose, petition the superior court of the county in which the petitioner resides,' and it also declares that, if the persons whose consent is necessary are not residents of said county, their written consent may be procured, and must be filed in the superior court of the said county at the time of the application and adoption. Civ.Code, § 226. This means that the court of the county in which the person desiring to adopt the child resides is the only county which has jurisdiction to declare and order an adoption. The proceeding for adoption is a special one, and the requirements of the statute must be strictly construed, particularly with respect to the jurisdiction of the court. Ex parte Clark, 87 Cal. [638], 640, 25 P. 967; [In re] Estate of Williams, 102 Cal. [70], 77, 36 P. 407, 41 Am.St.Rep. 163, [In re] Estate of McCombs, 174 Cal. [211], 214, 162 P. 897: It follows, therefore, that the order of adoption, being made by a court without jurisdiction, is void."

It is next urged by appellant that Chapter 5, supra, is unconstitutional, in that it violates the provisions of Article 4, Section 16, of the New Mexico Constitu-

tion. The record does not disclose whether or not the lower court ever heard, considered or ruled upon this question, nor is this question raised by the assignment of errors, hence it is not here for consideration.

Points not raised in the trial court will not be acted on by Appellate Court. Hutchens v. Jackson, 37 N.M. 325, 23 P.2d 355.

We hold that the statute in question is mandatory; that the lower court is without jurisdiction; and that it properly dismissed appellants' petition to adopt said minor child.

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

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

HUDSPETH, J., did not participate.

171 P.2d 316

LANGENEGGER v. McNALLY.

No. 4945.

Supreme Court of New Mexico.

June 27, 1946.

E. E. Young, of Roswell, for appellant.

A. B. Carpenter, of Roswell, for appellee.

BICKLEY, Justice.

This is an action by plaintiff to recover damages to her automobile alleged to have been caused by the negligence of the defendant resulting in an intersectional collision. Defendant denied that he was negligent and pleaded contributory negligence of the plaintiff.

The decision of the court contained findings of fact to the effect that plaintiff did not exercise the proper degree of care to avoid the collision, that she was negligent in failure to keep a proper lookout for cars crossing the intersection and in failing to reduce her speed so as to allow defendant to clear the intersection before entering it, and in continuing to drive without sufficiently reducing her speed and went into the intersection notwithstanding defendant was in her plain sight and already in the intersection, and in driving her car into defendant's car. The court also found that neither party was exceeding the speed limits of the City of Roswell, and that the defendant was negligent in attempting to cross at such a low rate of speed as that he employed, and that the negligence of each party proximately contributed to the collision.

The court's conclusion of law was that the plaintiff should be denied recovery whereupon the court rendered judgment in favor of defendant, dismissing plaintiff's cause of action.

The appellant urges that the court erred in making certain findings of facts which we have heretofore summarized—on the ground that they are not sustained by substantial evidence. Appellant urges that the physical facts refute the court's finding that plaintiff "ran into defendant's car".

If this finding were to be construed as an assertion that plaintiff ran head on into,

and hit defendant's car broadside, there would be merit to this argument of appellants.

On the other hand, it is arguable that plaintiff ran into defendant's car in a glancing manner, and we think the evidence supports this view. We are not convinced by the argument of appellant that the court erred in this respect.

The plaintiff testifying, repeatedly said she had the right of way and presumed that the defendant would stop, and appellant here invokes 1941 Comp. § 68-518. In view of the evidence that when defendant entered the intersection plaintiff was about 200 feet therefrom it is doubtful whether the cited section has any application. But assuming that it does, the presumption said to arise from having the right of way is of little value, except in case of entire absence of other evidence.

In Words and Phrases, Permanent Edition, Vol. 37, at page 673, we find the following:

" 'Right of way' merely means a preference to one of two vehicles asserting right of passage at same place and at approximately the same time. Cowan v. Market St. Ry. Co., 8 Cal.App.2d 642, 47 P.2d 752, 754. * * *

"The 'right of way' at street intersections given by city ordinance is a relative right only, and does not justify one who is entitled to the right of way in asserting his rights, when by the exercise of due care he can or should see that to do so is likely to cause an accident, and one so insisting upon the exercise of his right of way, under circumstances which would cause a reasonably prudent person not to do so, is guilty of negligence. Lund v. Western Union Telegraph Co., 192 Wash. 579, 74 P.2d 220, 223."

See also 2 Blashfield's Cyclopedia of Automobile Law and Practice, Perm.Ed., as follows:

§ 1024. "The right (of way) so given is not exclusive, but instead is at all times relative and subject to the fundamental common-law doctrine that he should exercise the right so as to avoid injury to himself or others."

§ 1027. "Where two persons are driving on lines that visibly intersect, the general obligation of ordinary care becomes for each a definite duty, and if, as they approach, their contiguity and mutual movements should suggest a probable or even possible collision, neither is entitled to act on the assumption that the other will give way. * * * And a motorist, although in a favored position in approaching an intersection, must exercise reasonable care to avoid a collision after he becomes, or in the exercise of reasonable care may be-

come, aware that an automobile coming from intersecting street is not going to yield the right of way."

Similar principles are involved in the mattter of speed. The fact as found by the court that plaintiff was not exceeding the speed limits of the city does not close the inquiry. The maximum speed permissible must yield to the admonition of 1941 Comp. § 68-504 and common sense that passenger automobiles may only be operated at such speed as shall be consistent at all times with safety and the proper use of the roads. We are unable to say that the court's finding that plaintiff was going too fast under the visible circumstances even though not travelling in excess of the maximum speed limit was erroneous.

We said in Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585, 592:

"The circumstances of each case must determine the degree of alertness required of a driver in keeping a lookout for road hazards; and, usually, as here, it is a question for jury."

After a careful review of the record, we are unconvinced that the trial court erred in its decision either as to findings and conclusions made, or in refusing those requested by the plaintiff, and so the judgment must be affirmed. It is so ordered.

SADLER, C. J., and BRICE, LUJAN, and HUDSPETH, JJ., concur.

171 P.2d 318

RICE v. FIRST NAT. BANK IN ALBUQUERQUE (BAIR, Intervener).

No. 4901.

Supreme Court of New Mexico.

June 27, 1946.

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[redacted]

[redacted]

[redacted]

[redacted]

Iden, Adams & Johnson, of Albuquerque, for appellant.

Rodey, Dickason & Sloan, and Frank M. Mims, all of Albuquerque, for defendant appellee.

Dailey & Rogers, and Jethro S. Vaught, Jr., both of Albuquerque, for intervener appellee.

HUDSPETH, Justice.

The plaintiff sued The First National Bank in Albuquerque for damages alleging negligence as escrow holder in failing to stop the recording of a deed, after the payment of a check of Kenneth H. Bair, the grantee in the deed, drawn on the escrow agent in favor of plaintiff had been stopped. Kenneth H. Bair intervened and defended on the ground that plaintiff was his agent, used his money in the purchase of the land, and was guilty of fraud. By stipulation it was agreed that plaintiff's rights under a written contract and the check given pursuant thereto as against the intervener should also be determined in this case. The findings and judgment were for the defendant bank and the intervener. Plaintiff has appealed.

Intervener proved to the satisfaction of the court that on the 15th of September, 1943, the plaintiff, a real estate broker, orally agreed to act as his agent in acquiring the Jerome Eddy Place in Valencia County, New Mexico, and stated that if he was authorized to go as high as $13,500 he would buy the place for intervener as cheaply as he could. He immendiately communicated with the owner and his broker by telephone and telegraph and on the following day the owner telegraphed that he would accept $9,500 net to him. On the 17th of September plaintiff received intervener's check for $6,500, and, using the check to secure the escrow deposit required by the owner, arranged to buy the place in his own name. On the same day he told the intervener that he had been able to get the place cheaper and had saved him $100; that he was get-

ting it for $13,400; that the owner would not deal with a third party and that he would have to take title in his own name. On the following day by these and other false representations he induced the intervener to enter into a written contract with him for the purchase of the place for the sum of $13,400, conditioned upon plaintiff acquiring title from the owner.

The first point argued by plaintiff is: "The written contract between appellant and intervener, dated September 18, 1943, was at all times valid and binding, there being no substantial evidence of an agency contract between them or of any fraud on appellant's part."

Some of the states have statutes regulating real estate brokers and requiring contracts of employment to be in writing; and many of the reported cases where an agent has taken title in his own name turn on an interpretation of the statute of frauds—not involved here—upon which there is hopeless conflict. However, it is universally held that where the principal furnishes the purchase money at or before the time of the purchase by the agent that a trust results in favor of the principal. It is of little moment whether an agreement of agency is made with fraudulent intent, or the agent succumbs to covetousness after he enters upon his duties, upon learning of the large profit which may be made by abandoning his trust. Nebraska Power Company v. Koenig, 93 Neb. 68, 139 N.W. 839, 842.

The general rule is that he who undertakes to act for another in any matter of trust or confidence shall not in the same matter act for himself against the interest of the one relying upon his integrity. Canfield v. With, 35 N.M. 420, 299 P. 351; Craig et al. v. Parsons et al., 22 N.M. 293, 161 P. 1117; Duncan v. Holder et al., 15 N.M. 323, 107 P. 685; Foster et al. v. Zapf et al., 35 N.M. 319, 296 P. 800; McBride v. Campredon, 24 N.M. 323, 171 P. 140, L.R.A. 1918D, 407; A.L.I. Restatement of Agency, Vol. 2, Sec. 387.

However, plaintiff strenuously argues that there is no substantial evidence of agency and points to the admitted fact that there was no agreement as to plaintiff's compensation; that the words "broker" or "agent" were not used by either plaintiff or intervener and that intervener requested and was given a warranty deed, although it was not provided for in the written contract of September 18, 1943.

Plaintiff also points out that he had to pay commissions, taxes and the interest on a $3500 mortgage, which he gave as a part of the purchase price of the tract, and dilates upon the inconsistencies of the testimony of the intervener, citing 24 Am. Jur. 188, et seq.

Other reviewing courts have considered similar cases. The Supreme Court of Cal-

ifornia in the case of Stromerson et al. v. Averill, 22 Cal.2d 808, 141 P.2d 732, 736, said:

"Inconsistencies only affect the credibility of the witness or reduce the weight of his testimony and it was for the trier of the fact to weigh the evidence and determine his credibility. 10 Cal.Jur. p. 1146, § 364. Furthermore, it is the duty of the court in support of a judgment on appeal to harmonize apparent inconsistencies wherever possible. 2 Cal.Jur. p. 938, § 551. It might also be noted that the testimony of Averill was supported by many circumstances and corroborated in important particulars by Davis, Lincoln and others. In our opinion there was substantial evidence to sustain the finding that Stromerson was acting as Averill's agent in the purchase of the 562 acres of land.

"It is contended, however, that since the judgment is based upon constructive fraud the facts which are relied upon to establish the fraud must be proved by clear, satisfactory and convincing evidence. The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal. Steiner v. Amsel, 18 Cal.2d 48, 53, 54, 112 P.2d 635; Steinberger v. Young, 175 Cal. 81, 84, 85, 165 P. 432; Couts v. Winston, 153 Cal. 686, 688, 689, 96 P. 357."

In an earlier decision of this case reported in 133 P.2d 617, on page 622:

"There can be no doubt that a fiduciary relationship exists between an agent and his principal. Civ.Code, §§ 2322, 2228–2239; 1 Cal.Jur. 788. It should be equally clear that where an agent is employed to purchase real property and purchases it in his own name and denies the trust, he holds it as a constructive trustee, even though the principal advanced none of the purchase price. That principle follows from the rule that the breach on the part of the agent of his fiduciary duty constitutes constructive fraud. Such a trust is not banned by the statute of frauds. Civ.Code, § 2224; Restatement, Agency, § 414; Restatement, Restitution, § 194; Williston on Contracts, Rev.Ed., vol. 4, § 1024; and cases collected [Kimmons v. Barnes & Metcalfe, 205 Ky. 502, 266 S.W. 891], 42 A.L.R. 10; [Quinn v. Phipps, 93 Fla. 805, 113 So. 419], 54 A.L.R. 1195; [Carkonen v. Alberts, 196 Wash. 575, 83 P.2d 899], 135 A.L.R. 232. * * * The breach of the fiduciary relation is even more pronounced because by having the agent take the property in his own name shows a greater degree of trust and confidence existing between the principal and the agent. The only difference is that the breach of the fiduciary relation comes with the repudiation by the agent of his duty

to hold the property for his principal when he repudiates his trust, rather than a breach in the inception when he acquires property in his name for himself when he should have acquired it for the principal and in the latter's name."

The Supreme Court of Florida in the case of Quinn et al. v. Phipps, 93 Fla. 805, 113 So. 419, 421, 54 A.L.R. 1173, discusses the evidence in a case somewhat similar to the one under consideration; from which we quote:

"Now let us inspect the record and see what it reveals to establish a relation of trust and confidence between Quinn and Phipps. It is shown that Quinn was a real estate broker doing business in West Palm Beach; that McDonald was the agent of Phipps; that Quinn on his own initiative approached McDonald and told him that he had a price on Mrs. Watson's property and requested him (McDonald) to assist him in finding a purchaser for it; that McDonald immediately communicated this information to Phipps, who authorized him (McDonald) to submit to Mrs. Watson through Quinn a cash offer of $50,000 for the property. It is further shown that McDonald urged Quinn to submit the offer to Mrs. Watson by long-distance telephone, but Quinn refused, agreeing instead to go to Boston in person to negotiate the purchase for Phipps. Quinn proceeded at once to Boston in compliance with his agreement with McDonald, but, after interviewing Mrs. Watson, instead of purchasing for Phipps, he purchased the property for himself at $45,000, and made no mention of Phipps' offer. The testimony of McDonald is positive as to all these facts, and his testimony is strongly corroborated by that of David T. Layman, John S. Phipps, George M. Osborne, and Mrs. Watson. The record also contains many revelations and recitations strongly supporting McDonald's testimony. It is true that Quinn denies every material allegation affirmed by McDonald, but his testimony is uncorroborated, and his conduct touching his relations to Phipps, Mrs. Watson, and his codefendant Gregory, not only rebuts his testimony, but it was entirely out of harmony with any code of business or professional ethics known to this court. The Chancellor believed McDonald's version of the facts, and his finding is amply supported by the record.

"Appellants urge that McDonald's testimony is materially weakened by his response to the following question propounded on direct examination: 'Was he to make that proposition for Mr. Phipps?' His response was, 'I certainly thought so; if I had not, I would not have fooled with it.' It is contended by appellants that, McDonald's response not being a direct affirmative, it had the effect of materially weakening or discrediting the force of his entire testimony. We do not consider this contention well grounded."

The Court of Errors and Appeals of New Jersey in Rogers v. Genung et al., 76 N.J.Eq. 306, 74 A. 473, 475, quoted with approval from Wright v. Smith, 23 N.J. Eq. 106, the following:

"* * * In holding the defendant to an accounting, the vice chancellor said that the fact that Smith was not formally constituted an agent with authority to bind the complainant, or that his agreement to act for him was not formally made, 'are points, which, if true, are of no sort of importance, nor is it important that no agreement was made to compensate him for his services. It is sufficient that he accepted and held a situation of trust in reference to procuring the lands.' "

The Supreme Court of Wisconsin in the case of Krzysko et al. v. Gaudynski et al., 207 Wis. 608, 242 N.W. 186, 189, said:

"One may become an agent without compensation. Absence of compensation is immaterial. Wright v. Smith, 23 N.J.Eq. 106, 111. If a real estate agent actually agrees orally to purchase land for another and takes money from the other to make the first payment on the purchase price, he must be held to have assumed to act for the other. And, having assumed so to act, he should be held to the same obligations of duty as if he were acting under a contract binding the other party to pay him a compensation. Counsel for respondent concede that, apart from the question of the invalidity of the contract of agency, the authorities are to the effect that the agent is bound as trustee; (A) one line of cases so holding him when the principal furnished the money for the purchase, and the (B) other line so holding him regardless of this; some (a) upon the ground that the agreement is not a contract to convey realty because it was not contemplated the agent should take the title in himself, and (b) others on the ground of the fiduciary relationship between the principal and agent." (Citing cases)

The weight to be given a request for a warranty deed by the principal of an agent was considered in the case of Kroll et al. v. Coach, 45 Or. 459, 78 P. 397, 399, from which we quote:

"In the legal aspect of the case, the defendant assumed a relation of trust and confidence toward plaintiffs. His position was such that he had exclusive knowledge of subsisting conditions affecting the venture that he proposed, and the plaintiffs were dependent entirely upon his representations, and relied upon them. In effect, he acted as their agent, as well as for himself, in negotiating and consummating the purchase from the original holders of the land to which they subsequently acquired the title in their own right. Such a relation enjoined upon the defendant absolute good faith toward the plaintiffs, and he was duty bound, in law as well as in ethics, to dis-

close to his principals all the knowledge attending the transaction that he possessed. If he had been dealing with them at arm's length, as his theory of the case would imply—that is, if he had been selling to them, instead of buying for them—the duty would have been otherwise. But he was not. He occupied the position of negotiating a joint purchase for the three, including the plaintiffs and himself, and plaintiffs were entitled to all the advantages jointly with him that he contracted for under his option with the original holders. According to his representations, they were securing all such advantages in the exact proportion that he was securing them, and, acting upon such representations, the purchase was consummated. It developed later, however, that he knowingly misled them as to a material fact in the transaction—one that would have influenced them to act differently, in all probability, if they had known of the true condition. The act was in palpable fraud of the plaintiffs' rights, and, as defendant thus secured an advantage he could not otherwise have obtained, he has through deception possessed himself of the plaintiffs' money to the extent of $2 per acre for three-fourths of the tract, which he applied toward the purchase of his own undivided one-fourth interest, and in this he must be held to the accountability of a trustee ex maleficio. The authorities are ample in support of this view. Wright v. Smith, 23 N.J.Eq. 106; McNutt v. Dix, 83 Mich. 328, 47 N.W. 212, 10 L.R.A. 660; King v. Wise, 43 Cal. 628; Willink v. Vanderveer, 1 Barb. [N.Y.] 599. Agency is a fiduciary relation, which is one of trust and confidence, and 'the same observations apply,' says Mr. Perry in his work on Trusts (vol. 1 (4th Ed.) § 206), 'as to other relations of trust and confidence.' He further observes: 'No person whose duty to another is inconsistent with taking an absolute title to himself will be permitted to purchase for himself, for no one can hold a benefit acquired by fraud or a breach of his duty. All the knowledge of the agent belongs to the principal for whom he acts, and, if the agent use it for his own benefit, he will become a trustee for his principal.' "

And on motion for rehearing, 45 Or. 459, 80 P. 900, 901—

"The deed is no more effective to conclude plaintiffs from inquiry touching the fraud than would the original contract have been, had it been wholly reduced to writing. But the defendant having deceived the plaintiffs, and procured from them their money through fraud, while acting in the capacity of an agent for them, the law declares him a trustee ex maleficio, in spite of the contract which he induced them to enter into by misleading them as to the real terms of the purchase from the original owners."

See also Evanoff v. Hall, 310 Mich. 487, 17 N.W.2d 724; and Stephenson v. Golden et al., 279 Mich. 493, 272 N.W. 881.

The testimony of plaintiff is in sharp conflict with that of the intervener, although he admitted that the $13.40 was a charge against the intervener in their final settlement, which the court found plaintiff had exacted of intervener as a 2 per cent Emergency School Tax on 5 per cent commission on the price of $13,400. Intervener is corroborated to some extent by other witnesses. Tom Hughes, the owner's broker, testified that plaintiff said nothing about buying the place himself in the telephone conversation on the night of the fifteenth, but it appears that after receipt of the owner's telegram of the sixteenth offering to sell for $9,500, plaintiff wired Hughes on the seventeenth, "I am buying it personally with view of trading as I told you by phone night of Sept. 15th."

On the 22nd of October the plaintiff and intervener met at the desk of Woodward, the Vice President of the defendant, for the purpose of closing the deal, and agreed on the amount of $3,367 as the balance due plaintiff from intervener on the price of $13,400, intervener assuming the mortgage for $3,500, given by plaintiff. Intervener drew his check for that sum on defendant, in favor of plaintiff, and handed the check to the Vice President of the defendant. The instructions given the escrow agent were reduced to writing and after being approved by the plaintiff and intervener were initialed by the Vice President of the defendant as follows:

"October 22, 1943

"Major K. H. Bair has handed to me his check for $3,367.00, payable to the order of C. T. Rice, which check is to be delivered to Mr. Rice after a Warranty Deed, executed by Edna L. Rice and C. T. Rice in favor of Kenneth H. Bair et ux., has been recorded in Valencia County, and abstract of title covering the property has been continued and does not show any intervening instrument from the time the property was conveyed to C. T. Rice until the time that C. T. Rice conveys the property to Major Bair.

"Immediately upon the return of the abstract to us, and if no intervening instruments have been filed of record, the check for $3,367.00 is to be delivered to Mr. Rice."

After the delivery of the papers to the Vice President of the defendant, intervener, who had been told that morning that the stamps on the deed from Eddy to plaintiff indicated that the consideration was only $9,500, called plaintiff into a private office in the bank where a conversation took place during which the plaintiff admitted he paid only $9,500 for the property. A heated argument ensued about

which the intervener testified, in part, as follows:

"He said something about the commissions he had to pay, and using his credit to negotiate the deal. I said: 'You didn't use any credit at all; you used my $6,500.-00 check, plus the $3,500.00 mortgage on the property concerned.' He said: 'I did use my credit; I used my credit to borrow money from the bank.' So then I stepped to the door and called Mr. Woodward into the room, and I said to Mr. Woodward: 'Mr. Rice says he used his credit to negotiate this deal. Is that true?' And Mr. Woodward turned to Mr. Rice and said: 'Do you want me to answer that question?' And Mr. Rice said 'Yes.' Then Mr. Woodward said: 'You didn't use your credit; you were using Major Bair's $6,500.00 check, plus the $3,500.00 mortgage on the property concerned.' He then said to Rice: 'I don't like the tone of this deal; I don't like what you have done here, and I would prefer that you take your account out of this bank.' Mr. Rice said: 'All right; if that is what you want', and he walked out, and I did."

The intervener consulted a lawyer and at 10:00 o'clock the next morning, on the advice of his counsel, stopped payment on this check. On the afternoon of October 22nd the deed was forwarded by the bank by registered mail, special delivery, to the County Clerk of Valencia County, some twenty-odd miles away, for record. The failure of the bank to endeavor to stop the recordation of the deed and to promptly notify plaintiff of the stop-payment order are the acts of alleged negligence on which plaintiff's action for damages is based. We are constrained to hold that the evidence that plaintiff agreed to act as the agent of intervener in the purchase of the land is substantial and it follows that a fiduciary relation existed between plaintiff and intervener; that plaintiff violated his duty to his principal and perpetrated a fraud upon the intervener.

Oral testimony was admissible to prove the fraud. This case falls in the exception to the oral evidence rule stated in Alford v. Rowell, 44 N.M. 392, 103 P.2d 119.

Plaintiff maintains that intervener waived the fraud. 37 C.J.S. § 69 of title "Fraud," p. 362, after stating that one may waive his right to maintain an action or counterclaim for damages sustained by the fraud of another, says:

"It is, however, difficult and perhaps hazardous to formulate or to apply general rules as to what will constitute such a waiver, and each case in which the question arises must be considered and disposed of on its own special facts, the underlying question being one of intent."

In this case the court found and concluded that there existed the relationship of agency between plaintiff and intervener,

that the plaintiff took only the bare legal title to the land, and held it subject to a resulting trust in the intervener, that after intervener paid plaintiff $6,500 and assumed the mortgage for $3,500, it was plaintiff's duty to convey the land to intervener; that plaintiff had suffered no damage, and that intervener had no duty to rescind.

Intervener only had definite knowledge of the fraud about noon October 22nd when plaintiff admitted that he paid Eddy only $9,500. At 10:00 o'clock the next morning he stopped payment on the check. He discovered the fraud in time to save himself and did so.

Rescission would have been inadequate, and he was not limited to that remedy. Harris v. Egger, 6 Cir., 226 F. 389, 141 C.C.A. 219; Great Western Gold Co. v. Chambers, 153 Cal. 307, 95 P. 151; McCornick & Co., Bankers, v. National Copper Bank of Salt Lake City et al., 49 Utah 296, 163 P. 1097; 24 Am.Jur. p. 46.

We have carefully read and considered the record and hold that the findings of the trial court are supported by substantial evidence, and that the claimed errors are without merit.

The judgment will be affirmed and the cause remanded. It is so ordered.

SADLER, C. J., and LUJAN, J., concur.

BICKLEY and BRICE, JJ., did not participate.

171 P.2d 325

THURMOND v. ESPALIN et al.

No. 4925.

Supreme Court of New Mexico.

June 27, 1946.

Rehearing Denied Aug. 21, 1946.

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Thos. B. Rapkoch, of Las Cruces, and John T. Hill, of El Paso, Tex., for appellants.

Edwin Mechem, of Las Cruces, for appellee.

BICKLEY, Justice.

This is a suit by plaintiff (appellee) to quiet title to a tract of land, claiming title by adverse possession. Defendants, claiming three-tenths interest in the land, challenge the plaintiff's claim of title.

The following constitute the Findings of Fact and Conclusions of Law of the Court:

"1. That the plaintiff in the year 1929 obtained a quitclaim deed to the land in question.

"2. That he immediately entered into the possession of the same and has ever since been in the open, exclusive, notorious, peaceable and adverse possession of the same and has paid all taxes levied and assessed against said land for more than ten years prior to the bringing of this action.

"Conclusions of Law.

"1. That the plaintiff is entitled to a decree quieting his title to the land described in the complaint.

"2. That the defendants have no right, title or interest in or to said land."

The court rendered judgment in favor of plaintiff and against defendants.

Certain evidentiary facts gleaned from virtual admissions in the briefs are as follows:

Refugio Espalin, a bachelor, had title to the land in question. He had two brothers, Jose L. and Damacio. Damacio died, leaving as his heirs the appellants in this case and two sons, Damacio and Ramon. Jose L. deeded his one-half interest to his wife, Matilda W. Espalin. April 5, 1929, Matilda W. Espalin executed and delivered a styled quitclaim deed to the lands involved to the appellee Benton S. Thurmond, which deed was recorded April 6, 1929. Ever since that time Thurmond has been in the possession of the lands and has paid the taxes thereon. Thurmond forthwith fenced the lands theretofore unfenced, used it for stock grazing and lately a small portion for raising crops.

About a week (April 13, 1929) after procuring and recording the deed plaintiff Thurmond procured an affidavit from two old timers stating that Matilda Espalin was a co-owner of an individual interest to half the land in question and that the other undivided one-half interest was owned by the heirs of Damacio Espalin. It is claimed by appellants that there is evidence from which the inference might be drawn that the facts stated in the affidavit were known to Thurmond at the time he received the conveyance to him.

The appellants requested a number of findings of fact, all of which were refused, among which is the following: "At the time the deed was executed and delivered, Burton S. Thurmond, plaintiff, knew there were relatives of Matilda Wood Espalin and family whose father was the brother of Jose Espalin and Refugio Espalin."

The evidence is such that reasonable men might draw different inferences therefrom. Had the trial court made the quoted requested finding of fact we might have been unable to say that the evidence did not warrant such finding, but on the other hand since we are required to indulge reasonable presumptions in support of the trial court's judgment and decisions as to questions of fact, we are unable to say that the trial court was in error in refusing this request of defendants.

Appellants' (defendants') contention is that the record does not show that the plaintiff established adverse possession. They argue that there is an absence of showing of good faith in the acquisition of the color of title relied upon by plaintiff. They also argue that the plaintiff did not assert a claim of right to the entire interest in the land in good faith. They say: "appellee's contention is that a quit claim deed in form can be a color of title the same as

a warranty deed or any other instrument of conveyance. Appellants agree to this proposition."

In State v. United States Coal & Oil Co., 86 W.Va. 256, 103 S.E. 50, it was decided: "A quitclaim deed, describing by metes and bounds the land remised, is good color on which to base a claim of title, regardless of whether or not the grantor appears to have any interest in or title to the land."

The court remarked in that case that: "The principal purpose of color is not to show actual grant of the land or of any interest therein, but is to designate the boundary of plaintiff's claim."

In Waterman Hall v. Waterman, 220 Ill. 569, 77 N.E. 142, 144, 4 L.R.A.,N.S., 776, the court said: "But counsel say that it was not color of title because it was a quitclaim deed. A warranty deed and a quitclaim deed both purport to accomplish the same thing, and have the same effect in transferring title. The covenants of a warranty deed do not pass the title, but create a liability, and a quitclaim deed which purports to convey the property is as good color of title as a warranty deed." And see 2 C.J.S., Adverse Possession, § 72, p. 603, where it is said: "A quitclaim deed is as effective as a warranty deed to confer color of title."

We think it well to remark that the concessions of appellants are accepted with caution. There is an Annotation in 3 A.L.R. 945 entitled: "Test of conveyance as quit claim or otherwise." It is there shown that a distinction is sometimes recognized by the courts as to characteristics of a deed which purports merely to convey the interest or title of the grantor as contrasted with one which conveys the property itself.

The deed in the case at bar belongs to the latter class and is color of title so far as the form of the instrument is concerned.

As we understand appellants' argument, it is, that although the deed in question is in form color of title, it is not in fact so, because the grantor did not in fact intend to convey and the grantee did not expect to acquire the whole of the property. Appellants say in their reply brief: "In the case before the court, appellee Thurmond acquired a one-half interest which was what Matilda Espalin owned in the property. She knew what she was conveying to him and he knew what he was acquiring from her, so from these facts, the transaction was one of good faith * * *. Under the pleadings and facts the quit claim deed could not be a color of title to the undivided interest of the other heirs and there being no color of title to said undivided interest shown under the New Mexico Statutes, title by adverse possession wholly failed."

Laying to one side the question of admissibility of evidence to impeach the deed

relied upon as color of title because not raised, we think the appellants are correct in their legal proposition. In 2 C.J.S., Adverse Possession, § 60, page 580, it is said of the effect of color of title: "The office of color of title is primarily to determine the character and extent of possession." And in a note on the same page is the following: " 'Color of title is anything which shows the extent of occupant's claim.' —Simmons v. Parsons, 20 S.C.L. 492, 495 [2 Hill 492, 495], quoted in Sprott v. Sprott, 110 S.C. 438, 114 S.C. 62, 96 S.E. 617, 619; and Thompson v. Brannon, 14 S.C. 542, 549."

Now, if the color of title may serve to limit the boundaries of plaintiff's claim, we see no reason why it may not also serve to limit or define the extent and nature of the claim with respect to the estate claimed. An illustration is given in 2 C.J.S., Adverse Possession, § 70, page 586, as follows:

"One may not secure by adverse possession a title or estate greater than that claimed.

"An essential element to an adverse holding which will ripen into title is that throughout the statutory period of possession the possessor must claim the character of title that he afterward asserts under his adverse holding, and, where only a life estate is claimed during the period of possession, one asserting title based upon such adverse possession may not secure the absolute or fee-simple title to the land."

If the deed in question had expressly conveyed only an undivided one-half interest, we think it could not be doubted that it were not color of title to the interest not conveyed. In Martinez v. Bruni, 235 S.W. 549, 551, the Commission of Appeals of Texas say: "It has been definitely decided in this state that a deed to an undivided interest will not, under the 5-year statute of limitation, protect the grantee beyond the interest it, on its face, purports to convey."

In the 2 C.J.S. article on Adverse Possession in § 61, it is asserted that color of title and claim of right are distinguishable saying: "Although 'color of title' and 'claim of title' are sometimes confounded and erroneously used as if synonymous in meaning, and may be legally equivalent where clearly made so under statute, they are ordinarily distinct and different in meaning, a claim under color of title being one made with a semblance of right or title and a claim of title being a claim to the land against the world irrespective of any foundation for such claim."

We find it unnecessary to engage in a discussion of the niceties of this suggested distinction since our Statute 1941 Comp. § 27-121 defines adverse possession to be "an actual and visible appropriation of land

commenced, and continued under color of title and claim of right inconsistent with and hostile to the claim of another;" etc. We do not hesitate to say that if the plaintiff's "claim of right" was to only an undivided one-half interest in the land here involved and he acknowledged the claim of others to an undivided half interest therein, such a claim was not "inconsistent with and hostile to the claim of" the defendants, and therefore such a claim would not support adverse possession of the entire estate in the lands unless the claim of others so recognized was repudiated and adverse possession was distinctly commenced and continued effectively against such erstwhile recognized claim.

Again consulting 2 C.J.S., Adverse Possession, we find in § 72, at page 591, the statement, "possession under a deed expressly made subject to another title or interest is not hostile thereto."

We assume in support of the judgment that when the trial court in its Findings of Fact heretofore quoted found that plaintiff had been in the "adverse possession" of the land, he used the expression as it is defined in the statute including the element of good faith. We do this the more readily because it appears in the record that good faith was an asserted issue.

It is arguable that the good faith required by our statute qualifies each of the elements of the statutory definition of adverse possession, but we find it unnecessary to go into that question at the present time. We are now concerned with what constitutes good faith by one who invokes Sec. 27-121, 1941 Comp., which requires broadly that adverse possession must be in good faith.

The question of what constitutes good faith is discussed in 2 C.J.S., Adverse Possession, § 170. Fortunately, in a case involving a Federal Statute of sufficient analogy to be useful, the trail has been blazed by our court to a considerable extent for correct understanding of the meaning of the phrase good faith. In Third Nat. Exch. Bank v. Smith, 20 N.M. 264, 148 P. 512, affirmed 244 U.S. 184, 37 S.Ct. 516, 61 L.Ed. 1071, it was decided: " 'Good faith,' in the creation or acquisition of color of title, is freedom from a design to defraud the person having the better title, and the knowledge of an adverse claim to or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien."

Since the foregoing is based upon a quotation of Chief Justice Fuller in Searl v. School-Dist. No. 2, 133 U.S. 553, 10 S.Ct. 374, 33 L.Ed. 740, from an early Illinois decision (McCagg v. Heacock, 34 Ill. 476, 85 Am.Dec. 327), it is interesting to note that the courts of that state have

continued to adhere to that view as shown by the following taken from Vol. 18, Words and Phrases, Permanent Edition, "Good Faith".

"Adverse possession

"There is 'good faith' in claim of adverse possession where there is no fraud and color of title is not acquired in bad faith. Smith-Hurd Stats. c. 83, § 6; Dunlavy v. Lowrie, 372 Ill. 622, 25 N.E.2d 67, 71.

" 'Good faith' in acquiring title by adverse possession does not require ignorance of adverse claims or defect in title, and notice actual or constructive is immaterial. Smith-Hurd Stats. c. 83, § 6. Dunlavy v. Lowrie, 372 Ill. 622, 25 N.E.2d 67, 71."

And an early text Buswell on Limitations and Adverse Possession Sec. 259, page 360 says: "a claim made in good faith by color of title is not disparaged by the fact of the occupants' knowledge that the boundary lines of the granted premises are uncertain, and that the title is disputed."

Ballentine's Law Dictionary defines good faith in adverse possession as follows: "In the law of adverse possession, whether general or statute, the term means free from a design to defraud those who appear to have a better title than the claimant's. His possession must be free from stealth." Citing 1 R.C.L. 710.

In 2 C.J.S., Adverse Possession, § 170, discussing constructive notice as affecting good faith, it is said: "If no one could invoke successfully the prescription statute who could have discovered by an examination of the public records before buying the property that the seller had no title, the plea would never be available because no one could invoke it except one having a valid title and having therefore no need for prescription." Land Development Co. v. Shulz, 169 La. 1, 124 So. 125, 127.

We think this is common sense even when applied to actual notice, at least to a substantial degree and this seems to have been the view of the Illinois Supreme Court in Dunlavy v. Lowrie [372 Ill. 622, 25 N.E.2d 71], heretofore cited from Words and Phrases where it was said that notice "actual or constructive" of adverse claims is immaterial.

With the foregoing principles in view, we proceed to an examination of the evidence to determine whether defendants are correct in their assertion that plaintiff did not in good faith claim more than an undivided one-half interest in the land.

A further rule to guide our consideration is that: "It is presumed that the color of title of one claiming by adverse possession was acquired in good faith, and that the parties so entered into and held possession. Bad faith is never

presumed." 2 C.J.S., Adverse Possession, § 219.

Plaintiff had color of title fair on its face to the land described. So far as the deed relied upon as color of title is concerned it appears that the grantor, Matilda Espalin, did not purport to convey merely an undivided one-half interest in the property. She conveyed the entire premises. The deed was executed and acknowledged on April 5, 1929 and recorded the following day. According to a finding of the court, the plaintiff immediately entered into possession of the land. We think these facts make out a prima facie case for plaintiff. The following is found in 2 C.J.S., Adverse Possession, § 170, Note 72, p. 743: "But knowledge of a defect in title is not of itself inconsistent with a bona fide claim of right. Where a claimant puts a deed upon record and enters into possession, his possession is presumptively referable to his deed. In such case, in so far as good faith is essential to his claim of right, it is presumed in his favor.—Collins v. Reimers, 181 Iowa 1143, 165 N.W. 373, 1 A.L.R. 878—Hughes v. Wyatt, 146 Iowa 392, 125 N.W. 334—Severson v. Gremm, 124 Iowa 729, 100 N.W. 862.".

There is no evidence produced by defendants touching on the question of plaintiff's good faith. Defendants must rely upon the testimony of plaintiff alone to prove their contentions heretofore outlined. The defendants did not procure the testimony of their aunt, Matilda Espalin, the grantor, to substantiate the claim now made by defendants that she did not intend to convey more than an undivided one-half interest to plaintiff Thurmond and that Thurmond did not understand that he was acquiring more than an undivided one-half interest. It is true that one of the defendants testified that only a year before the trial she learned that her Aunt Matilda had moved away and that "nobody knows where she is." There was no testimony as to the extent of the search, if any, which was made for the missing Matilda. The plaintiff Thurmond testified on cross-examination by defendant's counsel that he knew Jose Espalin and his widow, Matilda Espalin, from whom he bought the land, but that he had not known her long; he did not remember how much he paid her for the land; the land was not worth as much when he bought it as it is now; he lived about one-fourth of a mile from the land involved on the opposite side of the river; at the time of the trial he was not actually living on the land; he did not make an examination of the records to find out about the title; he did not know at the time he bought the land from Matilda Espalin that there were heirs who might be possible claimants, but some time after he bought the land (between April 5 and April 13, 1929) he inquired around and found out that there were heirs; maybe and

probably, Matilda Espalin, the grantor, either showed him the deed she had to the land from her husband, Jose Espalin, or gave such deed to him, he could not say for sure whether he had seen it or not (this deed conveyed an undivided half interest in the land involved). The following question and answer appear:

"Q. You knew she had a deed from her husband, didn't you? A. I don't know that I did, or whether she got her right to convey through probate proceedings or what. I just took her deed and that gave me the right to use the land."

With respect to the affidavit relating to possible claims of interest in the property referred to earlier in this opinion, the following questions were asked and answers given:

"Q. Do you know any of the Defendants in this case, Mrs. Hall here or Frank Espalin and Mrs. Wolfe? A. I knew there were heirs; I didn't know who they were or where they were.

"Q. How did you get knowledge of their heirship? A. From an affidavit. I inquired around and asked and I am the one who filed that affidavit, I think, and I have often tried to check my memory and see what I had in mind."

Whatever the plaintiff had in mind in procuring and filing for record this affidavit, we cannot see in this action any element of stealth, or design to defraud possible claimants of their interest in the land. To the contrary, it seemed open and above board and would afford at least constructive notice to such claimants that something was going on which might affect their interest adversely. As we have seen from the authorities quoted "good faith" in acquiring title by adverse possession does not require ignorance of adverse claims or defects in title. There is nothing in this affidavit or its recording which indicates a disavowal by Thurmond of his claim of right or a recognition of the claim of anyone else.

Since the trial court by its findings and conclusions necessarily concluded that the evidence did not show an absence of good faith and it being our duty on review to entertain all reasonable presumptions in favor of the correctness of the trial court's findings, conclusions and decree, we do not find ground for reversal.

Furthermore, while the question of good faith was plainly an issue in the case, the only finding of fact requested by the defendants is the one quoted in the early part of this opinion. If this finding had been made by the court, it would not of itself indicate bad faith since mere knowledge of adverse claims is not enough for that purpose. In any event, the evidence falls far short of proving that Matilda Espalin did not intend by her deed

to convey more than an undivided one-half interest in the property described and that plaintiff knew that she did not so intend and knew that he did not by the negotiations acquire more than a one-half interest therein.

It is not difficult to infer that even if plaintiff did see a deed made to the grantor conveying to her only an undivided one-half interest in the property, he may have entertained an honest belief that since she conveyed to him the entire property she had some other source of title to the other half. The evidence does not disclose that the plaintiff had knowledge of any bad faith conduct of his predecessor, if in fact she acted in bad faith, and therefore bad faith of Matilda Espalin, if any existed, could not be imputed to him. See 2 C.J.S., Adverse Possession, § 169.

We may not, as have some courts, ignore the element of good faith in adverse possession cases, because of the great difficulty of judicial investigation into the hidden motives of the entry or possession and all questions of good faith respecting the same. But these difficulties suggest the propriety of the requirement that where one relying upon adverse possession has satisfied all the other elements of it, one who challenges the good faith of the occupant must clearly discharge the burden of overcoming the presumption of good faith which flows from the occupant's open, exclusive, continuous, uninterrupted, hostile possession with the payment of taxes for the statutory period.

That plaintiff was in possession, exercising dominion over the land is not seriously questioned—what defendants contend is that plaintiffs' possession was for them as well as himself and therefore not hostile to them. In this connection appellants advance the proposition that: "Matilda Espalin being a cotenant with appellants conveyed to appellee only her existing title as cotenant and appellee took possession of the property as cotenant with appellants." We cannot agree to this. The act of the grantor Matilda W. Espalin in assuming to convey to a stranger the entire title as if she owned it was a repudiation of the existing cotenancy. It has been held that the effect of such a conveyance is to terminate the cotenancy. Jones v. Siler, 129 Tex. 18, 100 S.W.2d 352, 354.

Matilda W. Espalin did not convey an undivided one-half interest in the property, but, on the contrary, conveyed the entire premises. The acceptance of the deed by the grantee, his entry under it and his continued acts thereafter of ownership of, and dominion over, all of the land, were likewise hostile to the rights of appellants. The conveyance by Matilda W. Espalin of the entire estate in the entirety was decisive of her purpose to appropriate the entire estate to her own use, and entry by

Thurmond under the deed was equally evincive of his intention to claim the whole to the exclusion of the other cotenants of his grantor, if any, and upon the recording of the deed, the disseisin became complete.

According to the opinion in Jones v. Siler, supra, upon which we have drawn heavily in the foregoing statement of controlling principles, since it is a well-reasoned opinion decided upon facts quite similar to those in the case at bar, and even more favorable to similar contentions there urged, Thurmond's possession and the recording of the deed delivered to him, gave appellants constructive notice of the hostile character of his claim. The Commission of Appeals of Texas reasoned: "Siler's possession and the recording of the deed, taken together, gave defendants in error constructive notice of the hostile character of his claim (citing cases). The recording of the deed, without possession by the grantee, would not have given notice. This because of the general rule that one is not charged with notice by the registration of an instrument which is not in his chain of title. (Citation). But possession is equivalent to registration, in that it gives constructive notice of the possessor's rights. (Citation). Siler's possession pointed to the records for the information contained in his deed as to the source, nature, and extent of his claim. The function of the recorded deed here, to aid and explain the notice given by possession, is the same as that of the recorded deed in the ordinary case where title is claimed under the five-year statute of limitations. (Citations)."

In making use of the foregoing quotation, we do not mean to express an opinion as to whether under our registration laws, the recording of a deed has the limited effect stated in the Texas case. We say that our registration laws are at least as potent as claimed for the Texas Statute as construed. For further authorities in support of the view we take, see 2 C.J.S., Adverse Possession, § 72, p. 601, where it is said: "Where one tenant in common executes a deed purporting to convey the entire premises to a third person, who enters into possession under a claim of title to the whole, this will constitute a disseizin of the cotenants and after expiration of the statutory period, will bar the right of such cotenants to recover."

And see particularly Su Lee v. Peck, 49 Nev. 124, 240 P. 435, cited to the text where numerous authorities are assembled. And see also Pickens v. Stout, 67 W.Va. 422, 68 S.E. 354, where the proposition was discussed and the court had this to say on the question of notice: "Every owner is deemed to be cognizant of what is done upon his land and of who is in possession of it. The law exacts this measure of dil-

igence from him. He must know whether strangers are entering upon it, and, knowing that, must inquire by what right they do so. In every instance, such inquiry will presumptively lead to discovery of the hostile claim. Hence, the owner is bound to know, and is estopped from denying, all information to which such inquiry, prosecuted with reasonable diligence, would have led."

And Mr. Justice Brannon, concurring in the decision, made the following pertinent comments: "As long as a co-tenant continues in possession, giving no notice of adverse claim, his possession is for all; but, where he conveys the whole to a stranger, this itself is a disloyal act, in itself repudiates his fellow's right; and added to this there is a stranger in physical possession, and the co-tenant must take notice that a stranger is in possession, and his co-tenant gone, and he has no right to presume that a stranger is holding in friendship to him. Possession is notice. The party must inquire as to his right. * * * The claim that the deed or contract is not itself notice, but there must be evidence of knowledge brought home to the ousted co-tenant, is not sound. The deed or contract, with possession makes notice."

We have studiously considered the briefs of counsel and have read the record with care and we do not find error in the judgment. It will therefore be affirmed. It is so ordered.

SADLER, C. J., and LUJAN, BRICE, and HUDSPETH, JJ., concur.

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171 P.2d 647

WILSON v. SEWELL.

No. 4928.

Supreme Court of New Mexico.

July 31, 1946.

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A. J. Krehbiel, of Clayton, for appellant.

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

LUJAN, Justice.

Plaintiff (appellee) brought this action against defendant (appellant) on an oral contract. Appellee alleged that he was retained by appellant as a commission agent to sell or to procure a buyer for a ranch belonging to appellant; that he found a purchaser, a sale was made, but that appellant refused to pay the agreed commission of $2,000.

It is the contention of appellee that appellant listed with him, a broker, for sale or the procurement of a purchaser, a certain ranch, for a consideration of $45,000, agreeing to pay $2,000 as broker's commission if appellee either sold or procured a buyer for the ranch at the price aforesaid. He further contends that he did procure a purchaser and that appellant sold the ranch to him at a reduced price. Appellant claims appellee never performed the contract on his part and hence did not earn the agreed commission; that he was not the procuring cause of the sale, and that the contract was a special one for the payment of $2,000 only in the event appellee sold the ranch for $45,000.

The case was tried by the court without a jury and judgment was entered in favor of appellee for the sum of $2,000, together with interest thereon from date and costs. Appellant, seemingly not satisfied with the judgment, prosecutes this appeal.

The trial court made the following findings of fact and conclusions of law, and denied those requested by the parties which were in conflict therewith:

"1. That the plaintiff is a resident of Amarillo, Texas, and that the defendant is a resident of the State of New Mexico.

"2. That heretofore, in the month of February, 1944, the defendant listed with the plaintiff at Amarillo, Texas, a certain ranch in Union County, New Mexico, then owned by the defendant and consisting of approximately 17 sections of deeded and leased land, and then agreeing to pay a commission of $2,000.00 for his services in the sale of said land.

"3. That plaintiff has never held a realtor's license in the State of New Mexico, but continuously for a considerable number of years, and now is, a licensed realtor in the State of Texas.

"4. That shortly after the listing of said land with the plaintiff by the defendant, the plaintiff found a purchaser for said land, one Rufus Wright, who purchased same for his son Ralph Wright.

"5. That plaintiff was the procuring cause of the sale of said land by the defendant to the said Rufus Wright, for his son Ralph Wright, and that by reason thereof he is entitled to a commission $2000.00."

The court concluded as a matter of law that the plaintiff is entitled to judgment against the defendant for the sum of $2,000, with interest thereon from date until paid, at the rate of 6% per annum.

Appellant, in this court, for the first time challenges the sufficiency of the complaint to state a cause of action, and also contends that there is a fatal variance between the theory of the case pleaded and litigated upon trial and that adopted by the court.

If this contention were true, no advantage was taken of it before the trial court. Appellant having answered and gone to trial on the complaint, and all questions necessary to a complete determination of this cause having been litigated, and upon such issues evidence having been introduced by both parties, and no objection to evidence made on account of a defective complaint, the district court and this court will treat the same as sufficiently amended to support the judgment. Springer v. Wasson, 25 N.M. 379, 183 P. 398; State Bank of Commerce v. Western Union Telegraph Co., 19 N.M. 211, 222, 142 P. 156, L.R.A.1915A, 120.

While the complaint is not one to be recommended as a precedent to be hereafter followed, nevertheless, in view of the fact that no objection, either as to its form or substance was made in the court below, we are of the opinion that it is sufficient to support the judgment based upon it. It is true that the objection that the complaint does not state a cause of action may be successfully made for the first time on appeal, but the appellate court will not be over zealous to find a defect in the complaint that the appellant himself failed to discover until the case had been decided against him on its merits. We think the defects in the complaint, as well as the variance complained of, are no longer available to appellant since he permitted evidence which supports an amendment after judgment to go in without pointing out the defects now challenged. In Western Union Telegraph Company v. Longwill, 5 N.M. 308, 21 P. 339, 340, we said: "* * *

We think it sufficient to say that there appears to have been no demurrer, either general or special, to the declaration. Nor was there any objection made to the introduction of evidence, because there was no averment in the declaration under which evidence of plaintiff's damages could be received. While the statement in the declaration is in very general terms, it will be deemed good after verdict and judgment, when left unchallenged by the ordinary modes of reaching a formal insufficiency or uncertainty."

Applying the foregoing principles we hold that the complaint was sufficient to support the judgment.

It is next contended by appellant that a broker is not entitled to his commission on a sale unless and until he produces a buyer ready, able, and willing to buy the property on the terms fixed by the principal; and that the mere calling attention to land as being for sale does not constitute broker the procuring cause of a sale which results from negotiations between landowner and the ultimate purchaser.

To entitle a real estate broker to compensation, it is sufficient that a sale is effected through his agency as its procuring cause, and if his introduction of the purchaser is the means of bringing him and the owner together, and the sale results in consequence, the compensation is earned, although the broker does not negotiate and is not present at the sale. Williams v. Engler, 46 N.M. 454, 131 P.2d 267.

The question of "procuring cause" was one of fact. See Wood v. Smith, 162 Mich. 334, 127 N.W. 277. In Walker's Real Estate Agency, 2d Ed., 1922, Sec. 446, it is stated: "The agent who is the procuring cause of this sale is entitled to commission," the author citing many jurisdictions, including New Mexico. In the syllabus prepared by us to Jackson v. Brower, 22 N.M. 615, 167 P. 6, we defined "Procuring Cause" as follows: "A real estate agent is the procuring cause of a sale or trade of real estate placed in his hands for sale or trade, when the sale is traced to his introduction of the purchaser to the owner or principal."

Appellant claims that it was incumbent upon appellee to allege and prove that the purchaser procured by him was ready, able, and willing to pay for the property. It is true that in cases where the agent had produced a purchaser to whom the owner refused to sell, in order for him to recover, it is uniformly held that he must allege and show that the purchaser so tendered by the agent was ready, able, and willing to consummate the purchase at the price named. In Williams v. Engler, supra [46 N.M. 454, 131 P.2d 269],—this court remarked: "This case presents no circumstances which would vary the general and

quite universal rule that the broker has earned, and is entitled to, his commission, under the character of agreement here relied upon, when he has procured a purchaser who either consummates the purchase, or who is ready, able and willing to do so upon the terms given to the agent by the owner." Also see Pugh v. Dollahan, 49 N.M. 213, 160 P.2d 951.

But in the case at bar, we think appellant cannot be heard to complain of the failure of the appellee to show that the purchaser was ready, able, and willing to pay for the property, in view of the fact that appellant accepted the purchaser introduced to him by appellee and within two or three days thereafter made the sale himself for cash at a reduced price.

Nor is the owner to escape liability by himself taking over the negotiations and selling at a price agreeable to him yet below that at which he listed the property with the agent. In Plant v. Thompson, 42 Kan. 664, 22 P. 726, 727, 16 Am.St.Rep. 512, the Supreme Court of Kansas, in regard to this very question, said: "The defendants will not be allowed to take advantage of their introduction to the purchaser by plaintiffs, and reap the benefits of the sale made to him in consequence, and then escape all liability of paying them their commission because they sold the land for a sum less than the price given their agents, where the reduction was made of their own accord." Cf. Pugh v. Dollahan, supra.

For other cases holding to the same effect, see Schlegal v. Allerton, 65 Conn. 260, 32 A. 363; Shelton v. Lundin, 45 Ind.App. 172, 90 N.E. 387; Minks v. Clark, 70 Colo. 323, 201 P. 45; Meagher v. Reeney, 96 Conn. 116, 113 A. 169; Rogers & Cole v. Cole et ux., 99 Vt. 239, 131 A. 12; and Talbott v. Treacy, 213 Ky. 8, 280 S.W. 153.

We take it as an admitted fact in this case that the property was listed with appellee as agent for sale at $45,000. The owner, conducting his own negotiations with purchaser, ignoring the agent and having no further communication with him, chose to sell at a lesser price than that at which he had listed the property with the agent. Liability to the agent, under the circumstances here present, is not to be so lightly brushed aside. The authorities cited sustain the agent's right to recover.

Finding no error, the judgment will be affirmed and the cause remanded, with direction to the District Court to enter judgment against appellant and his supersedeas surety. It is so ordered.

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

172 P.2d 116

CARROLL v. BUNT et al.

No. 4942.

Supreme Court of New Mexico.

Aug. 29, 1946.

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

Adolf J. Krehbiel, of Clayton, for appellees.

HUDSPETH, Justice.

The plaintiff-appellant sued the defendants for $265, the value of personal property, which she alleged defendants sold, and from a judgment on the pleadings dismissing her amended complaint she appeals.

The trial court sustained a motion to dismiss the complaint with leave to plaintiff to amend, and after an amended complaint was filed defendants answered, including in their separate answers as their first defense a motion to dismiss.

Plaintiff filed a reply and the case came on for trial on the merits. After the witnesses were sworn defendants moved for judgment on the pleadings, which was sustained. The question for review is whether the trial court erred in sustaining that motion.

Plaintiff in her complaint alleged ownership of the chattels, and that they were stored (no date given) on the premises of Alice Ratcliff in Clayton, Union County, New Mexico, and were so stored at the time of Mrs. Ratcliff's death, which occurred on January 24, 1943. It was also alleged that an administrator of the estate of Alice Ratcliff, deceased, was appointed by the Probate Court of Union County, and that Harold Bunt and his brother were decreed to be her only heirs; that in the year 1938 plaintiff executed a note for

$30 in favor of Alice Ratcliff and a chattel mortgage on the property involved to secure the same.

Defendants moved to dismiss on the following grounds:

"A. That it appears from said complaint the property claimed by plaintiff was in the possession of Alice Ratcliff, also known as Alice B. Ratcliff, at the time of her death, and that her estate was administered upon by the Probate Court of Union County, New Mexico, and that if plaintiff had any claim to any of the property in the possession of said decedent at the time of her death, plaintiff should have asserted such claim in said probate court proceeding, and not having done so is now barred and estopped to assert any claim against these defendants or either of them, by reason of any such property.

"B. It affirmatively appears from plaintiff's complaint that more than four years have elapsed since plaintiff's cause of action, if any, accrued, in that plaintiff's mortgaged property came into the possession of Alice Ratcliff in the year 1938, that is, more than four years prior to August 17, 1944, date when plaintiff's action herein was commenced."

The motion was sustained, to which ruling plaintiff excepted, and she was allowed 20 days in which to further plead.

The New Mexico statutes provide that the mortgagor may retain possession of mortgaged chattels until condition is broken, and prescribes the manner of sale by mortgagee. 1941 Comp. § 63-509; Martin et al. v. Beard, 48 N.M. 236, 149 P.2d 126. The allegation is that the chattels were "stored." The four year statute of limitation would not apply, if the date the goods were stored had been given.

The motion to dismiss seems to be based on the theory that Alice Ratcliff held the property in some other capacity than that of bailee at the time of her death. A statement in a pleading may not be given the force and effect of an admission of a fact unless it amounts to such. McCallister v. Farmers Development Co., 47 N.M. 395, 143 P.2d 597. If evidence was heard, or admissions made on this point at the hearing on the motion to dismiss it does not appear in the record. Benson v. Export Equipment Corporation, 49 N.M. 356, 164 P.2d 380.

"Generally speaking a particular status or relation once shown is presumed to continue, at least as long as it would naturally in the ordinary course of events." 9 Encyc. of Evidence p. 912.

The record is blank as to the action, if any, taken by the administrator of the estate of Alice Ratcliff, deceased, with reference to this property. Hence

doubt arises as to whether there was occasion for the plaintiff to make claim for the property in the probate court. 21 Am. Jur. p. 888. Moreover, the statute of non-claim is not ordinarily controlling where the subject matter of the suit is not necessarily classifiable as a claim against the estate of a decedent. Tierney v. Shakespeare, 34 N.M. 501, 284 P. 1019. It does not appear to a legal certainty that the probate court had jurisdiction of the property.

The property may have passed to the heirs of Alice Ratcliff, but it did so clothed with the fiduciary obligation, if the allegations of the complaint are true. 33 C.J.S., Executors and Administrators, § 118, p. 1073; Matern v. Commissioner of Internal Revenue, 9 Cir., 61 F.2d 663.

On motion to dismiss under the new rule 12, § 19-101 the allegations of the complaint are to be taken as true. While this complaint is indefinite and uncertain, a motion to dismiss is not the proper mode of attacking a complaint for indefiniteness and uncertainty. Johnson v. City of Santa Fe, 35 N.M. 77, 290 P. 793. The question presented is one of legal sufficiency, whether the complaint is sufficient to withstand challenge by demurrer, or by its modern substitute, motion to dismiss. Ritter v. Albuquerque Gas & Electric Co., 47 N.M. 329, 142 P.2d 919, 153 A.L.R. 273; Benson v. Export Equipment Corporation, supra. In the latter case we commented upon the importance of eliminating delays, and saving costs to litigants, but nothing therein said was intended to modify the doctrine that "The general policy of the Rules requires that an adjudication on the merits rather than technicalities of procedure and form shall determine the rights of litigants." Victory v. Manning, 3 Cir., 128 F.2d 415, 417. See unanimous opinion of the Supreme Court in Bell v. Preferred Life Assur. Soc., 320 U.S. 238, 64 S.Ct. 5, 88 L.Ed. 15.

1 Moore Federal Practice, 1945, Supplement, 264, page 648, cites many federal cases in support of the following rule:

"A complaint should not be dismissed for insufficiency, for failure to state a cause of action, unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim."

It follows that the motion to dismiss should not have been sustained.

The amended complaint eliminated all reference to the probate court proceedings and the chattel mortgage, alleged ownership of the chattels, that they were stored on the premises of Alice Ratcliff prior to January, 1942, and that they were sold by the defendants, without authority and without plaintiff's knowledge or consent on the 2nd day of July, 1944.

The defendants maintain that the motion for judgment on the pleadings was properly granted because the same issues were involved as in the motion to dismiss the complaint, which "was sustained by the court and not having been appealed from by plaintiff, became res adjudicata and the law of the case."

The Supreme Court of Vermont says that the law of the case doctrine "is not that of stare decisis nor yet that of res judicata though akin to each." Perkins v. Vermont Hydro-Electric Corporation, 106 Vt. 367, 177 A. 631, 653.

As applied in this jurisdiction there is little or no distinction, except that the doctrine of "law of the case" applies only to the one case (Sanchez v. Torres, 38 N.M. 556, 37 P.2d 805), while res adjudicata forecloses parties or privies in one case by what has been done in another case. Floersheim v. Board of Com'rs of Harding Co., et al., 28 N.M. 330, 212 P. 451.

Defendants overlook the fact that the order sustaining the motion to dismiss allowed plaintiff twenty days in which to further plead and an exception to the ruling of the court.

It was not a final judgment and, therefore, not res adjudicata. Sec. 41 Restatement of the Law of Judgments; White et al. v. Mayo et al., 31 N.M. 366, 246 P. 910.

Plaintiff excepted to the rulings on the motion to dismiss and the motion for judgment on the pleadings.

The Supreme Court of Iowa in Whitfield v. Grimes, 229 Iowa 309, 294 N.W. 346, 350, states the correct rule on the law of the case doctrine, in a similar case to the one at bar, as follows:

"In Watkins v. Iowa Cent. R. Co., 123 Iowa 390, loc. cit. 395, 98 N.W. 910, loc. cit. 912, this court said: 'If, after a ruling on a demurrer, a party excepting to that ruling pleads over a mere repetition of the matter theretofore stated in the pleading demurred to, he does not, of course, waive the error in the ruling on the demurrer. By so doing he manifestly does not intend to waive the error in the ruling on the demurrer, if any there be. * * * He either does not plead over by reasserting the same matters, or, if he does, such pleading should not be held to be a waiver of the ruling theretofore properly excepted to. Our rules of procedure are not intended as a trap to catch the unwary. Of course, if no exception is taken to the ruling on the demurrer, and the party whose pleading is attacked makes no exception thereto, but pleads over, and the demurring party moves to strike it, because a mere repetition, the only question then to be considered is the correctness of the ruling on the motion to strike. By failing to except to the ruling on the de-

murrer, the pleader accepts it as the law of the case, and the only ruling he challenges is the one on the motion to strike.' "

We conclude that the trial court erred in sustaining the motion for judgment on the pleadings. It follows that the judgment should be reversed and the cause remanded for trial on the merits. It is so ordered.

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

172 P.2d 588

STATE v. WALKER.

No. 4960.

Supreme Court of New Mexico.

Sept. 14, 1946.

Otto Smith and Robert V. Wollard, both of Clovis, for appellant.

C. C. McCulloh, Atty. Gen., and Robert W. Ward, Asst. Atty. Gen., for appellee.

BICKLEY, Justice.

A criminal information was filed in the district court charging Aubrey Walker with the murder of his wife, Martha Walker. His defense was that he did not know the gun was loaded and that it went off accidently. A jury returned a verdict against him of voluntary manslaughter. A motion for new trial was filed and overruled. The sentence of the court was that the defendant be imprisoned for a term of not less than seven years and not more then ten years, and that he pay the costs of the prosecution. Seeking to reverse this judgment, defendant has appealed and has filed a supersedeas bond.

The details of the occurrence are reflected in the summaries of the testimony of the State's witnesses Phillips and Tharp, prepared by counsel for the State and accepted as correct by counsel for defendant.

"Witness Phillips testified:

" 'He (defendant) said she had thrown something at him; that they had quarrelled and they had been drinking some. He said he went over to the desk . . . let me see . . . he wanted to see how many war bonds he had because he was thinking of cashing some to make some improvements on his place. He said he saw the gun in the drawer with the bonds and he picked it up. He said he thought he would frighten her. He said he didn't point the gun at her and knew it was not loaded.'

"Mr. Tharp Testified:

" 'The first he (defendant) said was, "We had a fuss and we were drinking and we always fussed when we drank. We didn't fuss any other time." * * * He said during the time they were fussing his wife threw a match case at him. I believe those are the words he used. * * * He said then he went to the desk, after the match case was thrown * * * he never did specifically say the time * * * but he went to the desk and went to the drawer in the desk to get some bonds he calculated on selling—cashing out, and that the gun was in the same drawer with the bonds. He picked it up to scare her and didn't think it was loaded. He never did say he pulled the trigger. He said he pointed it to scare her.' "

It is the admission of this testimony as to what defendant said at the coroner's inquest that is the basis of defendant's single assignment of error as follows:

"The court erred in permitting evidence of statements made by the defendant before the coroner's jury to be introduced at the trial of this case."

More specifically, defendant's counsel complains that the statements (a) were not freely and voluntarily made; (b) they were

made while the defendant was in a stupor; (c) he was not advised of his rights and (d) he was not given an opportunity to consult counsel.

We agree with the statement of the Missouri Supreme Court made in State v. Young, 119 Mo. 495, 24 S.W. 1038, 1045, quoted by counsel for appellant:

"The great question, after all, is, was the statement voluntary? and it must be determined from the facts in each case."

We indicated in State v. Archuleta, 29 N. M. 25, 217 P. 619, that a voluntary statement was not rendered inadmissible merely because the party making the statement was under arrest, and was not warned of the effect of the statement. And see People v. Chan Chaun, 41 Cal.App. 586, 107 P.2d 455, 457, where it was said:

"It is better and safer practice to inform an accused that his replies may be used against him, but if the statements are not made under oath, or under conditions requiring such a warning, the failure to specifically so instruct an accused does not affect the admissibility of the statement as evidence."

And in State v. Dena, 28 N.M. 479, 214 P. 583, the principles of exclusion applicable to confessions are discussed and New Mexico cases cited, and it was decided that where confessions are freely and voluntarily made, without duress, coercion, hope, fear, and without promise of reward or immunity, even though while accused is under arrest and before advice of counsel is obtained, are admissible in evidence. So it seems that defendant's specific objections (c) and (d) are without merit.

We may also say in passing, for what it is worth, that defendant did not request that the question of whether the statements were voluntary be submitted to the jury, doubtless because the defendant did not produce any evidence in conflict with the prima facie showing of voluntariness made by the State. See State v. Anderson, 24 N.M. 360, 174 P. 215. The facts apearing from the record do not persuade us that the defendant was in a stupor or was not in full possession of his faculties when the statements were made. No specific objection of that sort was made when the testimony was offered but we have reviewed the record nevertheless.

After carefully considering the record and briefs of counsel for defendant, we do not find merit in the contention that the statements of the defendant at the coroner's inquest were not free and voluntary.

We have referred to the principles of exclusion applicable to confessions. It is held in California that admissions not amounting to confessions are not controlled by the stricter rules applying to confessions. In People v. Durazo, 31 Cal.App.2d 559, 88 P. 2d 218, it was decided:

"Voluntary statements of accused containing damaging admissions but not constituting confession of guilt were properly admitted without preliminary proof that admissions were voluntarily made where accused had full opportunity to show that statements were involuntary."

See also People v. Chan Chaun, supra.

Whether the California doctrine is correct or not, we need not now decide. But where the statements made by a participant in an occurrence is to a considerable extent exculpatory, this may be a circumstance to consider as tending to support the view that the statements were voluntarily made. Statements in the main exculpatory, are frequently made with some eagerness and with an absence of reluctance.

Furthermore, defendant himself, either on direct or proper cross-examination, when he took the stand in his own defense, testified in substantial effect to the matters related by the witnesses Phillips and Tharp, who detailed the defendant's statements made at the coroner's inquest. Under such circumstances, even if otherwise erroneous, though we think in fact it was not, the admission in evidence of the testimony complained of does not constitute prejudicial error. See Honda v. People, 1943, 111 Colo. 279, 141 P.2d 178; State v. Talamante, 50 N.M. 6, 165 P.2d 812.

Finally, it may be well to refer to the principle governing review of such questions.

In 24 C.J.S., Criminal Law, § 1869, it is said:

"Rulings of the trial court on the competency of witnesses will not be disturbed in the absence of abuse of discretion. * * *

"Similarly, it is peculiarly the province of the trial, as distinguished from the appellate, court to pass on the preliminary proofs essential to the admission of certain kinds of evidence, such as evidence received in prior proceedings, dying declarations, and secondary evidence generally, confessions, etc."

Among the numerous cases cited in support of the text is State v. Di Stefano, Mo., 1941, 152 S.W.2d 20, where it was decided:

"Where defendant objects to the admission of confession on the ground that it was involuntary, unless manifest error has been committed, appellate court will defer to trial court's ruling in view of its better opportunity to arrive at the truth."

From all of the foregoing, it appears that the judgment must be affirmed.

And it is so ordered.

SADLER, C. J., and BRICE, LUJAN, and HUDSPETH, JJ., concur.

172 P.2d 818

GEORGE H. SASSER & CO. v. CHUCK WAGON SYSTEM, Inc.

No. 4923.

Supreme Court of New Mexico.

Sept. 20, 1946.

Jas. J. McNamara and Wesley Quinn, both of Clovis, for appellant.

Otto Smith, of Clovis, for appellee.

HUDSPETH, Justice.

Defendant appeals from a decree foreclosing liens on personal property referred to in the briefs as the sandwich shop. Attached to the plaintiff's complaint as Exhibit "A" is a purchase contract signed: The Chuck Wagon System, Inc., by H. M. Hanchey, Vice President (First Party), and George H. Sasser & Co., by G. H. Sasser, and H. M. Hanchey (Second Parties), in which the personal property is listed and also certain debts assumed by defendant, the amount of which is not in dispute. Plaintiff and Hanchey "warrant and covenant that they have legal title and possession * * * lawful right to dispose of" the personal property involved in this suit.

Paragraph III of the complaint reads as follows: "That the business sold by second parties to first party, together with all equipment described in Exhibit A, is located on Lot 12, Block 7, Original Town of Clovis, New Mexico, owned by plaintiff; that upon the execution of said contract, the defendant went into possession thereof; that defendant has now abandoned said property and the business for which the property was purchased; that the above described indebtedness to the American Business Credit Corporation and to the Home Lumber & Supply Co., were secured by indebtedness and liens on which plaintiff was primarily liable, and the payment of which was assumed by defendant; and that on account of the failure of the defendant to pay the said indebtedness as agreed, the plaintiff has been forced to pay part of said amounts, and to assume payment of the remainder. That H. M. Hanchey has assigned all of his right, title and interest in and to all matters and things involved in this suit to plaintiff, who has assumed all obligations of the said H. M. Hanchey; and that on account of the various matters and facts herein stated, plaintiff is subrogated to the rights of the lienholders, American Business Credit Corporation and Home Lumber Co., and is entitled to take possession of all of said property described in Exhibit A, and to a foreclosure of the lien to the American Business Credit Corporation."

Upon the filing of the verified complaint, the Court issued an ex parte order under

which plaintiff took possession of the property about a month after the alleged abandonment.

Defendant answered, admitted the execution of the purchase contract and the assumption of the indebtedness, but denied that it had abandoned the property and "denies that plaintiff is subrogated to any rights of the American Business Credit Corporation or the Home Lumber Company" and denied that plaintiff was entitled to possession of the property.

At the trial plaintiff introduced in evidence the purchase contract and George H. Sasser testified that plaintiff owned the lot on which the sandwich shop was located; that plaintiff had paid some of the indebtedness assumed by defendant, and had assumed the balance.

At the close of plaintiff's case the following occurred:

"The Court: What is your defense, Mr. McNamara?

"Mr. McNamara: The defendant will demur to the testimony and also to the complaint, for the reason that no cause of action is set out, and demurs to the evidence for the reason that no cause of action has been proved by the testimony. This is apparently a suit to foreclose certain liens and the testimony fails to show that there was any lien in favor of the American Credit Corporation, or whatever the name of the company is. There was no mortgage of any kind introduced and could not be, for the reason that if there was a mortgage or a lien in existence, it was not attached to or made a part of the complaint, as required by law. There is the same situation relative to the alleged lien of the Home Lumber and Supply Company, and the defendant further contends that the testimony shows no landlord's lien.

"The Court: The demurrer will be overruled. Do you have some proof to submit?

"Mr. McNamara: No, sir; we will stand on our demurrer. Let the record show an exception to the ruling of the Court."

Nearly two years after the trial, and after the defendant had submitted requested findings of fact and conclusions of law, plaintiff, with the permission of the court, amended the complaint by attaching as an exhibit a conditional sales contract signed by the Valentine System, by A. H. Valentine, "Vendor," and H. M. Hanchey and G. H. Sasser, "Vendee," which had been assigned to American Business Credit Corporation. It provides that the title shall remain in the vendor and upon an attempt of vendee to sell or transfer possession or ownership of said property the full purchase price shall immediately become due and payable, and vendor, or its agents, may take possession (payments theretofore made to be forfeited as liquidated dam-

ages), or may proceed against vendee to collect the balance due. The document does not bear a filing mark of the County Clerk and was not introduced in evidence.

Immediately after the filing of the amended complaint, requested findings of fact and conclusions of law were filed by plaintiff, and amended requested findings and conclusions were filed by the defendant. Two days later the court made its decision finding that defendant had abandoned the property and left it on plaintiff's premises, defaulted in the payment of rent and the indebtedness to the American Business Credit Corporation, the Home Lumber and Supply Company, and other creditors, and further: "8. That in order to protect itself, plaintiff took possession of said premises under an order of this Court and remains in possession thereof; that no tender of the indebtedness assumed by defendant and unpaid at the time of its abandonment of the sandwich shop has been made and no attempt by defendant or any of its agents or employees has been made to take possession of said sandwich shop or to operate the same."

And the Court concluded: "1. That defendant (plaintiff) is subrogated to the rights of the American Business Credit Corporation under its conditional sales contract and to the rights of the Home Lumber and Supply Company under its builder's lien and by virtue thereof is entitled to possession of the sandwich shop, fixtures and equipment involved in this case."

The defendant duly excepted to the findings and conclusions of the Court, after which decree foreclosing the liens was entered. This appeal followed.

While there is testimony to the effect that the defendant corporation was organized to take over the business, the partnership agreed to pay all of its debts not listed in the purchase contract; hence, this is not a case where the corporation is liable for all the debts of a predecessor. Pankey v. Hot Springs National Bank, 46 N.M. 10, 119 P.2d 636; Annotation, 149 A.L.R. 787, 797.

But plaintiff argues that the demurrer to the evidence and complaint set out above should be taken as an admission of the allegations of the complaint as amended by the addition of the conditional sales contract, and that the defendant corporation is chargeable with knowledge of all the facts with reference to the liens connected with the indebtedness, which it assumed because H. M. Hanchey, its vice president, who executed the purchase contract for it was one of the vendees in the conditional sales contract and a partner familiar with liens on the partnership property sold to defendant.

We are not impressed with these arguments. The purchase contract sets out

that plaintiff and Hanchey "are the sole owners of the sandwich shop, warrant the title thereto," etc. It is not probable that Hanchey informed the other officers of the defendant corporation that these statements were false.

Further evidence that defendant was not informed as to liens on the property is furnished by the purchase contract which states that: "Second Parties have today furnished First Party with a schedule of payments showing dates and amounts due firms or individuals on indebtednesses set forth above * * *" referring to the debts assumed by defendant. The schedule is not in the record.

The rule as stated in 19 C.J.S., Corporations, § 1084, page 621, is as follows: "Notice to an officer or agent is not regarded as notice to the corporation where the circumstances are such as to raise a clear presumption that he will not communicate his knowledge to the corporation, that is, where the fact is one which he is interested in concealing from it; and, accordingly, the corporation will not be charged with notice of facts of which an officer or agent acquires knowledge while acting in a transaction in which he is interested, either for himself or for another, adversely to the corporation, or in a scheme in which he is engaged to defraud the corporation. Thus, where an officer or agent of a corporation deals with the corporation for himself in his private capacity, any uncommunicated knowledge which he may have with respect to the transaction will not be imputed to the latter by reason of his possession of it; and, therefore, to charge the corporation with a knowledge of such facts it must be shown that they were known by disinterested officers of the corporation." 1 Restatement Agency, § 279; Shear Co. v. Wilson et al., Tex.Com. App., 292 S.W. 531; Ohio Millers' Mut. Ins. Co. v. Artesia State Bank, 5 Cir., 39 F.2d 400; Warren v. Lincoln et al., 58 S.D. 196, 235 N.W. 597; Swenson et al. v. G. O. Miller Telephone Co., 200 Minn. 354, 274 N.W. 222; McFerson v. Bristol, 73 Colo. 214, 214 P. 395; Western Securities Co. v. Silver King Consol. Mining Co. of Utah et al., 57 Utah 88, 192 P. 664; Lawhead v. Stewart et al., 122 W. Va. 80, 7 S.E.2d 350; Arnett v. Stephens, 199 Ky. 730, 733, 251 S.W. 947.

Plaintiff abandoned in this court the claim of landlord's lien. George H. Sasser, plaintiff's only witness, testified that he was paying the American Business Credit Co. at the rate of $50 per month, and further:

"'Q. The account of the Home Lumber and Supply Company. Have you paid it out? A. I have not paid all of it.

"'Q. Have you assumed its payment? A. Yes, sir.

"'Q. I believe it was necessary to pay that in order to keep a lien from being foreclosed. Is that right? A. Yes, that's right.'"

Plaintiff owned the lot on which the sandwich shop was situated. There is no evidence in the record as to the nature of the lien referred to by the witness in favor of the Home Lumber and Supply Company. There is no substantial evidence in the record of liens in the plaintiff, and under the rule stated in Pankey v. Hot Springs National Bank, supra, plaintiff has not made a prima facie case.

We are constrained to hold that the court erred in giving plaintiff possession of the property, and in entering the decree. Mathieu v. Roberts, 31 N.M. 469, 247 P. 1066; Troy Laundry Machinery Co. v. Carbon City Laundry Co., 27 N.M. 117, 196 P. 745.

The rule is well established that it is necessary that the debts be paid in full before one can become subrogated to collateral, or remedies available to the creditor. American Surety Company v. Westinghouse E. Mfg. Co., 296 U.S. 133, 56 S.Ct. 9, 80 L.Ed. 105; Annotations: 9 A.L.R. 1596, 91 A.L.R. 855.

In Fidelity & Deposit Co. of Maryland v. Atherton, 47 N.M. 443, 144 P.2d 157, 161, we said: "No general rule can be laid down which will afford a test in every case in which subrogation is sought. The underlying principle is that the right flows from principles of justice and equity. Every case depends upon its particular facts, * * *."

We express no opinion as to the right of plaintiff to be subrogated if and when it pays in full the debts which defendant assumed and agreed to pay. All the facts are not before us.

The judgment of the trial court is reversed and the cause remanded with directions to grant a new trial and to permit the parties to amend their pleadings, if they are so advised. It is so ordered.

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

172 P.2d 1016

RANKIN v. WANSER.

No. 4932.

Supreme Court of New Mexico.

Sept. 28, 1946.

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

Fred C. Stringfellow, of Raton, for appellee.

SADLER, Chief Justice.

J. H. Rankin, as receiver of City Drug Store of Clayton, New Mexico, prosecutes this appeal from a judgment rendered by the District Court of Union County decreeing a lien upon the funds in his hands as receiver in favor of Mrs. Rhea R. Wanser to secure a balance due on a note and mortgage evidencing the purchase price of certain drug store furniture and fixtures previously owned by her. For a statement of the pleadings upon which a former appeal out of this case was before us, see Fuqua v. Trego, 47 N.M. 34, 133 P.2d 344.

As disclosed by the opinion on the former appeal, the partners composing City Drug Store of Clayton, namely, Fuqua, Murphy and Trego, upon becoming insolvent filed a petition in the district court for the appointment of a receiver. J. H. Rankin, the appellant here, was named such receiver. Other pleadings were filed in that case on behalf of two of the plaintiffs therein, Fuqua and Murphy, which it is unnecessary to describe but which will be found discussed in the opinion on the former appeal.

The intervenor-appellant on that appeal, Mrs. Rhea R. Wanser, filed her amended petition in intervention setting up three causes of action, only one of which it will be necessary to mention here. The first claimed an equitable lien on the funds in the hands of the receiver resulting from the sale of the furniture and fixtures of City Drug Store. It was alleged that a note and mortgage evidencing a balance due upon the sale were given pursuant to a contract between purchasers, the said

Murphy and one Markham of the one part and Mrs. Rhea R. Wanser, by the terms of which the purchasers covenanted to give her a good and valid lien upon the furniture and fixtures to secure the balance due on the purchase price; that a note and chattel mortgage were executed in behalf of the seller, but that due to the gross negligence and intentional fraud of the said Murphy and Markham, they failed to acknowledge either the contract or the mortgage so as to entitle them to be filed of record or recorded. Other allegations appeared not necessary to mention.

The plaintiffs in the aforementioned suit and the present appellant, J. H. Rankin, as receiver, demurred to the petition in intervention filed by Mrs. Wanser. The demurrer was sustained and, treating the order sustaining same as having the effect of a dismissal of her petition in intervention, the intervenor, Mrs. Wanser, prosecuted an appeal to this court. It was disposed of by the opinion officially reported as above mentioned. We reversed the district court, holding that the demurrer should have been overruled and that "plaintiffs should have been required to answer or otherwise plead further." We directed the trial court to set aside its order sustaining the demurrer and enter an order overruling the same and to permit the parties to proceed in a manner not inconsistent with our opinion.

When the cause again reached the District Court of Union County, the receiver, J. H. Rankin, filed his answer to the amended petition in intervention in which he denied knowledge of the existence of the contract to give a chattel mortgage until long after his appointment as receiver and denied the effect of either the contract or the chattel mortgage as notice to him because of the lack of a statutory acknowledgment entitling either to filing or record in the office of the county clerk.

The case was later tried and the court made its findings of fact and conclusions of law substantially in conformity with the allegations of the appellee's amended petition in intervention, especially as respects the agreement of the purchasers of the furniture and fixtures to give to the seller, the appellee here, a good and valid lien upon the property sold by a mortgage to be executed by them securing the balance of the purchase price and as regards the purchasers' failure to acknowledge either the contract or chattel mortgage before filing the same with the County Clerk of Union County.

The trial court also found in conformity with allegations of the petition in intervention that various transfers of interests in said drug store, including the furniture and fixtures, subsequently took place but that in each instance the purchaser took with knowledge of the note and mortgage and

that the amount due thereunder was unpaid; that finally one Wilbur Trego, upon acquiring the whole or a part interest in said drug store, assumed and agreed to pay the indebtedness due Mrs. Wanser and that all subsequent purchasers of interests in the store recognized and ratified the transaction for the sale of the furniture and fixtures and made installment payments of $75 each, aggregating thirty-two in number, according to the terms of said note.

The amount due to the appellee on account of the transaction related was found to be $2100 with interest thereon at the rate of eight (8%) per cent. per annum from May 2, 1941, less a credit of $800 by reason of a payment made by the said J. L. Fuqua, Jr., and the said W. R. Murphy, former partners in City Drug Store.

The court concluded from the facts found that appellee, intervenor below, had a lien on the moneys in the hands of the receiver realized from the sale of the furniture and fixtures sold by appellee, as aforesaid, and described in said chattel mortgage. Judgment was accordingly rendered adjudging the amount due appellee as the sum of $2,341.93 and decreeing a lien in her favor on the funds in the hands of the receiver for said amount, first and prior to all other liens, except for taxes due from the receiver on property of which he had been possessed and save for the costs and expenses of the receivership. It is from such judgment that the receiver prosecutes this appeal.

The principal and practically the only point relied upon by the receiver, on this appeal, is that because of the absence of an acknowledgment to the above mentioned contract to give a mortgage and to the mortgage itself, the mortgage was void against the receiver and could not be made the basis of an enforceable lien against any property or funds in the receiver's hands. At the very beginning of his argument, the appellant states:

"Our principal contention is that the case stands or falls on the validity or invalidity of the $4500.00 chattel mortgage, held to be void by Judge Chavez, and the so-called preliminary contract shown beginning at page 110. This so-called purchase contract, shown as Exhibit 2 in the record, was not acknowledged before any Notary Public or any other officer authorized to take acknowledgments, and it is in the same class as the $4500.00 chattel mortgage which Judge Chavez held to be void."

Reference is made in the trial court's findings to the fact, as indicated in the quotation from appellant's brief, that in earlier proceedings in the case, the mortgage had been held void as against the receiver. The receiver's counsel refer to the statute, 1941 Comp. § 63-502, L.1935, c. 54, § 1, authorizing the acknowledgment

and filing in the county clerk's office of chattel mortgages and declaring that failure to so file shall render the same void as to subsequent purchasers, receivers from the date of filing the order of appointment and others named. He then argues, citing Simon Vorenberg Co. v. Bosserman, 17 N.M. 433, 130 P. 438, that filing of the mortgage was ineffectual as notice since the instrument was improperly filed because lacking an acknowledgment.

All that is said may be conceded and it still will not aid the receiver. In the former appeal to which he was a party the precise question of the effect of absence of an acknowledgment to the mortgage was involved. In setting forth in our opinion the objections to the petition in intervention raised below by the parties, which is the same amended petition in intervention on which the cause was tried after remand, one of such objections set forth was [47 N.M. 34, 133 P.2d 346]: "That the execution of the chattel mortgage, *incomplete and ineffectual though it be to create a lien because not acknowledged*, having absorbed by merger the prior contract between the parties concerned to give such a mortgage lien, no such lien can now be relied upon."

Now what did we have to say touching this and other claims of the receiver and his co-appellees? It was this:

"The facts alleged in the petition, if established by evidence, would be sufficient to create a valid and enforceable equitable lien upon the property in the hands of the receiver for the amount of intervener's claim. Plaintiffs would not dispute this proposition, probably, except for the reason that they rely upon the law of merger as having nullified all force and effect of the agreement to give intervener a chattel mortgage carrying a lien. Plaintiffs mistake the applicability of the rule of merger, as well as that pertaining to equitable mortgages. An agreement founded on a valuable consideration to give a mortgage lien on a chattel constitutes an equitable mortgage lien. That is a rule of universal application. Van Sickle v. Keck, 42 N.M. 450, 81 P.2d 707; 5 R.C.L., Chattel Mortgages, § 10; 17 R.C.L., Liens, § 13; 37 C.J., Liens, § 18, 19. Of course, no intervening interest of third persons will be affected by such equitable mortgage subsequently adjudged to exist. However, all parties to this controversy had notice of intervener's claim and the understanding that she had a valid lien, according to the petition. The appointment of a receiver is in the nature of an equitable execution. By it the court is able to reach only the actual interest of the debtor in the property—the interest which the creditors themselves could reach with an execution issued on a judgment of law in their favor. Long-

fellow v. Barnard, 58 Neb. 612, 79 N.W. 255, 76 Am.St.Rep. 117.

"Generally speaking, all previous stipulations are merged in the final and formal contract executed by the parties, and this applies to a deed or mortgage based upon a contract to convey (Norment et ux. v. Turley et al., 24 N.M. 526, 174 P. 999); and all previous contemporaneous oral negotiations concerning the subject matter likewise merge in the valid written contract. But the doctrine of merger could not apply where the second or final contract is incomplete or invalid."

It would avail us little to reconsider the questions there decided, if otherwise disposed so to do. We held on the former appeal that if the intervenor (appellee here) established by evidence the facts alleged in her petition of intervention, they would be sufficient to create a "valid and enforceable equitable lien upon the property in the hands of the receiver for the amount of intervener's claim." This was said in the face of the admitted fact, urged in objection, that the contract to give a lien and the mortgage itself lacked acknowledgments. The intervenor went back to the lower court after that opinion and established the allegations of her petition. For us now, after that holding on the former appeal, to declare she had no lien would certainly repudiate the doctrine of the "law of the case" as it long has been applied in this jurisdiction. See Sanchez v. Torres, 38 N.M. 556, 37 P.2d 805, 811. This we are not inclined to do.

All other questions argued by the appellant are so interwoven with and related to this one that its decision resolves them all. Indeed, as appellant himself states, "the case stands or falls on the validity or invalidity" of the so-called chattel mortgage and preliminary contract to give the same. We held against this contention on the former appeal.

It follows from what we have said that the judgment is correct and should be affirmed.

It is so ordered.

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

172 P.2d 1019

STATE v. GRAYSON et al.

No. 4937.

Supreme Court of New Mexico.

Sept. 28, 1946.

Fletcher A. Catron, of Santa Fe, for appellants.

C. C. McCulloh, Atty. Gen., and Thomas C. McCarty, Asst. Atty. Gen., for appellee.

HUDSPETH, Justice.

The defendants were convicted of the crime of attempt to commit murder and from the judgment and sentence entered upon the verdict, appeal.

The evidence of the state shows that the defendants registered at a hotel in the

City of Santa Fe about 8 p.m., and were assigned Room 304, to which they were conducted by Pedro Gonzales, the prosecuting witness, an employee of the hotel.

Later that night Gonzales saw a woman in Room 304 with the defendant, Grayson, but denied that he procured her for him. The following afternoon Gonzales was enticed by defendants into Room 304.

After Gonzales and defendants entered the room the door was locked by one of the defendants. They offered Gonzales a drink of liquor, and asked him the name of the woman who had been in the room with Grayson, stating that she had stolen some money. Gonzales declared and maintained throughout the "third degree" ordeal that he did not know the name of the woman—only knew her by sight. Defendants had two bottles of liquor, part of which they consumed in the presence of Gonzales, threatened to strike him with a bottle, and repeatedly threatened to kill him. They struck him with their fists, and Gonzales testified as to the further assaults, as follows:

"A. And I was very bloody after I had been beaten, and they told me to wash.

"Q. Do you remember who told you that, Pete? A. I don't know, but they told me. I couldn't see because my eye was swollen. They told me to wash, I washed, and I was cleaning my face with a towel when I finished cleaning they again attacked me, one side, I don't recall which side, and then they got me dizzy and they put me across the wall, and then they told me to call the girl through the telephone, that the telephone was there. I didn't say anything, but I thought of calling help for me. I went to the telephone with my hands all bloody, and I put them there, and I called downstairs to the desk, and no one answered. I was excited, but I said these words: 'Come up to the 304 right away,' and then they grabbed me here from behind, I don't know who, and they put me back where I was, and they again attacked me. Before that they said this: 'This son of a bitch called downstairs for help.' and then they attacked me again. Two or three times they put me on top of the beds, there was two double beds, they would put me there and they would put me here, they would cover me with sheets or quilts, and hit me on the head. I don't know when they did cut me here, I didn't feel it, I didn't feel it until I went to the hospital. * * * 'After that I don't remember because I was very dizzy and I could not see. I screamed very loud when they had me against the bed and covered, they pulled me by the hair and others would strike me on the back, I don't know who they were' ".

Gonzales was confined to the hospital for ten days as a result of his injuries. The doctors testified that he had suffered the loss of two teeth, two complete fractures of the lower jaw, fracture of two

ribs, the loss of about one-third of the right ear and numerous cuts and bruises.

When the State rested the defendants also rested and moved for an instructed verdict. The motion follows:

"Mr. Catron: At this time, if the Court please, the defendants move that the jury be instructed to bring in a verdict of not guilty for the following reasons:

"The defendants are charged here under Section 41-611 of the New Mexico Statutes, 1941 Annotated, with the crime of attempting to commit the crime of murder on the prosecuting witness, Pedro Gonzales. The State has failed to show that these defendants had the specific intent to murder Pedro Gonzales; the State has failed to show by any evidence that the means employed, or the acts done by the defendants, insofar as Pedro Gonzales is concerned, were apparently reasonably adapted to the accomplishment of the end which is charged that is, the murder of Pedro Gonzales, or that those acts were done under circumstances making the murder of Pedro Gonzales apparently possible. This being an alleged attempt to commit the crime of murder, it was incumbent upon the State to establish by the evidence, beyond a reasonable doubt, that the acts done by the defendant were done with malice aforethought, and either with deliberation and premeditation, and the intent to commit murder or with premeditation and with the intent to commit murder, those being the necessary ingredients of the crimes of murder in the first degree and murder in the second degree, and it is only with murder and attempt to commit murder that we are here concerned.

"For the further reason that even should the Court believe that there is any evidence here from which the jury might believe, beyond a reasonable doubt, that there was an intent on the part of the defendants to commit murder, and in that event, the defendants would have to be discharged because an assault having been shown it would then be assault with intent to murder, and under this Statute, they cannot be convicted of the crime of assault with intent to murder because of the language itself which reads:

" 'If any person shall attempt to commit the crime of murder by poisoning, drowning or strangling another person, or by any means not constituting an assault with intent to murder, such offender shall be punished by imprisonment, etc.' The District Attorney is proceeding on the theory that that language is to be construed as eliminating intent. On the contrary, all authorities hold that a specific intent to murder must be established, in order to convict of the crime of attempt to murder. As a result, we have this situation, either there is no intent shown, and we therefore lack an essential element of the crime which is

charged here, and the defendants must be discharged, acquitted, or if we have an intent shown, they must be discharged because they are entitled (indicted) or informed against under the wrong law."

The motion was overruled. Defendants excepted, and assigned the action of the Court as error. Their contention was presented by requested instruction No. 6, which the Court refused, and again by motion to set aside the verdict.

The Court embodied in his instructions to the jury, without objection from the State, defendants' requested Instruction No. 1, as follows: "The Court instructs the jury that the defendants are charged under Section 41-611, New Mexico Statutes, 1941 Annotated, with the crime of attempting to commit the crime of murder upon one Pedro Gonzales. In order to justify a verdict of guilty of the crime so charged, the facts and circumstances shown by the evidence in this case must convince you beyond a reasonable doubt that the defendants attempted to murder said Pedro Gonzales by poisoning, drowning, or strangling him, or by any means, not constituting an assault with intent to murder."

Mr. Justice Bickley briefly discussed 1941 Comp. Secs. 41-611 and 41-606 in State v. Martin, 32 N.M. 48, 250 P. 842. Secs. 15 and 16, Chapter 265, Anno.Laws of Mass., enacted more than 140 years ago, are similar; and statutes similar to or identical with 1941 Comp. Secs. 41-606 and 41-611 and other sections of Chapter 3 of the Act of N.M. Defining Crimes and Punishments, Laws 1853–1854, appear in the Revised Statutes of Wis. of the year 1849; and the Supreme Court of that state in Jambor v. State, 75 Wis. 664, 44 N.W. 963, 966, commented on the section under consideration here, from which we quote: "It is very true the defendant is prosecuted for an attempt to murder M. M. Secor by means not constituting an assault with intent to murder. Actual assault or violence is not an ingredient of the crime. If physical force were used, it might amount to an assault with intent to murder, and be a different crime. * * * It is said that this tends to prove another crime, viz., an assault with intent to murder, which is not the offense charged in the information. But we cannot conceive of what offense comes under section 4374, unless the one charged does; for the statute has expressly provided for an assault with intent to kill, and then provides for the offense of attempting to murder by poisoning, drowning, or strangling, or by other means not constituting an assault with intent to murder. So there must be a distinction between the two offenses. An assault implies some unlawful physical force, partly or fully put in motion. It includes violence. But we are considering the attempt to commit murder by means not constituting an assault."

"Every battery includes an assault, because the greater includes the lesser." 6 C.J.S. Assault and Battery, § 1, p. 797.

The word "attempt" is more comprehensive than the word "intent" implying both the purpose and the actual effort to carry that purpose into execution. Smith v. State, 126 Ga. 544, 55 S.E. 475. The specific intent to murder is the gist of the crime. It raises it from misdemeanor to felony and the error based upon the denial by the trial court of defendant's request that the jury be instructed on the question of intent is well taken. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280; State v. Louther, 22 Wash.2d 497, 156 P.2d 672; Norwood v. State, 182 Miss. 898, 183 So. 523; Daniels v. State, 196 Miss. 328, 17 So.2d 793; Carter et al. v. State, 181 Tenn. 259, 181 S.W.2d 137; Davis v. State, 206 Ark. 726, 177 S.W.2d 190; 22 C.J.S., Criminal Law, §§ 32, 75; 40 C.J.S., Homicide, Sec. 79, p. 942.

While the information did not charge a crime under Sec. 41-611, because it shows that a crime was committed by an assault, and it was not an attempt to commit the crime of murder by poisoning, drowning, or strangling, which may be accomplished by assault; yet the defendants are guilty of a cowardly and brutal assault upon Pedro Gonzales, for which they richly deserve punishment, and we assume that the District Attorney will desire to further prosecute the case.

The judgment of the trial court will be reversed, the verdict of the jury set aside, and the case remanded with instruction to the District Court to set aside his judgment and to grant a new trial, and proceed not inconsistent herewith. It is so ordered.

BRICE and LUJAN, JJ., concur.

BICKLEY, Justice (concurring specially).

I am unable to fully concur in the opinion of Mr. Justice Hudspeth. It is therein stated that the information did not charge a crime under Sec. 41-611, "because it shows that a crime was committed by an assault, and it was not an attempt to commit the crime of murder by poisoning, drowning or strangling, *which may be accomplished by assault.*" (Emphasis mine.)

I agree that the crime of attempting to commit the crime of murder under Sec. 41-611 may be accomplished by an assault. To this extent we all repudiate the contention of appellant and the apparent holding of the Wisconsin court in Jambor v. State quoted from in the main opinion, and there is no reasoning supplied in lieu thereof.

Since it is conceded that an assault may be an ingredient of the crime defined in

Sec. 41-611 it becomes important to scrutinize the language of the said section to ascertain whether it was the legislative intent to limit its scope to attempts to commit the crime of murder "by poisoning, drowning, or strangling."

It is familiar law of statutory construction that effect shall be given to all of the words and phrases of a statute.

Sec. 41-606 (Assault with intent to murder) and Sec. 41-611 (Attempt to Commit Murder) were originally enacted as Secs. 26 and 27 of Ch. III of act 28 of the Laws of 1853–1854 as follows:

"Assault. Sec. 26. If any person shall assault another, with intent to murder, or to maim or to disfigure, or injure his person, in any of the ways mentioned in the next preceding section, shall be punished by imprisonment in the county jail or Territorial prison not more than five years, nor less than one year, or by fine not exceeding one thousand dollars nor less than fifty dollars.

"Assault, &c. Sec. 27. If any person shall attempt to commit the crime of murder, by poisoning, drowning, or strangling another person, or by any means, not constituting an assault with intent to murder, such offender shall be punished by imprisonment in the county jail or Territorial prison, not more than ten years, nor less than one year."

The marginal notes indicate that either the Legislature or the editor preparing the matter for publication recognized that assault might be an ingredient of both offenses. Such seems to be the holding in the main opinion.

I cannot but think that the difference in punishment was arranged because the Legislature viewed with greater abhorrence the means employed such as poisoning, drowning or strangling and that the lawmakers believed that the employment of such means was attended with an irrebuttable presumption that a person attempting to commit murder by such means was acting with a deliberate and premeditated design indicating a depraved mind, which might not necessarily or invariably attend assaults with intent to murder by less obnoxious means and as more lightly punishable under Sec. 26.

The idea is not novel. There are certain "horror murders", included in first-degree murders. For instance: "All murder which shall be perpetrated by means of poisoning or lying in wait, (or) torture," are defined as first-degree murder. Sec. 41-2404.

If these means are employed deliberation and premeditation are conclusively presumed.

I think by Sec. 27, the Legislature had in mind to impose the severer penalty upon

"horror attempts to murder," and that such attempts by poisoning, drowning or strangling were meant to be illustrative and did not exhaust the class since they said that any person attempting to commit the crime of murder "by any means not constituting an assault with intent to murder" must be punished as therein provided. Since the main opinion does not eliminate assault as an ingredient of the crime of attempting to commit the crime of murder by poisoning, drowning or strangling, it is apparent that such attempt to commit murder would be punishable under the provisions of Sec. 27 notwithstanding that the proved facts might also constitute assault with intent to murder under Sec. 26, except for the fact of the legislative declaration to the contrary. In other words, the same evidence might establish both the offense of "assault with intent to murder" and the offense of "attempt to murder," but the offense would fall within and be punishable under the provisions of Sec. 27 if committed by the means described therein, simply because the Legislature has said that it falls within and shall be punishable as provided in that section and not as provided in Sec. 26. Sec. 27 immediately after employing the phrase "by poisoning, drowning or strangling another person" goes on to say: "or by any means, not constituting an assault with intent to murder." It is to be noted that this language does not necessarily exclude assault from the means employed, but only excludes means constituting an assault with intent to murder. An assault with intent to murder otherwise falling under Sec. 26, if the assault be by means described in Sec. 27, would be punishable under Sec. 27 and *ergo* an assault with intent to murder by any of the means described in Sec. 27 would be an attempt to murder and not an assault with intent to murder as contemplated by Sec. 26.

It may be well to call attention to the fact that in 40 C.J.S., Homicide, Sec. 68, discussing attempts, it is said: "*Distinguished from assault with intent to murder.* It has been stated that there is very little substantial difference between an assault with intent to murder and an attempt to murder."

This being so and the main opinion having conceded that an offender may be proceeded against under Sec. 27 notwithstanding that an assault is involved, the only significance I can discover in the words "or by any means, not constituting an assault with intent to murder" is to characterize the means thus referred to as being of the same kind as those theretofore specifically mentioned in the section, namely, by poisoning, drowning or strangling.

Since we are all agreed that whether there has been an assault or not is not a

determining ingredient of the offense under Sec. 27 (41-611), what significance must be given to the phrase, "or by any means, not constituting an assault with intent to murder"?

I think the answer to this question is to be found in the employment of the maxim of statutory construction known as *ejusdem generis*. To refresh our recollection, this maxim means according to 28 C.J.S., Ejusdem, 1049: "Literally 'Of the same kind or species.' A well-known maxim of construction, sometimes called Lord Tenterden's Rule, to aid in ascertaining the meaning of a statute or other written instrument, the doctrine being that, where an enumeration of specific things if followed by some more general word or phrase, such general word or phrase is to be held to refer to things of the same kind. * * *"

If it be inquired what means unspecified would be considered as the same kind as those specifically enumerated, I would venture to look to our first-degree murder statute above cited and conclude that an attempt to commit the crime of murder by lying in wait or torture would be of the same kind and that any of the various kinds of torture could be assimilated to the class of horror attempts to murder specifically enumerated. Also, while there might be a technical distinction between strangling and smothering, I think an attempt to commit the crime of murder by smothering would be a good illustration of means of the same kind as strangling, specifically mentioned in Sec. 27. An attempt to murder by smothering another person would doubtless also come within the purview of torture.

If the means employed satisfies the rule of ejusdem generis then there would be no greater reason to eliminate assault as an ingredient of accomplishment of attempt to murder by such means than if the attempt were made by poisoning, drowning, or strangling.

It is arguable that there is in this case evidence sufficient to show that the defendants attempted to murder Pedro Gonzales by means of lying in wait, torture and smothering and that they could be proceeded against under Sec. 27 (41-611).

However, the views presented in this opinion, if correct, were not adequately presented in the information nor in the instructions and for this reason I do not resist the decision in the main opinion to remand the case for further proceedings.

This opinion should not be closed without stating, that for the purpose of ascertaining the meaning of the act and the intent of the 1853 Legislature, I have disregarded the 1921 amendment increasing the penalty for the offense described in Sec. 26 (originally regarded as the lesser) and leaving unchanged the punishment for commission of the graver crime described in

Sec. 27. I think this circumstance proves nothing except inattention on the part of the draftsman and does not aid us in any way in construing the language employed in Sec. 27.

SADLER, C. J., concurs.

173 P.2d 484

In re MATSON'S ESTATE.

MATSON v. MATSON.

No. 4941.

Supreme Court of New Mexico.

Oct. 5, 1946.

Dailey & Rogers and Jethro S. Vaught, Jr., all of Albuquerque, for appellant.

K. Gill Shaffer, Theo E. Jones, and Edwin L. Swope, all of Albuquerque, for appellee.

BRICE, Justice.

The question is whether a claim filed by Myrtle B. Matson with the administrator of the estate of Lauren C. Matson, deceased, was barred by the statute of limitation. The facts are substantially as follows:

On August 20, 1922, at Wichita, Kansas, Lauren C. Matson, a resident of that state, made, executed, and delivered for a cash consideration to Myrtle B. Matson the claimant, a promissory note for the sum of $7603.39, due one year after date, bearing interest at 7 per cent per annum from maturity until paid. There were credits at various dates between August 8, 1938, and November 8, 1941, aggregating $805.80, all except two of which were endorsed upon a paper attached to the note. In the year of 1931 Lauren C. Matson, still a resident of Kansas, visited New Mexico for one week. Thereafter, on May 1, 1936, he became a resident of New Mexico; and except seven days and a few hours spent outside the state he remained in New Mexico from May 1, 1936, until October 11, 1941, on which date he died.

Myrtle B. Matson has been the owner and holder of the note mentioned since its execution.

Grace L. Matson, the wife of Lauren C. Matson, made no application to be appointed administratrix of the estate of her husband after his death, until July 16, 1942 on which date she was appointed administra-

trix. Prior thereto, and on April 30, 1942, Myrtle B. Matson, the claimant, filed a petition in the district court of Bernalillo County praying to be appointed administratrix of the estate, but the district court on the same day appointed Augustus T. Seymour administrator. On May 4, 1942, Myrtle B. Matson filed proof of claim with the administrator. On July 6, 1942, Seymour resigned as such administrator and thereafter on July 16, 1942, Grace L. Matson was appointed administratrix of her husband's estate and she has been administratrix since that date.

The following statutes are material to a decision:

"The following suits or actions may be brought within the time hereinafter limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially provided." N.M.Sts.1941 Sec. 27-101.

"Those founded upon any bond, promissory note, bill of exchange or other contract in writing, or upon any judgment of any court not of record, within six years. * * *" N.M.Sts.1941 Sec. 27-103.

"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." N. M.Sts.1941 Sec. 27-108.

"The times limited for the bringing of actions by the preceding provisions of this chapter shall, in favor of minors and persons insane or under any legal disability, be extended so that they shall have one [1] year from and after the termination of such disability within which to commence said actions." N.M.Sts.1941 Sec. 27-109.

"When the commencement of any action shall be stayed or prevented by injunction order or other lawful proceeding, the time such injunction order or proceeding shall continue in force shall not be counted in computing the period of limitation." N. M.Sts.1941 Sec. 27-111.

"The following persons are not qualified to act as executors or administrators: Nonresidents of this state; minors; judicial officers; persons of unsound mind, or who have been convicted of any felony, or of a misdemeanor involving moral turpitude." N.M.Sts.1941, Sec. 33-106.

"If the deceased person makes no will, the estate shall be administered by the surviving conjugal partner, if married, and in the absence of such person, by the nearest relative of the deceased, or other person having an interest in the distribution of the

property, be it an executor, legatee or creditor." N.M.Sts.1941 Sec. 33-109.

"If there should be no such person, or if such person should not take out letters of administration, within twenty [20] days after the death of the testator, or of having received notice thereof, the probate judge shall appoint a person of sufficient capacity to administer said estate wherever it may be situated." N.M.Sts.1941 Sec. 33-110.

The deceased came to New Mexico to make it his home on May 1, 1936. He died October 11, 1941, and an administrator of his estate was appointed April 30, 1942. The claim in question was filed with the administrator on May 4, 1942; which was six years and three days after he moved to New Mexico. But he had been in the state seven days in 1931, which, added to the above, would make six years and nine days in which no action had been taken on the note or claim. From these facts it appears that the note was barred by the six year statute of limitations, *if the trial court erred* in holding that there should be deducted from this time the twenty days after the death of the deceased in which his widow was given a preference right to administer the estate by Secs. 33-109 and 33-110, N.M.Sts.1941, of which right she did not avail herself. In re Goldworthy's Estate, 45 N.M. 406, 115 P.2d 627, 148 A.L.R. 722.

Section 33-109, supra, gives a preference right to the widow of the deceased to administer the estate. It is only "in the absence of such person" that "the nearest relative of the deceased, or other person having an interest in the distribution of property," has the twenty day preference right to apply for letters of administration. It may be that the legislature intended that if there was a surviving conjugal partner who refused to make application for letters of administration within the twenty days that one of the other persons named should have a preference over "a person of sufficient capacity to administer said estate" as provided by Sec. 33-110 supra. This seems to be our holding In re Miller's Estate, 39 N.M. 40, 38 P.2d 1116. We are of the opinion, however, that as there was a surviving conjugal partner of the deceased that she, and she alone, had twenty days within which to make application to be appointed administratrix of her husband's estate. Whether the court was without *jurisdiction* to appoint another until after the expiration of the twenty days, as held by some courts (Pikey v. Riles, 223 Mo.App. 921, 20 S.W.2d 550; In re Wilson's Estate, Mo.App., 16 S.W.2d 737; Haug v. Primeau, 98 Mich. 91, 57 N.W. 25); or whether the appointment of another within the twenty days was error only (Jones v. Bittinger, 110 Ind. 476, 11 N.E. 456), we need not decide. But in any event

the statute is mandatory; and a widow who is qualified cannot be arbitrarily deprived of her preferential right.

The widow failed to make an application for appointment until long after the expiration of the twenty days in which she had a preference right to administer her husband's estate, but during that twenty days the court was without authority to arbitrarily appoint another. There were then twenty days, within the six years and ten days that elapsed between the death of deceased and the filing of the claim, in which no action upon the claim could have been legally taken, although this situation did not prevent the filing of the claim within six years after the death of deceased. The claimant had several months after the expiration of the twenty days preference time in which she could have secured the appointment of an administrator, had she so elected.

Many states have statutes which toll the statutes of limitation until an administrator is appointed; others for a specific time after the death of deceased. Many of the authorities on the question have reference to these statutes. In our search we have noted that the following states have such statutes: North Carolina, Montana, Pennsylvania, New York, Oregon, Texas, Georgia, Washington, California, Kentucky, Mississippi, Alabama, Idaho, Massachusetts, Virginia, Illinois, Michigan, South Carolina, Nevada, and New Hampshire.

The trial court held, and the appellee asserts here, that the six year statute of limitation was tolled during the twenty days immediately following the death of the deceased in which the widow had a preferential right to apply for letters of administration. If this ruling is correct there remained eleven days for the statute to run at the time the claim was filed with the administrator.

The appellant contends that when the six year statute of limitations had started to run "it could be tolled only by a specific tolling statute," and New Mexico has none; that the claim had been barred by the six year statute nine days when filed.

Whether the trial court erred depends, therefore, upon whether the statute of limitations was tolled during the twenty day period in which the widow of deceased had the preferential right to administer upon her husband's estate.

It is a rule supported by the weight of authority that when statutes of limitation have begun to run, a disability to sue does not suspend the running of the statute, in the absence of a specific statute enacted for that purpose. Brooks v. Preston, 106 Md. 693, 68 A. 294; Johnson v. Wren, 3 Stew., Ala., 172; Copeland v. Collins, 122 N.C. 619, 30 S.E. 315; Succession of Linderman, 3 La.Ann. 714; Mitcheltree's Adm'r

v. Veach, 31 Pa. 455; Anderson v. Bedford, 44 Tenn. 464; Swift v. Trotti, 52 Tex. 498; Handy v. Smith, 30 W.Va. 195, 3 S.E. 604; Baker v. Brown, 18 Ill. 91; Johnson v. Equitable, etc., Society, 137 Ky. 437, 125 S.W. 1074; 34 A.J. "Limitations" Secs. 188, 189, 191; 37 C.J. "Limitations" Secs. 156, 443, 446.

The following texts state the general rule:

"Generally speaking statutes of limitation are not interrupted or tolled by reason of the death of a party to a cause of action unless special provision is made in such statutes for suspending or interrupting the statute. In suits upon claims of indebtedness incurred by the decedent, action must be brought within the time limited for bringing the action had the decedent lived, unless some special provision is made in the statute for suspending or tolling it." 21 A.J. "Executors & Administrators."

"Where a cause of action accrues after the death of the person against whom it lies, limitation does not begin to run until there is a grant of administration on his estate; but the general rule is that the death of one against whom a cause of action has already accrued does not suspend the running of limitations until administration on his estate is taken out, although there is some authority for the contrary view, * * *." 34 C.J.S., Executors' and Administrators, § 732, page 748. Also see: Appeal of Keyser, 124 Pa. 80, 16 A. 577, 2 L.R.A. 159; McAuliff v. Parker, 10 Wash. 141, 38 P. 744.

The courts of a number of states have held, in the absence of a tolling statute, that the statutes of limitation are suspended on claims against the estates of decedents until the appointment of an administrator; or until the creditor by using diligence could secure such appointment. Rose v. Daniel, 3 Brev., S.C., 438; Brown v. Leavitt, 26 N.H. 493; Toby v. Allen, 3 Kan. 395; Burnet's Ex'rs v. Bryan's Adm'rs, 6 N.J.L. 377; Long v. Clegg, 94 N.C. 763; In re McCandless' Estate, 61 Pa. 9; Briggs v. Thomas' Estate, 32 Vt. 176; Stanton v. Gibbins, 103 Mo.App. 264, 77 S.W. 95.

It seems that the Supreme Courts of North Carolina and Oklahoma have decided the question both ways. See Long v. Clegg, supra; Copeland v. Collins, 122 N.C. 619, 30 S.E. 315; Shawnee Nat. Bank v. Marler, 106 Okl. 71, 233 P. 207; Robitaille v. Mumaugh, 167 Okl. 339, 29 P.2d 602; Griffin v. Hannan, 185 Okl. 433, 93 P.2d 1078.

The first case on the question decided in this country was Hopkirk v. Bell, 3 Cranch 454, 2 L.Ed. 497, in which it was held that the statutes of limitation of Virginia were suspended during the Revolutionary War; but the decision rested principally upon the terms of the treaty of

peace between the United States and Great Britain, in which it was provided that creditors of neither country should meet with any lawful impediment to the recovery of the full sum of debts due its citizens by the citizens of the other.

Following the Civil War the Supreme Court of the United States held in a number of cases that the statutes of limitation of the Confederate States were suspended as to causes of action against "Rebel debtors" owed to "loyal citizens" during the time that a suit could not be instituted because of war conditions. The principal cases are Hanger v. Abbott, 6 Wall. 532, 18 L.Ed. 939; United States v. Wiley, 11 Wall. 508, 20 L.Ed. 211, and Braun v. Sauerwein, 10 Wall. 218, 19 L.Ed. 895. In the Braun case the Supreme Court said:

"It is, undoubtedly, a general principle, that when a statute of limitation has begun to run, a disability to sue subsequently intervening does not stop its running, even though the disability be one of those expressly recognized in the statute itself. * * * But in Hanger v. Abbott, 6 Wall. 532, 18 L.Ed. 939, it was ruled, after grave consideration, that the time during which the courts of the recently rebellious states were closed to the citizens of other states, is, in suits brought by such citizens, to be excluded from the computation of the time fixed by statutes of limitation, within which only suits may be brought, and this, though the statutes contain no such exemption. In other words, it was held that the statutes of limitations of the insurrectionary states were suspended, while the courts in those states were closed by the war. Similar decisions have been made in the state courts. They all rest on the ground that the creditor has been disabled to sue, by a superior power, without any default of his own and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case; that unless the statutes cease to run during the continuance of the supervening disability, he is deprived of a portion of the time within which the law contemplated he might sue."

In United States v. Wiley, supra, the Court stated:

"Statutes of limitation are indeed statutes of repose. They are enacted upon the presumption that one having a well-founded claim will not delay enforcing it beyond a reasonable time, if he has the power to sue. Such reasonable time is, therefore, defined and allowed. But the basis of presumption is gone whenever the ability to resort to the courts has been taken away. In such a case the creditor has not the time within which to bring his suit that the statute contemplated he should have."

These war opinions construed the Federal statute of 1864 tolling the statutes of limitation of the Confederate states. 13 Stat. 123. It was upheld as a war meas-

ure; though the soundness of these opinions was questioned in Brown v. Walker, 161 U.S. 591, 16 S.Ct. 644, 40 L.Ed. 819.

One of the earliest state cases in which an exception was added to the statute of limitation was Toby v. Allen, supra, decided in 1866. Without citing authority it was said in the opinion:

"It is true the death of the debtor operates to suspend the statute until an administrator is appointed because there must be a party to be sued."

The soundness of this case was questioned in Bauserman v. Charlott, 46 Kan. 480, 26 P. 1051, in which the court stated:

"It is not necessary at this time to reconsider any of the former decisions of this court, and therefore it is not necessary now for us to comment on prior decisions referred to." (Among these decisions was the Toby case.)

The same question was before the court but the reason for the rule stated in the Toby case was not followed. It was held that only the time necessary to secure the appointment of an administrator by exercising diligence is given creditors.

In Timmonds v. Messner, 109 Kan. 518, 200 P. 270, 271, it was said:

"The death of the debtor does not suspend the operation of the statute longer than to give the creditor a reasonable time and opportunity to procure the appointment of an administrator of the deceased debtor's estate."

The case of Bauserman v. Blunt, 147 U.S. 647, 13 S.Ct. 466, 470, 37 L.Ed. 316, has been cited a number of times by courts as supporting the minority rule, but this is not correct. The Supreme Court was there construing a statute of the State of Kansas, and necessarily followed the Kansas court's construction of Kansas statutes. But the court stated, as though not in accord with the Kansas rule:

"In the absence of express statute or controlling adjudication to the contrary two general rules are well settled: (1) When the statute of limitations has once begun to run, its operation is not suspended by a subsequent disability to sue. * * * (2) The bar of the statute cannot be postponed by the failure of the creditor to avail himself of any means within his power to prosecute or to preserve his claim."

The Supreme Court cited McDonald v. Hovey, 110 U.S. 619, 4 S.Ct. 142, 28 L.Ed. 269, in support of the above, wherein it was held that when a statute of limitation begins to run, no subsequent disability will interrupt it.

It would unnecessarily lengthen this opinion to review the many cases cited by counsel. Each side of the question is supported by authority, and the Kansas cases fairly represent those supporting the trial court's conclusion.

Aside from the fact that the trial court followed the minority rule, this court in Buss v. Kemp Lumber Co., 23 N.M. 567, 170 P. 54, 57, L.R.A.1918C, 1015, has followed the majority rule, and we are not disposed to depart from it. The question there was whether the statute of limitation was tolled on a debt secured by a mortgage on real estate during the time mortgagee was in possession with the consent of the mortgagor.

This court stated that a number of cases held that the statute was suspended while a mortgagee so held possession; but declined to follow the rule, because the statute itself made no such exception. After stating certain contention of the appellee, we said:

"* * * But admitting all this, should we hold the mortgagee's possession, with the consent of the mortgagor, tolled the statute, notwithstanding that the statute itself makes no such exception? In 17 R.C.L. 'Limitations of Actions,' § 33, appears the following:

"'In the early years after their enactment, an inhospitable reception was accorded by the courts to the legislative policies embodied in statutes of limitations. Among other means of evading the letter of the law, the courts were in the habit of implying exceptions at every opportunity. The courts in later years, while not inclined to deny or question the authority of the precedents importing into the statute certain exceptions, are usually unwilling to continue the practice of adding other exceptions which might be deemed wise, but which the Legislature has not seen fit to make. The general principle recognized to-day for the construction of statutes of limitations is that unless some good ground can be found in the statute for restraining or enlarging the meaning of its general words, they must receive a general construction, and that the courts cannot arbitrarily subtract from or add thereto, and cannot create an exception where none exists, even when the exception would be an equitable one. * * *'

"At section 190 of the same work, it is said:

"'As a general rule the courts are without power to read into these statutes exceptions which have not been embodied therein, however reasonable they may seem. It is not for judicial tribunals to extend the law to all cases coming within the reason of it, so long as they are not within the letter. * * *'

"The doctrine is supported by numerous cases. In Bank of the State of Alabama v. Dalton, 9 How. 522, 529, 13 L.Ed. 242, the court said:

"'The Legislature having made no exception, the courts of justice can make

none, as this would be legislating. In the language of this court in the case of McIver v. Ragan, 2 Wheat 25, 29, 4 L.Ed. 175. "Wherever the situation of the party was such as, in the opinion of the Legislature, to furnish a motive for excepting him from the operation of the law, the Legislature has made the exception, and it would be going far for this court to add to those exceptions." The rule is established beyond controversy. * * *'

"In Butler v. Craig, 27 Miss. 628, 61 Am.Dec. 527, it was held that:

" 'No equitable exceptions are to be ingrafted upon the statutes of limitation, and that where there is not express exception, the court cannot create one.'

"In Tynan v. Walker, 35 Cal. 634, 95 Am.Dec. 152, it was contended by one party that the fact that no person was in existence competent to sue did not prevent the operation of the statute of limitations. The court said:

" 'We have thus glanced at the condition of the law for the purpose of showing that the rule which the plaintiff has invoked has its foundation in judicial construction, and not in the language or general purpose and design of the statute, and that it is opposed to all the well-established rules by which courts should be guided in ascertaining and giving effect to the will of the Legislature, and for the further purpose of justifying ourselves, if any justification be required, in adopting the same rule of construction in relation of the statute of limitations which we uniformly apply to all other statutes—that is to say, to read it as it is written, without any arbitrary subtraction or addition to its meaning. The violation of this rule, as we consider, which we have noticed, can be accounted for only by referring it to the well known hostility of the courts, at an early day, to statutes of limitations. That hostility no longer exists, and with it, in our judgment, its effects also should be allowed to pass away.'

"As the statute itself creates no exception to the running of the statute in favor of a mortgagee in possession none exists."

[redacted] The trial court erred in holding that the statute of limitation was suspended during the twenty days in which the deceased's widow had the preferential right of administration.

[redacted] The last question is whether the statute of non-claim was substituted for the statute of limitation upon the death of deceased. There is authority so holding (In re Estate of Anderson, 200 Minn. 470, 274 N.W. 621, 112 A.L.R. 287), but the weight of authority is against it. The general rule is stated in Woerner's American Law of Administration as follows:

"The Statute of Non-claim, or Special Limitation, is not to be construed together

with. or as attached to, the general Statute of Limitations, but independently. Hence generally, either of the statutes, if it has run its course, although the other has not, may be relied on as a bar. But it is otherwise in some states, for instance, in Arkansas, California, Connecticut, Florida, Illinois, Indiana, Kentucky, Massachusetts, New Hampshire, New York, and North Carolina, where it is enacted by statute or held, that if the general Statute of Limitations has not run its course at the time of the debtor's death, the creditor may bring his action at any time within a certain period from the grant of letters, or after the debtor's death, or (as in Arkansas) at any time within the period covered by the Statute of Non-claim, although the general statute may meanwhile have completed its course." Woerner's L.Adm., 3d Ed., Sec. 400.

See cases cited to this text and annotation in 112 A.L.R. 287.

The judgment appealed from is reversed and cause remanded with instructions to the district court to set aside its judgment and enter judgment for appellant.

It is so ordered.

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

BICKLEY, J., did not participate in this decision.

173 P.2d 490

PECOS VALLEY ARTESIAN CONSERVANCY DIST. v. PETERS.

No. 4878.

Supreme Court of New Mexico.

Aug. 28, 1945.

Rehearing Denied Oct. 26, 1946.

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W. A. Dunn, G. T. Watts, and O. O. Askren, all of Roswell, for appellant.

L. O. Fullen and Harold Hurd, both of Roswell, for appellee.

Clarence E. Hinkle, of Roswell, amicus curiae.

SADLER, Justice.

The question for decision is whether an artesian conservancy district organized under the provisions of L. 1931, c. 97 (1941 Comp., Art. 13, c. 77) is authorized to maintain a suit to enjoin the use of water taken from an artesian well drilled on land located outside the exterior boundaries of the district but alleged to be supplied by the artesian basin underlying the lands within the territorial boundaries of the district to the detriment of the water users of the district.

As filed the complaint upon which the hearing was had joined as co-plaintiffs five landowners, each of whom was alleged to be the owner of lands within the district which were and had been for more than 30 years irrigated by wells supplied by waters from the artesian basin underlying the lands within the district. Prior to trial, however, four of the five co-plaintiffs upon their own several applications were dismissed out as plaintiffs and the fifth went out upon suggestion of the original plaintiff, the conservancy district, that a mistake had been made in his joinder as a co-plaintiff upon the assumption that he had a sufficient interest to seek relief as such. This left as the sole plaintiff, The Pecos Valley Artesian Conservancy District.

The cause was put at issue by plaintiff's first amended complaint, the defendant's first amended answer and the plaintiff's reply thereto. Certain facts are settled by the pleadings, to-wit: (1) That the land on which the defendant drilled his well has never been within the territorial boundaries of the district, unless action by the State Engineer subsequent to the drilling of defendant's well agreed by both parties to have been unauthorized, placed such land territorially within the district; (2) that at the time of drilling the well the defendant had made no application for a permit to drill the same pursuant to the provisions of 1941 Comp. § 77-1204; (3) that after drilling the well and applying to beneficial use waters therefrom on 285.6 acres of land in quantities of 2000 gallons per minute, the defendant filed in the office of the State Engineer a declaration of water rights pursuant to 1941 Comp. § 77-1105, followed by an amended declaration correcting the number of acres irrigated to 285.6 (acres); (4) that prior to the drilling of this well artesian water had never been developed on defendant's land.

Notwithstanding the agreement of the parties on the foregoing salient facts, issue was joined in the pleadings on certain

others of equal importance. It was alleged by the plaintiff and denied by the defendant that the latter's well was taking water from the Roswell Artesian Basin to the detriment of other water users of the plaintiff district. Similarly, there was allegation and denial that there existed unappropriated waters in the Roswell Artesian Basin, either at the time the defendant began drilling his well or at any time thereafter.

The trial judge, deeming the case ripe for judgment on admitted facts, heard no evidence. He ruled as a matter of law that the Pecos Valley Artesian Conservancy District was not a proper party plaintiff and that it was without power or authority to maintain the suit. Although there was no formal motion for judgment on the pleadings, the defendant appears to have invoked a ruling on the plaintiff's capacity to maintain the suit, following which the latter requested certain conclusions of law. These moves were treated by the trial court as authorizing it to decide the case on the pleadings and it acted accordingly. The plaintiff's requested conclusions of law (all of which were refused) and those actually adopted by the trial court, so narrow and delineate the primary issue between the parties that we set them out in full, as follows:

"This matter being before the court at this time on the sole question as to whether The Pecos Valley Artesian Conservancy District is a proper plaintiff, the following Conclusions of Law are requested by said plaintiff.

"I. The Pecos Valley Artesian Conservancy District, a corporation has the power generally to seek by suit to conserve the waters of the artesian basin.

"II. The Pecos Valley Artesian Conservancy District has such an interest in the result of this suit which permits them (it) to sue for the purpose of conserving the artesian waters of the District.

"III. The mere fact that defendant's land upon which the Artesian well was drilled is not within the exterior boundaries of the District is not sufficient to bar this plaintiff from sueing to determine whether there was unappropriated water and whether the defendant's well has tapped the same artesian basin the waters of which this plaintiff seeks to conserve.

"IV. It is the duty of this plaintiff to do all lawful things to conserve the waters of the artesian basin in question and if a suit is deemed necessary, to do that thing, this plaintiff has the right to maintain such suit even though the District as such owns no water."

Three days after the filing of the foregoing request for conclusions of law by the plaintiff, the trial court made its own conclusions of law embraced in an order dismissing plaintiff's suit, and reading as follows:

"This matter coming on this day to be heard by the Court on the motion of defendant that the Pecos Valley Artesian Conservancy District, plaintiff, is not a

proper plaintiff in this action and fails to state a claim against defendant upon which relief can be granted, and said plaintiff and said defendant being represented by O. O. Askren and G. T. Watts for plaintiff, and Harold Hurd and L. O. Fullen for defendant, and the matter having been fully argued and submitted to the Court, the Court finds:

"1. That both parties, plaintiff and defendant, agree and have pleaded that the artesian well of the defendant, Frank Peters, is not now and never was within the defined boundaries of the Pecos Valley Artesian Conservancy District.

"2. That said plaintiff, The Pecos Valley Artesian Conservancy District is not a proper plaintiff; that it has no power, authority or jurisdiction to maintain this suit.

"3. The Requested Conclusions of Law by said plaintiff, The Pecos Valley Artesian Conservancy District, numbered from one to four, inclusive, are refused.

"It is therefore, ordered that the suit of The Pecos Valley Artesian Conservancy District, plaintiff, against the defendant Frank Peters, be and the same hereby is dismissed.

"To all of which the said plaintiff, the Pecos Valley Artesian Conservancy District, excepts."

The plaintiff as appellant prosecutes this appeal for the revision and correction of the order so entered.

In order intelligently to decide the question here presented, it will be necessary to consider several statutes having a bearing thereon. The first statutory authority for the appropriation of underground waters appears to have been given by L. 1927, c. 182, 1929 Comp. §§ 151-201 to 151-205, which this court held unconstitutional in Yeo v. Tweedy, 34 N.M. 611, 286 P. 970, as an attempt to extend by reference existing statutes other than procedural in violation of Const. Art. 4, § 18. The nullification of this statute by court decision was followed by its re-enactment in amplified and enlarged scope as L. 1931, c. 131, 1941 Comp. §§ 77-1101 to 77-1111. This statute will be referred to later in greater detail. However, the plaintiff was organized as an artesian conservancy district under the provisions of L. 1931, c. 97, 1941 Comp. §§ 77-1301 to 77-1321, which, except for an amendment of § 18 thereof by L. 1941, c. 98, § 4, still exists in its original form. Sections 1 and 2 of the enabling act read:

"The purpose of this act is to provide for the organization of artesian conservancy districts to conserve, where necessary, the waters in any artesian basin or basins within the state, the boundaries of which have been scientifically determined by investigations, and where such waters have been beneficially appropriated for private, public, domestic, commercial or irrigation purposes, or otherwise."

"Any artesian conservancy district organized pursuant to the provisions of this act shall include all lands overlying any such artesian basin and any land outside of the boundaries thereof upon which waters

from such basin are being used, either for private, public, commercial, domestic or irrigation purposes, or otherwise.

"Two (2) or more such artesian basins or reservoirs may be embraced in the same conservancy district, where the same are so closely related, geographically or otherwise, that the waters therein can more surely and effectively be conserved by the unified control of one (1) district, and where the improvements contemplated will tend to conserve the waters in each basin so included."

Section 3 of the Act authorizes initiation of proceedings to establish an artesian conservancy district by the filing of a petition in the district court of the county wherein the greater portion of the lands to be embraced in the district are situated. It must have been signed by owners of more than one-third of the real property in the proposed district, in either acreage or value, as shown by the last preceding assessment roll on the county or counties into which any portion of the district extends. The petition must give the proposed name of the district, a statement of the purpose for which it is to be formed and disclose how the property embraced in the district will be benefited by the accomplishment of some one or more of the purposes enumerated, "and giving a general description of the property to be included in the proposed district."

When the petition is filed, the court must fix a time and place not less than 60 days thereafter for hearing thereon and the clerk is called upon to publish notice of the hearing in each county in which there is property to be included in the proposed district, or if there be none in any such county, in a newspaper of general circulation in the proposed district. Only a general description of property to be included in the district, sufficient to enable an owner to determine whether or not his land is included, is required. Publication must be for at least once each week for four consecutive weeks.

Other sections of the Act authorize the filing of objections to the organization of the district and for hearings thereon. Under § 11, however, the Act provides that at such hearing, if the allegations of the petition are found to be true and objections have not been filed or, if filed, have been dismissed, then, it is further provided by said section:

"* * *, the court shall, by order, adjudicate all questions of jurisdiction, declare the district organized and give it a corporate name, by which, in all proceedings, it shall thereafter be known, but said decree shall not be final as to the boundaries of said district, or as to the lands to be embraced therein, until the approval of the report of the commissioners, as hereinafter provided, at which time a final decree as to the property to be embraced in the district shall be entered, and no appeal therefrom as to any particular tracts or parcels of property shall, in any way, prevent the district from functioning, nor prevent the levy of any taxes against such property in question pending the appeal therefrom.

"Upon declaring the district organized, the same shall be a political subdivision of the state of New Mexico, and a body corporate with all the powers of a public or municipal corporation; shall have power to sue and be sued, to incur debts, liabilities and obligations, to exercise the right of eminent domain and of taxation and assessment as herein provided and to do and perform all acts herein expressly authorized, and all other acts necessary and proper for carrying out to all intents and purposes the objects for which the district was created, and for exercising the powers with which it is invested." 1941 Comp. § 77-1311.

Under the provisions of § 13 of the Act, 1941 Comp. § 77-1313, it is made the duty of the court within ten days after declaring the district organized to appoint three owners of land within the district to determine and define the boundaries of the district and to make up a list of property to be embraced and included in the district. These persons are designated as "Commissioners." This section further provides:

"Said commissioners shall include all property in the district which has, within four (4) years, received some benefit, either directly or indirectly, from the artesian waters underlying the district, or which may be benefited in some degree by the improvements to be made by the district. Property benefited by the artesian waters, and the improvements to be made by the district, shall include property upon which waters from such basin, or basins, is, or may be, used for irrigation, domestic, public or commercial purposes, and shall include any such property, whether the same be owned by an individual, corporation, village, town, city or other municipality, or public corporation."

Provision is made for the drawing up of an election code by the Commissioners under which directors are to be elected, one from each of 5 districts into which the Commissioners, with the approval of the court, are directed to divide the conservancy district. Election is to be by popular vote of the property owners in each district. After making provision for organizing the Board of Directors by election of a president and secretary and treasurer and for adoption of by-laws, § 17 of the Act, 1941 Comp. § 77-1317, among other things, provides:

"The board of directors are hereby vested with full power and authority to do and perform every act and thing necessary to carry out, to all intents and purposes the provisions of this act, purposes and objects for which the district is created, including the power to enter into contracts with, and engage all necessary agents and employees, and to fix their compensation, and to require of any such employees bonds for the faithful performance of their duties, as to the directors may seem proper."

In § 18 of the Act the directors are ordered to proceed, following formation of the district, with the cooperation of the State Engineer and United States Geological Survey, if such cooperation is offered, to outline plans and to make an estimate of the cost of improvements needed in the dis-

trict. This section, as originally enacted, further provides as follows:

"The improvements to be made shall be such as are calculated to accomplish the objects for which the district was created, and may include the plugging of all Artesian wells within the district found, by tests, to be materially leaking, *or wasting the waters of the Artesian basin,* as aforesaid; provided, however, where any such well is being beneficially used, the same shall not be plugged without the written consent of the owner thereof. All such artesian wells found to be wasting the waters *of the artesian basin,* as aforesaid, are hereby declared to be a public nuisance, and the Directors of the district, and those under their authority, shall have the right and authority to go upon the lands, upon which any such well is located, to abate such nuisance by plugging or repairing any such well." Laws 1931, c. 97.

This section, as already stated, has been amended by L. 1941, c. 98, § 4, and in its present form the entire section reads as follows:

"After the formation of any artesian conservancy district, it shall be the duty of the board of directors from year to year to outline a plan or program of water conservation and administration, and they shall make an estimate of the cost of administration, equipment and improvements necessary to carry out such program from year to year, when the cost thereof is to be paid by tax levies. In carrying out any such plan or program the board of directors shall have authority to cooperate with the state engineer and the United States geological survey, where such cooperation is offered.

"The program to be carried out and the improvements to be made and the equipment to be purchased shall be designed to accomplish the objects and purposes for which the district was created, and may include the plugging of all wells within the district found by tests to be materially leaking or *wasting any waters included in the district.* The directors may proceed to carry out the improvements so outlined in such manner as may be deemed for the best interest of all concerned, and may enter into any contracts or do or perform any act or thing necessary or advisable to carry out to all intents and purposes the objects and purposes for which the district was formed, and shall have the right of ingress and egress at all reasonable times to all wells within the district for the purpose of making leakage tests, and otherwise determining that such wells are properly equipped and are being used so as *to conserve the waters included in the conservancy district.* All wells included in the district found to be leaking or wasting such waters, are hereby declared to be a public nuisance, and the directors of the district and those under their authority shall have the right, power and authority to go upon the lands upon which any such well is located to abate such nuisance by plugging or repairing any such well." (Emphasis ours) 1941 Comp. § 77-1318.

It is to be noted for such bearing as the change may have on the case, that the Legislature changes the phrase "wasting the waters of the Artesian basin," as it appears in the 1931 law, to the phrase "wasting any waters included in the district" in connection with directions as to plugging leaking wells.

The same session of the Legislature which enacted L. 1931, c. 97, also enacted another statute bearing on the question at issue in this case designated as L. 1931, c. 131, consisting of 11 sections. Sections 1 and 2 of said Act, 1941 Comp. §§ 77-1101 and 1102, read as follows:

"The waters of underground streams, channels, artesian basins, reservoirs, or lakes, having reasonably ascertainable boundaries, are hereby declared to be public waters and to belong to the public and to be subject to appropriation for beneficial use."

"Beneficial use is the basis, the measure and the limit to the right to the use of the waters described in this act."

Section 3 of this Act provides that any person desiring to appropriate underground waters shall make application to the State Engineer in a form to be prescribed by him in which the applicant shall designate the particular underground stream, channel, artesian basin, reservoir or lake from which water is to be appropriated, the beneficial use to which it is proposed to apply such water, the location of the proposed well, and so forth. The State Engineer is then called upon to give notice by publication in a newspaper of general circulation of the filing of such application and that objections to the granting of the permit may be filed within 10 days following last publication. After expiration of the time for filing objections, if none have been filed, the State Engineer is directed to grant the application if he finds there are unappropriated waters available in the underground stream, channel, artesian basin or reservoir.

If objections have been filed provision is made for a hearing in the courthouse of the county in which the proposed well will be located. If after such hearing it appears there are no unappropriated waters in the designated source, or that the proposed appropriation would impair existing water rights from such source, the application is to be denied. Sections 4, 5 and 6 of the Act 1941 Comp. §§ 77-1104, 77-1105 and 77-1106, read as follows:

"Existing water rights based upon application to beneficial use are hereby recognized. Nothing herein contained is intended to impair the same or to disturb the priorities thereof."

"Any person, firm or corporation claiming to be the owner of a vested water right from any of the underground sources in this act described, by application of waters therefrom to beneficial use, may make and file in the office of the state engineer a declaration in a form to be prescribed by the state engineer setting forth the beneficial use to which said water has been applied, the date of first application to bene-

ficial use, the continuity thereof, the location of the well and if such water has been used for irrigation purposes, the description of the land upon which such water has been so used and the name of the owner thereof. Such declaration shall be verified but if the declarant cannot verify the same of his own personal knowledge he may do so on information and belief. Such declarations so filed shall be recorded at length in the office of the state engineer and may also be recorded in the office of the county clerk of the county wherein the well therein described is located. Such records or copies thereof officially certified shall be prima facie evidence of the truth of their contents."

"Declarations heretofore filed in substantial compliance with section 5 hereof shall be recognized as of the same force and effect as if filed after the taking effect of this act."

The Legislature in 1933 enacted L. 1933, c. 122, amending § 9 of the foregoing Act, 1941 Comp., § 77-1109, but not in any respect material to the present controversy and adding, by way of amendment, in § 2 thereof, a new § 11, 1941 Comp. § 77-1111, reading as follows:

"The state engineer is hereby given the power and it is made his duty to formulate rules and regulations for the purpose of carrying out the provisions of (this) act, which rules and regulations shall be printed and made available for distribution to all applicants."

Still another statute, L. 1935, c. 43, 1941 Comp. §§ 77-1201 to 77-1212, must be considered if we give a complete picture of the statutory background. It is "an act relating to artesian wells and artesian basins; providing for the control and regulation of artesian wells; giving authority to the state engineer to promulgate rules and regulations governing the drilling, casing, repairing, plugging, and abandonment of artesian wells; defining waste of artesian waters, declaring such waste to be a public nuisance," etc.

Section 1 declares an artesian well for purposes of the Act to be an artificial well which derives its water supply from any artesian stratum or basin.

Section 2 of the Act reads:

"All artesian waters which have been declared to be public waters shall be under the supervision and control of the state engineer, as provided by this act, but where artesian conservancy districts have been duly organized pursuant to chapter 97 of the New Mexico Session Laws of 1931 and acts amendatory thereof, such districts shall have concurrent power and authority with the state engineer to enforce the regulatory provisions, as herein provided, in so far as the waters to be conserved and controlled by the respective districts are affected.

"This act shall not be construed to affect the provisions of chapter 131 of the New Mexico Session Laws of 1931, being 'An act relating to underground waters, declaring certain underground waters to be public waters and relating to the beneficial appro-

priation thereof and repealing article 2 of chapter 151 of the New Mexico Statutes Annotated, 1929 Compilation', and the state engineer may intervene on behalf of the state in any proceeding brought by or against any artesian conservancy district where it is necessary for the proper protection or adjudication of rights to the public waters of the state."

Under section 4 the State Engineer is directed to make and enforce reasonable rules and regulations to govern the drilling, casing, plugging and abandonment of artesian wells. The section further provides that before any artesian well is to be drilled the owner of the land on which same is to be drilled must apply to the State Engineer for permit to drill the same and a violation of this requirement is made a misdemeanor punishable by fine. L. 1935, c. 43, § 12, 1941 Comp. § 77-1212.

The act goes on in section 7 to declare as a public nuisance any abandoned artesian well as to which the right to use the waters has reverted to the state if waters from any artesian basin are wasting by reason thereof and authorizes the State Engineer or the Artesian Conservancy District in which the well is located to abate such nuisance in a summary manner without notice to the owner by plugging or otherwise. So much for the statutes.

In stating in the first paragraph of this opinion the question for decision, we perhaps have gone beyond the very narrow issue upon which the matter seems to have been ruled below and have posed the more fundamental one of the extent of the right of an artesian conservancy district to conserve the waters of the artesian basin constituting the source of supply for its users, where such waters are tapped beyond its territorially defined boundaries. In the court below, as well as here, it seems not to have been nor to be seriously questioned that, but for the dismissal out as plaintiffs of all the actual landowners and appropriators to beneficial use of waters of the basin, the complaint would have stated a cause of action. Nevertheless, because the district owned no land being serviced by the waters of the basin nor any water right on its own, it was thought by the defendant and the trial court as well not to be the real party in interest and hence not a proper party plaintiff.

Under the provisions of 1941 Comp. § 77-1311 (L. 1931, c. 97, § 11), when the district is organized, it becomes a political subdivision of the state and a body corporate, with power "to sue and be sued" and "to do and perform all acts * * * expressly authorized, and all other acts necessary and proper for carrying out to all intents and purposes the objects for which the district was created, and for exercising the powers with which it is invested."

One of the prime objects for which the plaintiff was organized, as expressed both in the title of the enabling act and in the first and as well in several succeeding sections, is "to conserve" the waters of the artesian basin which supplies water to the

users of the district. In so far, therefore, as the plaintiff's right and competency to maintain the suit is concerned, what was said in Carlsbad Irrigation District v. Ford, 46 N.M. 335, 128 P.2d 1047, 1050, in disposing of a similar challenge to the district's standing as a party plaintiff, applies with equal force and pertinency, to the challenge here made.

The court said:

"Errors assigned by appellants are eight in number, and are argued in the briefs under designation as points. The first is that plaintiff is not a proper party to maintain this suit.

"The pleadings, findings and decision of the trial court disclose such a relationship between the plaintiff and the Government of the United States, which had an interest in the right to use the waters involved, and the land owners who are the beneficial users of the water, and for whose benefit plaintiff was organized and maintains its existence and service, and to whom it owed a duty of impounding, preserving and distributing the water involved, that we conclude as did the district court that the plaintiff was a proper party to maintain this action."

Decisions from other jurisdictions lend support to the conclusion we reach on plaintiff's right to maintain the present suit. See Coachella Valley County Water Dist. v. Stevens, 206 Cal. 400, 274 P. 538; Salt River Valley Water Users' Ass'n v. Norviel, 29 Ariz. 360, 241 P. 503; Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455, 93 Am.St.Rep. 701; Caviness v. La Grande Irr. Co., 60 Or. 410, 119 P. 731; United States v. Tilley, 8 Cir., 124 F.2d 850.

In Coachella Valley County Water Dist. v. Stevens, supra, the Supreme Court of California dealt with the precise question now before us. The defendant was sinking wells tapping the artesian basin in which the water users within the plaintiff district claimed superior rights. The district, as a plaintiff, was asserting that right for them in seeking to enjoin the defendant. Its capacity and right to do so was challenged and sustained. One of the chief duties of the plaintiff district was "to conserve water for future use." [206 Cal. 400, 274 P. 541] Among other things, the court said:

"In the present case we think it indisputable that the power conferred on a county water district to sue and be sued with respect to the preservation and conservation of the sources of water supply used and usable for the lands and inhabitants within the district is directly in line with the objects of the creation of the district and germane to the purposes for which it was organized. The power to sue and be sued has been conferred upon numerous public corporations of this character and the conferring of such power without specific mention thereof in the title of the acts has not, so far as we have discovered, ever been successfully brought into question. * * *

"Furthermore, we find no objection in providing in the body of the act without specific mention thereof in the title for the prosecution of proceedings to prevent interference with or diminution of the natural

flow of any stream or subterranean water supply used or useful for any purpose of the district or a common benefit to the lands within the district or its inhabitants. *One of the express purposes of the act is to conserve water for future use and to preserve water and water rights. The fact that the district as such does not assert title in itself to any of such rights is of no consequence, if it has the power to proceed in a representative capacity to protect the rights of all of the landowners and other users of water in the district. And this power the district unquestionably possesses not only under the clear provisions of the act but under well-recognized principles of equity jurisprudence.*" (Emphasis ours).

It is true that the language conferring statutory authority to sue in the California case is more explicit than any to be found in the act before us. Nevertheless, unless we are prepared to confine the meaning of the word "conserve" to plugging or repairing leaky wells, the language found in Section 11 of the act, 1941 Comp. § 77-1311, conferring upon the district the power "to sue and be sued * * * and to do and perform all acts herein expressly authorized *and all other acts necessary and proper for carrying out to all intents and purposes the objects for which the district was created*" (emphasis ours), affords ample statutory authority to support plaintiff's maintenance of the present suit. Webster's New International Dictionary (2d Ed.) defines the verb "conserve" as meaning "to keep in a safe or sound state; to save, to preserve from change or destruction." Synonyms are listed under the definition as "maintain," "sustain," "uphold," "defend," "protect," "guard," "shield" and "secure." See, also, United States v. Mammoth Oil Co., D.C., 5 F.2d 330, 351, and Hill v. Bank of San Pedro, 41 Cal.App.2d 595, 107 P.2d 399. In United States v. Mammoth Oil Co., supra [5 F.2d 331], the court declared the meaning of the word "conserve" as found in an act of Congress, in the following manner, to-wit:

"Act June 4, 1920 [34 U.S.C.A. § 524], directing Secretary of the Navy to take possession of properties within naval petroleum reserves, and conserve, develop, use, and operate them in his discretion, directly or by contract, lease, or otherwise, and use, store, exchange, or sell the products, uses the word 'conserve' in its larger meaning of saving from loss, and not in its more limited meaning of holding in the ground, and thereunder the Secretary may conserve, develop, use, and operate all at the same time, and may use, store, exchange, and sell, or any of them, in his discretion, in carrying out the general purposes of the act."

We likewise think that the word "conserve" as found in our statute is used in the sense of saving or preserving from loss. In describing the nature of the improvements to be made by the district, specific means of conserving are mentioned permissively in form in the statute itself, such as plugging or repairing leaky wells and declaring a public nuisance all wells found to be wasting the artesian waters with authority in the directors to go upon any

lands for the purpose of abating such nuisance by plugging or repairing the well. The title of the act, L. 1931, c. 97, provides for the creation of Artesian Conservancy Districts "for the purpose of conserving the waters in artesian basins." The first section emphasizes this basic thought by declaring "the purpose of this Act is to provide for the organization of Artesian Conservancy Districts to conserve, where necessary, the waters in any artesian basin or basins within the state."

It would seem an anomalous construction that confined the district in executing such a fundamental purpose to repairing and plugging leaky wells through which water was flowing in a small stream and yet denied it the power to enjoin the maintenance of an unlawfully drilled well tapping the basin through which water gushed in a torrent—in other words, to say the district could conserve and stop wastage by placing a finger in the leak but could not dam the flood in carrying out the same overall purpose. Truly, the 1941 legislature took no such narrow view of what "conserve" means when, as commented upon later, it enacted L. 1941, c. 98, among other things, authorizing artesian conservancy districts, by formal protests and objections before the State Engineer, to initiate opposition to the drilling of additional wells tapping the waters of their basins. And, if we may resort to analogy, it impresses us as an impractical and unrealistic view to ascribe to the legislature an intention to make a nice distinction between common law waste and trespass in their relative effect in keeping "in a safe or sound state" or "preserving from change or destruction" that which the district is admonished to conserve, since the wrongful act whether committed by a waster or a trespasser has exactly the same damaging effect. Cf. Roots v. Boring Junction Lumber Co., 50 Or. 298, 316, 92 P. 811, 818, 94 P. 182; 1 Foundations of Legal Liability (Street) 33.

It may fairly be assumed that when our legislature enacted L. 1931, c. 97, the enabling act under which the plaintiff was organized, it was familiar with the provisions of our code of civil procedure declaratory of the equity rule permitting one or more to sue or defend for the benefit of the whole number when the question involved 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. 1941 Comp. § 19-601. Cf. § 19-101 Rule 23. In Bliss on Code Pleading, 3rd Ed., 126, § 79, the author writes concerning this code provision, as follows:

"Mr. Story (Story's Equity Pleading, (10th Ed.) § 97) classifies the cases where it is applied to equity pleading under three heads:

" 'First, when the question is one of common or general interest and one or more sue or defend for the benefit of the whole; *second, where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and inter-*

ests of the whole; third, where the parties are very numerous, and although they have, or may have, separate and distinct interests, yet it is impractical to bring them all before the court.' These *three* classes are included in the two named in the statute." (Emphasis supplied.)

While the plaintiff district is a corporation rather than a voluntary association, its creation resulted from the voluntary action of the interested water users within the district and the legislature may very well have felt that it conferred no extraordinary power on the corporation (as indeed it did not) in the matter of suing or defending, in constituting it an agency authorized to do on behalf of all the water users within the district what anyone of them suing for himself and others similarly situated might alone do, even though all would be bound by the judgment rendered. Cf. Floersheim v. Board of County Commissioners, 28 N.M. 330, 212 P. 451. Indeed, many considerations, personal or financial, such as slightness of the injury to a single water user as compared with the expense of redressing it, and others, might restrain him from moving to sue or defend in a matter of common and general interest to all, where a district acting through its governing board would be more alive and alert to a situation calling for action.

The courts of sister states have employed by way of analogy this and other pertinent provisions of the code of civil procedure, common to their own as well as our statutes, in arriving at the result we reach. Coachella Valley County Water Dist. v. Stevens, supra; Caviness v. La Grande Irr. Co., supra; see, also Salt River Valley Water Users' Ass'n v. Norviel, supra, and United States v. Tilley, supra. Our 1929 Comp. §§ 105-103 and 105-104, substantially adopted as a District Court Rule in 1941 Comp. § 19-101, Rule 17(a), requires that every action be presented in the name of the real party in interest but in the very same section excepts from the requirement actions prosecuted pursuant to the next succeeding section. The latter provides that the trustee of an express trust, or a person expressly authorized by statute, may sue in his own name without joining his cestui que trust.

In Coachella Valley County Water Dist. v. Stevens, supra, commenting on these various statutory provisions, the Supreme Court of California said:

"Conceding properly, as the defendant does, that an action would lie on behalf of each landowner in the district to protect his individual right, it would necessarily follow that under section 382 of the Code of Civil Procedure one might sue for the benefit of all. See Miller v. Bay Cities Water Co., 157 Cal. 256, 288, 107 P. 115, 27 L.R.A.,N.S., 772. It is true that section 367 of the same code provides that every action must be prosecuted in the name of the real party in interest but the same section excepts actions prosecuted as provided in section 369 of the Code of Civil Procedure. The last section referred to provides that a person *expressly authorized by statute* may sue

without joining with him the persons for whose benefit the action is prosecuted. The county water district act expressly authorizes the present action and any final determination therein would necessarily bind the parties for whose benefit it is prosecuted. Furthermore, no good reason has been suggested why, under the authority of the statute, the landowners and other water users in the district may not set up such a governmental agency to act in a representative capacity in their behalf. In our opinion they have done so and having done so they will necessarily be bound by the result of the litigation."

This Court applied certain of these statutes under similar circumstances by way of analogy where it appeared, as in the case at bar, that all those represented by the plaintiff had a common or general interest in the subject matter of the suit. La Luz Community Ditch Company v. Town of Alamogordo, 34 N.M. 127, 279 P. 72. The plaintiff's right and competency to maintain the suit must be upheld.

Having thus disposed of the challenge made below and found the trial court in error, after directing entry of an order reversing and remanding the cause for a new trial, we might very well rest from our labors. Our inspection of the record fails to establish convincingly what view the trial court may have entertained upon the larger question here presented and made the basis of practically all argument contained in the briefs of counsel, viz., the control, if any, of an artesian conservancy district over waters of the artesian basin underlying the territory embraced within the district where such waters are tapped by a well located beyond the territorial boundaries of the district. Possibly, had not the trial court erroneously concluded that the plaintiff district was not the right party to raise the question, upon proper proof it might have awarded to plaintiff the injunctive relief it sought under the complaint filed. On the other hand, persuaded by the claim of defendant that the plaintiff was without power to interfere because defendant tapped waters of the basin by a well outside the territorial boundaries of the district, the court might have denied such relief. We simply cannot say with any degree of assurance what it would have done.

There is a bare possibility that the trial court may have ruled on this question (and adversely to plaintiff) in view of its finding No. 1 included in the order dismissing the complaint. This finding recites that defendant's well is outside the territorial boundaries of the district. Be this as it may, in view of the public importance of the question, particularly in the artesian belt of the state, and more especially because a present declaration of our views on the subject may avoid a second appeal following a new trial, we have concluded to express ourselves now.

Unless an artesian conservancy district organized under the Act in question possesses and can exercise the power here sought to be invoked, then the purpose of its creation is substantially curtailed. A care-

ful consideration of applicable statutes reviewed at some length hereinbefore, satisfies us that if the defendant's well has tapped waters of the artesian basin underlying the territory embraced within the boundaries of the district, it is wholly immaterial that the defendant drilled it outside such territorial lines.

It would serve no useful purpose again to undertake a discussion of the status in our law of the waters of underground streams, channels, artesian basins, reservoirs or lakes, having reasonably ascertainable boundaries. That has been so well done in the able and illuminating opinion prepared for the court by Mr. Justice Watson in the case of Yeo v. Tweedy, 34 N.M. 611, 286 P. 970, 974, that a mere reference to the case will bring the reader in touch with the sound reasoning by means of which the court charted the future course in this state for the administration of subterranean waters subject to appropriation. This thought stands out in the opinion and holding of the court, namely, that legislative enactments classifying such waters as public and subject to appropriation are merely declaratory of the state of the law prior to such legislation and that except for any differences compelled by their subterranean character, such waters are affected with all the incidents of surface waters as to use, appropriation and administration. As we there said:

"* * * the same reasoning which, upon the premise of riparian rights in running streams, leads to correlative rights in artesian waters, will, on the premise of prior appropriation of the waters of running streams, lead to the same basis of right in the waters of artesian basins."

So viewed then, and conceding the plaintiff's competency to invoke the remedy sought, as we have held, whence comes defendant's right to take and use waters previously appropriated, as alleged by plaintiff, to beneficial use by the water users of the plaintiff conservancy district? The mere fact that water might flow by his land in a defined channel near the headwaters of a surface stream, certainly would give him no right as a riparian proprietor, to the use of such waters, if landowners farther downstream previously had appropriated to beneficial use all available unappropriated water of the stream. Does it matter that the water is underground, if the same situation prevails as to its use and prior appropriation by others? We think not.

In effect, the defendant here asserts the right of a surface owner to a priority of use and right in underground waters, a contention ignored and repudiated in Yeo v. Tweedy, supra. Even if defendant's well does not tap waters of the artesian basin underlying the plaintiff district, he was without right to drill it except under a permit from the State Engineer as required either by L. 1931, c. 131, or by L. 1935, c. 43, if it was to tap the waters of some underground stream, channel, artesian basin, reservoir or lake, having reasonably ascertainable boundaries. Admittedly, he had no such permit.

It seems obvious that L. 1935, c. 43, was enacted to tighten the control of the State Engineer over artesian waters of the state not already placed under control of some artesian conservancy district organized pursuant to L. 1931, c. 97. Yet even as to them, he shares with such districts concurrent jurisdiction to enforce the regulatory provisions of the 1935 Act and to intervene in any suit by or against the conservancy district where necessary for the proper protection or adjudication of rights to public waters of the State. 1941 Comp. § 77-1202, L. 1935, c. 43, § 2. The fact that the State Engineer has not seen fit to seek intervention in the case at bar suggests a view entertained by him that the State's interest in public waters of the artesian basin will be properly safeguarded through the plaintiff district, the party the more immediately concerned and charged by the Act giving it life with the obligation "to conserve" such waters.

As already indicated, the fifteenth regular session of the Legislature evidently considered that to prevent the unauthorized drilling of wells tapping waters of an artesian basin was one means of conserving the waters thereof for by L. 1941, c. 98, § 3 (1941 Comp. § 77-1324), it expressly enacted:

"That any artesian conservancy district which has heretofore been organized, or may be hereafter organized, as provided by law, shall in addition to the powers granted to such districts have the right, power and authority to protest or object to any application made to the state engineer to appropriate any waters included within the boundaries of such conservancy district which may be subject to appropriation as provided by law, * * * and such district shall have the right to appeal to the district court from the decision of the state engineer within the time and manner provided by law for appeals from such decisions."

If, as required by the statute, the defendant had filed an application to drill a well tapping the waters of the artesian basin and the district had then sought to maintain this action, he might have contended that the procedure mentioned in 1941 Comp. § 77-1324 (L. 1941, c. 98, § 3) is exclusive. But, regardless of whether the plaintiff may have chosen to present in such a proceeding the questions upon which issue is here joined, where defendant has ignored the statute and thus denied the district an opportunity to avail itself of the statutory protest, it does not lie in his mouth to assert, nor can it be successfully maintained, that equity is powerless in the premises. Cf. State ex rel. Stephens v. State Corporation Comm., 25 N.M. 32, 176 P. 866.

As a matter of fact, if defendant's well taps waters of this basin, then the land upon which he drilled it is of a kind expressly ordered by the enabling act to be included within the territorial boundaries of the district. Section 2 (§ 77-1302) provides that any conservancy district organized pursuant to the Act "shall include all lands

overlying any such artesian basin and *any lands outside the boundaries thereof* upon which waters from such basin are being used, either for * * * domestic or irrigation purposes, or otherwise." (Emphasis ours.) Again in Section 13, § 77-1313, quoted supra, specific directions are laid down for the Commissioners to include in the district all property which within four years has received some benefit from artesian waters of the district, or *may be benefited* in some degree by improvements of the district. Benefit to the land is made the test of inclusion and the section declares that "property benefited" by the artesian waters is to include property upon which water from the basin is, or may be used for irrigation, domestic, public or commercial purposes. In the face of these statutory mandates, can the neglect, oversight or inadvertance of the Commissioners in omitting lands overlying some part of the basin, deny to the district the power, or relieve it of the statutory duty, to restrain acts on such land which are calculated to diminish or deplete the waters of the basin?

The defendant asserts the omission of lands of the kind described has exactly that effect. We think otherwise. Just as the tiniest rivulet far up the mountainside is drawn within the orbit of control and administration of the larger stream system of which it forms a part, so wherever tapped, on lands territorially within or without the outboundaries of the conservancy district organized to conserve the waters of such basin, the waters tapped, if in fact waters of such artesian basin, are subject to conservation by the district and, within statutory limits, to the supervision and control of its governing board.

We conclude that the trial court erred in dismissing the plaintiff's complaint. The judgment will be reversed and the cause remanded with directions to the trial court to set aside such judgment, award a new trial, and for further proceedings consistent with the views herein expressed.

BICKLEY and LUJAN, JJ., concur.

BRICE, Justice (dissenting).

The act under which appellant was incorporated does not authorize the institution of this action. The power given to conserve the water of the artesian basins was not intended by the legislature as authority to prosecute suits, the effect of which is to try title to valuable property rights, none of which appellant owns or has authority to own. The character of conservation is indicated by the following excerpt from Sec. 18 of the Act (Ch. 97 N.M.L.1931):

"* * * The improvements to be made shall be such as are calculated to accomplish the objects for which the district was created, and may include the plugging of all Artesian wells within the district found, by tests, to be materially leaking, or wasting the waters of the Artesian basin, as aforesaid; provided, however, where any such well is being beneficially used, the same shall not be plugged without the written consent of the owner thereof. All such ar-

tesian wells found to be wasting the waters of the artesian basin, as aforesaid, are hereby declared to be a public nuisance, and the Directors of the district, and those under their authority, shall have the right and authority to go upon the lands, upon which any such well is located, to abate such nuisance by plugging or repairing any such well. The Directors may proceed to carry out the improvements so outlined in such manner as shall be deemed to be for the best interest of all concerned, but shall cause all artesian wells found to be wasting said waters, and which have not been beneficially used for more than four years, to be first plugged."

There is nothing in the act to indicate that the district's authority extended further than protection against waste. The fact that it could sue and be sued did not give it the general power to sue in behalf of property owners, any one of whom may institute actions in his own behalf, and in behalf of all others similarly situated. The majority cite no authority that supports their opinion. The case of Coachella Valley County Water Dist. v. Stevens, 206 Cal. 400, 274 P. 538 (the only similar case), is not in point because the California district was given specific authority to bring such actions; assuming such authority could be given consistently with constitutional inhibitions. The authority given such districts by the California act, St.1923, p. 312, is as follows:

"To store water for the benefit of the district; to conserve water for future use; to appropriate, acquire and conserve water and water rights for any useful purpose; to commence, maintain, intervene in and compromise, in the name of the district, and to assume the costs of any action or proceeding involving or affecting the ownership or use of waters or water rights within the district used or useful for any purpose of the district or a benefit to any land situated therein; to commence, maintain, intervene in, defend and compromise actions and proceedings to prevent interference with or diminution of the natural flow of any stream or natural subterranean supply of waters used or useful for any purpose of the district or a common benefit to the lands within the district or its inhabitants; and to commence, maintain and defend actions and proceedings to prevent any such interference with the aforesaid waters as may endanger the inhabitants or lands of the district."

It is interesting to note that Justice Curtis dissented, expressing the view that the opinion of the District Court of Appeals (266 P. 341) which held that as the district had no interest in the use of the water underlying the district and owned no land with water rights therein, that it was not authorized to bring the action, notwithstanding the statute. If it can be said that the California district had authority to prosecute such action because specifically given it by the legislature of that state, I answer that no such authority was given to the appellant here, nor did the legislature have in mind the granting of such broad powers.

Carlsbad Irrigation Dist. v. Ford; Salt River Valley Water Users' Ass'n v. Norviel; Oregon Const. Co. v. Allen Ditch Co.; Caviness v. La Grande Irrigation Co., and United States v. Tilley, all cited in the majority opinion, are cases in which irrigation districts, having the authority and duty to impound and distribute water to its water users, necessarily were held to have authority by legal proceedings to protect such rights against trespassers, though the effect was to protect the rights of their water users. The appellant has not the remotest interest in the artesian water involved. The appellee is not wasting water, but is applying it to a beneficial use. It is a matter of general public knowledge that the purpose of the act was to prevent waste by plugging or repairing leaky wells; and not to determine the right to the use of water.

Let us assume that upon remand and trial the district court will find that appellant has not established by substantial evidence that the water flowing from appellee's well comes from either of the artesian basins underlying the territory covered by appellant district. If so, will the interested landowners be bound by such decree? According to the majority opinion they will be so bound, although not parties to the suit. The legislature never intended to give to the district any such authority, if indeed it could. The judgment of the district court is correct and should be affirmed.

MABRY, C. J., concurs.

On Motion for Rehearing.

SADLER, Chief Justice.

The defendant's motion for rehearing has been argued orally and in addition to being supported by his own brief, it has the support of an extensive brief filed with our leave by amicus curiae who also participated in the oral argument in support of the motion. Thus it is that even if the motion shall draw a formal denial, as a matter of fact, it has been considered as if upon a rehearing of the entire case. Such reconsideration leaves us still of the opinion that the result announced is correct, which calls for a denial of the motion, although there are certain matters we desire to clear up in disposing of same.

Amicus curiae correctly reminds us of error in our statement in the opinion on file that the land on which defendant drilled his well was never within the territorial boundaries of the plaintiff district unless the State Engineer's order, made subsequent to such drilling, placed it there. What should have been said was that this land was never within the territorially defined boundaries of the artesian *basin* unless action by the State Engineer, subsequent to the drilling, placed it there. Somewhat indiscriminate use of the terms "basin" and "district" in the brief of plaintiff-appellant accounts for the misstatement. The unimportance of this inaccuracy is disclosed by the fact that throughout our opin-

ion it was taken as an admitted fact that the site of defendant's well was never within the territorial boundaries of the *district*. Likewise, its presence outside the defined boundaries of the basin, when drilled, if actually it taps the waters of such basin, where previous applications to beneficial use by water users of the district have exhausted the supply available for appropriation, as we shall show, also lacks decisive importance.

We already have held in the opinion filed that the mere fact defendant's well was drilled outside the territorial boundaries of the district does not deny it the right to enjoin maintenance of same if the well taps waters of the artesian basin underlying the district to the detriment of its water users whose previous applications to beneficial use have combined to exhaust all waters of the basin available for appropriation. True enough, when we so held we were under the impression that at the time defendant drilled his well the same was within defined boundaries of the basin, thus requiring a permit from the State Engineer to render lawful the drilling under the provisions of L.1935, c. 43, 1941 Comp. § 77-1201 et seq. Furthermore, we employed arguendo in support of our conclusion that preventing an unlawful taking of the fully appropriated waters of an artesian basin was to "conserve" the same within the meaning of that term as employed in the enabling act, as much so as preventing "waste" through leaky wells, the action of a subsequent legislature, L.1941, c. 98, § 3, 1941 Comp. § 77-1324, in authorizing conservancy districts to protest before the State Engineer applications for drilling new wells to appropriate waters of the district.

It now appearing that defendant's well, when drilled, was not within the defined boundaries of the artesian basin supplying water users of plaintiff district, no permit was necessary to render lawful the drilling and, hence, a protest by plaintiff prior to discovery that the well actually tapped the basin would have been untimely and out of order. The inquiry naturally follows: Does the erroneous assumption in our opinion that defendant's act in drilling without a permit was unlawful dictate a result contrary to that announced by us? This question is to be answered by determining what effect, if any, discovery that defendant violated no law in drilling can have on the plaintiff's competency to sue to enjoin an unlawful depletion of the district's water supply for its users. The answer can only be—no effect whatever. The important fact in connection with any new drilling, particularly as respects an interest on the part of the plaintiff which will give it a right to sue, is always: Will it tap waters of the basin supplying users in the district? Presumptively, it will, if drilled

within defined boundaries of the artesian basin underlying the district, whether within or outside territorial boundaries of the district and, hence, a permit must be secured to give legality to the drilling. But, even though drilled outside the defined boundaries of an artesian basin and without a permit, since in such case none is required, once it is established that the well has tapped waters of the basin a conservancy district was created to conserve, the latter's right to sue arises instanter and automatically. It may lose on the facts, as for instance by proof that there are surplus waters subject to appropriation, thus disproving detriment or injury to plaintiff's water users, but defeat cannot be predicated on a lack of competency to sue on plaintiff's part.

These conclusions are as simple as A-B-C unless boundaries originally established for an artesian basin are to be deemed "frozen" for all time by a conclusive presumption that they embrace all lands overlying any part of the basin, a result contemplated by the statute, 1941 Comp. § 77-1302, yet truly seldom, if ever, actually the case. That the latter is true is abundantly demonstrated by the admission of defendant's counsel at oral argument of the motion for rehearing that the State Engineer has been endeavoring to keep up with events by extending defined boundaries of the basin, from time to time, to embrace lands shown by subsequent drillings of third parties to lie over portions of the basin.

Counsel for defendant refer arguendo to 1941 Comp., § 77-1208, L. 1935, c. 43, § 8, which provides for summary abatement as a public nuisance, after notice, of wells wasting water at the surface, and authorizes the State Engineer, artesian well supervisor, or artesian conservancy district, "if the well is situated therein," to fit the well with valves or other devices to stop the waste, constituting the cost thereof a lien on the land where the well is situated and any other land entitled to use water from the well. The quoted language, say counsel, indicates a legislative intent to confine the district within its territorial boundaries in its efforts to conserve waters for its users. But a very good reason, applicable to the conservancy district, but not to the State Engineer and artesian well supervisor, properly limits the district's right thus to abate, summarily, to wells within its territorial boundaries.

It is to be noted that the cost of abating fixes itself as a lien on the land. Now unless the well whose waters are wasting actually taps the basin supplying the district's users, a decisive issue yet to be tried out in the case at bar, the district would be utterly lacking in statutory interest or concern in the matter of such wastage. Accordingly, where the well is outside its territorial boundaries this statute denies it the right to abate wastage in a summary manner. It must, as it has

done here, first test its rights in the premises by appeal to the courts. Not so, as to the State Engineer or an artesian well supervisor acting under his direction pursuant to regulations prescribed by him, 1941 Comp. §§ 77-1203 and 77-1204, in territory outside artesian conservancy districts but within an artesian basin. It is the concern of the State Engineer, certainly, to stop wastage whether it affects waters within or without the territorial boundaries of an artesian conservancy district, yet within the boundaries of an artesian basin theretofore defined by him. Hence, the significant use of the language now underscored appearing in such statute, viz., "such officials *having jurisdiction* may abate such nuisance," etc. (Emphasis ours.)

The exact nature or extent of defendant's claim to underground waters has been somewhat obscure prior to the filing of his brief supporting rehearing, although in our opinion filed we said that, in effect, he here asserts the right of a surface owner to priority of use and right in such waters, a contention repudiated in Yeo v. Tweedy, 34 N.M. 611, 286 P. 970, as we pointed out. That we were substantially correct in our appraisal of his claim is demonstrated by the proposition now boldly urged in brief supporting his motion that waters discovered outside boundaries of underground streams, channels, artesian basins, reservoirs or lakes, theretofore defined by the State Engineer, are subject to "unregulated appropriation" and are "without his (the State Engineer's) jurisdiction." It may be granted, as already conceded, that no permit is necessary for drilling in such territory. But it does not follow that, where such well taps waters of an artesian basin or other underground stream whose available supply of waters already has been exhausted by prior appropriations, the well owner acquires a valid right to the use of such waters as against the body of prior appropriators. Unless we blind ourselves to the migratory character of waters, whether surface or underground, one often will be able to tap same outside the defined—and where they do not exactly coincide, outside the natural—boundaries of underground streams, artesian basins or lakes, making their way into them. Waters within such boundaries would have to be inexhaustible to prevent a taking by anyone from a source supplying the underground basin or stream from diminishing the supply available to those having prior rights to waters within the same.

Certainly, unless we desire to invite chaos in the administration of underground waters, *somebody* has authority to enjoin a trespass of the kind just mentioned. But, say counsel for defendant, the conservancy district concerned may not (1) because without right to sue at all in such behalf and (2) because the well

is beyond its surface boundaries. The State Engineer may not, they say, because of defendant's right to "unregulated appropriation," putting the matter "without his jurisdiction," the well having been drilled beyond his previously defined boundaries of any underground stream, artesian basin or lake. And, by the same token, a water user who is a prior appropriator may not enjoin, because of defendant's right to "unregulated appropriation," even though it be conceded the questioned well taps the artesian basin or lake supplying him, all of whose waters already have been applied to beneficial use by prior appropriations. We are unable to sustain a claim so astounding!

It is also complained in the defendant's brief supporting motion for rehearing that our opinion goes far beyond the sole question tried below, viz., the plaintiff's competency to sue "and has inferentially determined at least, other issues which were raised by the pleadings, but never heard and determined by the trial court, and in support of which no evidence or proof was offered." We pointed out in our opinion how difficult it was to determine exactly what the trial court did decide. Its sole finding of fact was that the Peters well was outside the territorial boundaries of the district. It then concluded the conservancy district was not a proper party plaintiff and dismissed its suit. But the presence of the well outside the boundaries of the district is not a matter going to the competency of the plaintiff to maintain the suit unless the court's ruling rested on the view that this was not a method of conserving waters of the basin committed unto the plaintiff district. If that were true, the same defect in plaintiff's right to maintain the suit would exist, even though the well were located within territorial boundaries of the district. Thus mention of its location outside such boundaries would lose significance.

In this state of confusion as to just what the trial court did decide we imputed to it a holding that the plaintiff was not a proper party plaintiff because seeking to "conserve" waters of the basin in a manner not authorized by the act, as argued by the defendant. In other words, and viewed in this aspect, in effect, we put to ourselves the question: *"Is a governmental agency, created for the declared purpose of conserving the waters of an artesian basin and given power to sue, to be denied the exercise of that power in relation to the primary function it was established to perform?"* We supplied a negative answer to that inquiry. We might have stopped right there. But the trial court had seemingly attached significance on the plaintiff's right to sue to presence of the well outside the district's boundaries—something, as already noted, going to the merits of the case rather than competency of plaintiff to sue. Since we were

having to send the case back for a trial of decisive but undetermined issues, it was deemed appropriate to pass upon this question as well and we did.

There is no language in our opinion to inspire or support the suggested apprehension that under it the conservancy district may be involved in controversies between water users of the district as to existence or priority of their water rights. We tried to make it plain in what was said, and we now reaffirm, that it is only where the water users of the district have a common or general interest in the subject matter of the suit that the district may sue or defend for them in a representative capacity. It is not authorized to adjudicate water rights as between the water users of the district or to take up the fight of one as against the other. We sought to make this clear before and we reemphasize it now.

Exception is taken in the minority opinion on motion for rehearing to language in the majority opinion heretofore filed contrasting loss of water to users of the district through leakage with that to be suffered from an unauthorized well tapping the artesian basin wherein we commented on the definition of the word "conserve" urged upon us by defendant's counsel in this language, to-wit: "* * * in other words, (defining it) to say the district could conserve and stop wastage by placing a finger in the leak but could not dam the flood in carrying out the same overall purpose." The majority are virtually charged with gross ignorance of the true situation in assuming "at least that the waste, including casing leaks, were (was) infinitesimal if compared with the alleged 2000 gallons per minute pumped from the Peters well."

The misapprehension disclosed by the minority opinion in this connection reveals itself in interpreting what we said as comprehending the aggregate loss from leakage over the entire district as "infinitesimal" in comparison with the loss to the district's water users of the entire output of the Peters well. The thought we endeavored to convey (and we think the language does not reasonably bear any other construction) was the incongruity of a legislative intent which would authorize the district to "stop a leak" in a well, the loss from which necessarily is less than the total production from such well, and yet deny it the power to enjoin maintenance of that same well, if unlawfully maintained, the entire production of which was thereby lost to the water users of the district. The criticized language was simply a statement by us of the old equation: It requires the sum of all the parts to equal the whole. Hence, a single part necessarily is less than the whole. Certainly, water lost through a leak in a given well would rarely, if ever, equal its total production. The majority have never for a moment doubted that the aggregate loss to the water users from leaks in all

wells throughout the district is very large. But we still affirm the thought intended and actually conveyed, as we think, by the language employed that the leak in a given well is less than its entire output.

The position of the defense throughout has been that, if loss is occurring through a leak, the district can prevent it but if the entire output of a given well is lost to the district's water users, as one maintained without authority, the district is helpless in the premises—that although enjoined by statute to conserve waters of the basin for the benefit of the water users in the district, to enjoin a taking by trespassers is a method of conservation not contemplated by the legislature when it ordered the district to "conserve" the waters of an artesian basin supplying it. In what has been said, both in our original opinion and in this one on motion for rehearing, we think we have adequately shown that this position is not to be successfully maintained. That it is not to be is further demonstrated by the amendment heretofore adverted to in our former and this opinion, found in L. 1941, c. 98, § 3, 1941 Comp., § 77-1324, giving the word "conserve" the broader meaning we impute to it in the matter of appearing as a protestant before the State Engineer against applications to appropriate artesian waters supplying the district and of prosecuting appeals from his decision to the district court.

The motion for rehearing is not well taken and should be denied.

It is so ordered.

BICKLEY and LUJAN, JJ., concur.

HUDSPETH, J., did not participate in this decision.

BRICE, Justice (dissenting).

The principal question is whether plaintiff has capacity to prosecute this suit. No such express power is granted, as will appear from a later reference to the statutes that authorized its being. The answer to the question will depend upon whether the power was impliedly granted.

The case was tried upon the pleadings, in which there was a meager statement of facts, entirely insufficient to support the conclusion of the majority, as reflected in the two opinions. But the majority opinion assumes a state of facts utterly erroneous, not in the record, or the briefs of the parties, or that remotely resembles the real facts and conditions that induced the legislature to enact ten separate laws for the conservation of artesian water, beginning as early as 1905. It is stated in the original opinion:

"It would seem an anomalous construction that confined the district in executing such a fundamental purpose to repairing

and plugging leaky wells through which water was flowing in a small stream and yet denied it the power to enjoin the maintenance of an unlawfully drilled well tapping the basin through which water gushed in a torrent—in other words, to say the district could conserve and stop wastage by placing a finger in the leak but could not dam the flood in carrying out the same overall purpose."

This imaginary condition had for a basis allegations of fact in substance that defendant had drilled a well outside of the boundaries of the plaintiff district, with the purpose and intent of irrigating therefrom 285.6 acres of land, and that he was pumping from that well 2000 gallons of water per minute for such purpose.

These, and these only, are the simple facts alleged from which the Chief Justice has not only constructed a well "gushing a torrent" but has reduced the loss of water through leaks in well casings and otherwise, to streams that could be stopped with his finger. The statement quoted cannot be justified as figurative, because it assumed at least that the waste, including casing leaks, was infinitesimal if compared with the alleged 2000 gallons per minute pumped from the Peters well; for at the time that opinion was written this court had no information from the facts alleged in the pleadings upon which this case was tried regarding the quantity of water lost through leaks in casings, or otherwise.

Now, it having been determined that "a torrent" of water was "gushing" from the Peters well, and that all waste (including leaks from casings) was negligible, and that the owners of water rights had refused to join in legal proceedings against Peters, it was thought to be the duty of this court to prevent "chaos" and inevitable ruin in the Pecos Valley, to constitute the plaintiff the agent of the water right owners to prosecute actions involving the right to the use of water from the artesian basins against the desire of the interested parties. I do not question the authority of any water right owner to institute such legal proceedings against Peters for himself and all similarly situated; but I deny the authority of this court to interfere with that right by bestowing upon plaintiff, against the will of the water right owners, the authority to prosecute actions to try title to real property in which it has no beneficial interest or title.

The general rule is that public corporations possess and can exercise only such powers as the legislature grants by *express words,* and such additional powers as are necessarily implied from those expressly granted.

"* * * Unless authority can be found elsewhere in the statutes or the Con-

stitution, then it does not exist; for a municipality can do no act for which authority is not expressly granted or which may not be reasonably inferred from those conferred upon it." Barker v. State, 39 N.M. 434, 49 P.2d 246, 248.

"Counties, cities and towns are municipal corporations created by the authority of the legislature, and they derive all their powers from the source of their creation, except where the constitution of the state otherwise provides. They have no inherent jurisdiction to make laws or to adopt governmental regulations, nor can they exercise any other powers in that regard than such as are expressly or impliedly derived from their charters or other statutes of the state." Town of Mount Pleasant v. Beckwith, 100 U.S. 514, 520, 25 L.Ed. 699.

"A municipal corporation, therefore, possesses no powers of faculties not conferred upon it, either expressly or by fair implication, by the law which created it, or by other laws, constitutional or statutory, applicable to it. It is a creature of law established for special purposes and its corporate acts must be authorized by its charter or other laws applicable thereto." 1 McQuillen, Municipal Corporations, 2nd Ed.Rev., Sec. 367.

Also see Atkin v. State of Kansas, 191 U.S. 207, 24 S.Ct. 124, 48 L.Ed. 148; City of Chelsea v. Treasurer Receiver General, 237 Mass. 422, 130 N.E. 397; and Foster v. Waco, 113 Tex. 352, 255 S.W. 1104.

Such organizations are usually judicially designated "quasi-municipal corporations." Davy v. McNeill, 31 N.M. 7, 240 P. 482; People v. Letford, 102 Colo. 284, 79 P.2d 274; Wheatley v. Superior Court, 207 Cal. 722, 279 P. 989.

The powers conferred on public corporations are strictly construed.

"The rule is generally stated that the scope of sovereignty delegated to municipal corporations should not be enlarged by liberal construction. The powers conferred are strictly construed, and any fair, substantial, and reasonable doubt concerning the existence of any power, or any ambiguity in the statute upon which the assertion of such power rests, is to be resolved against the corporation, and the power denied. * * *" 37 A. J., Municipal Corporations, Sec. 113.

From these authorities I conclude that the plaintiff has such powers only as have been expressly granted, and those that may be reasonably inferred from those granted. That it is the duty of this court to construe the grants of power strictly, and to resolve any fair and reasonable doubt regarding its powers against the plaintiff.

A history of the legislation for the conservation of underground water will throw

some light on the legislative intent in providing for the organization of conservancy districts. It is history in this state that the first wells tapping the artesian basin in southeastern New Mexico which produced a flow of artesian water sufficient to irrigate large quantities of land, were constructed about the year of 1903. Very shortly thereafter the people began to agitate the question of the conservation of artesian water. From the legislation that followed in 1905 it may be inferred that defective casing had been used to case wells, some had not been properly set to prevent leaks from the basin into the upper strata. Wells were allowed to flow without beneficial use of the water, etc.

The legislature of 1905, Ch. 17, passed "An Act to regulate the use of artesian wells and to prevent the waste of subterranean flows of water and for other purposes." As the title shows, the subject was waste of artesian water. It was provided that artesian wells should be tightly and securely cased and capped to prevent the waste of water and such waste was declared to be a public nuisance and the owner occupying land suffering such waste was held to be guilty of a misdemeanor. Waste was defined as follows:

"Waste is defined for the purpose of this act to be the causing, suffering or permitting the water flowing in such well to reach any porous substratum before coming to the earth's surface, or to flow from such wells, unnecessarily upon any land, or directly or indirectly into any river, creek or other natural water course or channel, or into any lake or pond, or into any street, road or highway, unless it be used on lands for beneficial purposes: * * *." N.M.L. 1905, Ch. 17, Sec. 4.

The act required that artesian wells should be cased their entire depth with a good quality of casing set in the rock overlying the artesian basin.

Chapter 64, N.M.L.1909 was entitled "An Act to regulate the use of artesian wells, storage reservoirs and ditches connected therewith, and to prevent the waste of subterranean flows of water, and for other purposes * * *." It was a comprehensive law of 32 sections, enacted to prevent waste of water from artesian wells, either above ground or in the earth above the artesian basin. Waste is defined as follows:

"Waste from artesian wells, for the purpose of this act, is defined to be the causing, suffering or permitting the water in any artesian well to reach any porous substratum before coming to the earth's surface, or to flow from such well unnecessarily upon any land, or directly into any river, creek or other natural water course or channel, or into any lake or pond, or into any street, road or highway, unless to be used on land for beneficial purposes under the constant supervision of the person using such water

or his employee: * * *." N.M.L.1909, Ch. 64, Sec. 5.

The act is much too long to more than state its purposes generally, which are: To prevent waste of artesian water caused by defective casing; prohibiting the flow of water not to be beneficially used; prohibiting the use of wasteful reservoirs and ditches; prescribing the weight of casing; an artesian well board is provided for and its duties prescribed; limitation is made on the use of water; and repairs of leaky wells, ditches and reservoirs are required.

Chapter 81 of the Laws of 1912 is very similar to the act of 1909. The principal addition is authority given the artesian well supervisor to stop waste from leaky reservoirs and wells, and to plug wells when necessary to prevent waste; all at the expense of the land owner.

The artesian well law was re-enacted in 1925, Ch. 101, in substantially the same language as the act of 1912 and the purposes were precisely the same. This act was amended in 1927 in some particulars, Ch. 149, but the purposes of the act of 1925 and the amendments of 1927 were to prevent the waste of artesian water, as waste is defined in the various conservation acts.

These laws were not changed again until 1931. In that year there was enacted the Conservancy District Law, Ch. 97, the law declaring artesian water to be public water, Ch. 131, and Ch. 70, the title to which is as follows:

"An Act Appropriating Money for the Repair and Plugging of Artesian Wells in the Pecos Valley Artesian Water Basins Situated in Chaves and Eddy Counties Where Said Wells are Found to be Wasting the Waters From Said Underground Reservoirs, and Providing for the Supervision of Said Work by the State Engineer."

This act contains the following preamble:

"Whereas, the boundaries of the Artesian Reservoirs, situated in Chaves and Eddy Counties in the Pecos Valley extending southward from above the city of Roswell, have been scientifically and definitely determined; and

"Whereas, all of the waters of said reservoirs have been beneficially appropriated and have been made available by the drilling of several hundred artesian wells, many of which have been in use for a long period of time, and because of the disintegration, or rusting of the casings in many of the same the waters which would otherwise be stored in said reservoirs are finding outlet to the surface through the upper strata of the earth or flowing into porous sub-strata where they cannot be used and thereby materially diminishing the water supply and depleting and destroying the value of the lands irrigated therefrom; and

"Whereas, many of said wells have been abandoned and through said condition the

waters of said reservoirs are being wasted and depleted and it is necessary, in order to permanently establish and conserve the water of said reservoirs for irrigation purposes, that all such wells be repaired or plugged."

The legislature by this act appropriated $20,000 "* * * for the purpose of causing artesian wells in the Pecos Valley Artesian Basin found by the State Engineer to be leaking and wasting the waters from said reservoirs to be plugged or repaired, so as to preserve the permanency of the reservoir or reservoirs and to prevent further waste therefrom."

This was the status of the artesian water conservation law in New Mexico at the time the legislature enacted the laws under which the plaintiff was incorporated. The legislature at the time was informed from the laws it had enacted beginning in 1905, that from the discovery of the large water supply in the artesian basin until that time there had been a great waste of artesian water and that this waste increased with the years, so that in 1931 the causes of waste, as they appear from these laws, were, (1) a larger flow of water from wells than could be beneficially used; (2) wells that were defectively cased so that the water would pass around the casing into the strata above the impervious rock covering it; (3) waste from poorly constructed reservoirs and ditches; (4) the failure to use casing of sufficient strength to hold the water, and (5) the disintegrating or rotting of casing from natural causes.

It is evident from the preamble I have quoted from Ch. 70, N.M.L.1931 that the fifth cause of waste had become so serious a problem as that it endangered the water supply of the artesian basin; that it had become necessary to plug or repair leaky and abandoned wells to preserve the permanency of the artesian water supply. To conserve this water the legislature appropriated $20,000 of state money to be used to pay for the plugging of leaky and abandoned wells.

This court can take judicial notice of the laws of nature and the results of time; and therefore of the fact that iron casing in artesian wells will disintegrate in time, so that after water by its pressure is forced through weak places in the pipe into the strata above the basin, the pressure and disintegration will continue until the entire flow is lost.

The express powers granted to appellant are contained in the original conservancy district act and amendments thereto, Ch. 97 N.M.L.1931; Ch. 98, N.M.L.1941, Secs. 77-1301 to 77-1324 inclusive, N.M.Comp. 1941; and an act relating to artesian wells, Ch. 43, N.M.L.1935, Secs. 77-1201 to 77-1212, N.M.Comp.1941. All of the parts of these acts by which powers are granted to conservancy districts, or which make reference to grants of power, or refer to the

purpose of the legislation, are the following as they appear in the 1941 compilation:

"The purpose of this act is to provide for the organization of artesian conservancy districts to conserve, where necessary, the waters in any artesian basin or basins within the state, the boundaries of which have been scientifically determined by investigations, and where such waters have been beneficially appropriated for private, public, domestic, commercial or irrigation purposes, or otherwise." Sec. 77-1301.

"* * * Upon declaring the district organized, the same shall be a political subdivision of the state of New Mexico, and a body corporate with all the powers of a public or municipal corporation; shall have power to sue and be sued, to incur debts, liabilities and obligations, to exercise the right of eminent domain and of taxation and assessment as herein provided and to do and perform all acts herein expressly authorized, and all other acts necessary and proper for carrying out to all intents and purposes the objects for which the district was created, and for exercising the powers with which it is invested. * * *" Sec. 77-1311.

"After the formation of any artesian conservancy district, it shall be the duty of the board of directors from year to year to outline a plan or program of water conservation and administration, and they shall make an estimate of the cost of administration, equipment and improvements necessary to carry out such program from year to year, when the cost thereof is to be paid by tax levies.

"In carrying out any such plan or program the board of directors shall have authority to cooperate with the state engineer and the United States geological survey, where such cooperation is offered.

"The program to be carried out and the improvements to be made and the equipment to be purchased shall be designed to accomplish the objects and purposes for which the district was created, and may include the plugging of all wells within the district found by tests to be materially leaking or wasting any waters included in the district. The directors may proceed to carry out the improvements so outlined in such manner as may be deemed for the best interest of all concerned, and may enter into any contracts or do or perform any act or thing necessary or advisable to carry out to all intents and purposes the objects and purposes for which the district was formed, and shall have the right of ingress and egress at all reasonable times to all wells within the district for the purpose of making leakage tests, and otherwise determining that such wells are properly equipped and are being used so as to conserve the waters included in the conservancy district.

"All wells included in the district found to be leaking or wasting such waters, are

hereby declared to be a public nuisance, and the directors of the district and those under their authority shall have the right, power and authority to go upon the lands upon which any such well is located to abate such nuisance by plugging or repairing any such well." Sec. 77-1318.

It is provided by Sec. 77-1319 that the directors shall make up a tax roll including all property in the district and from the value thereof to "determine the tax levy to be made against the same to produce the necessary revenue to make the improvements needed in the district," as provided by Sec. 77-1319.

"Wherever any artesian conservancy district has heretofore been organized or may hereafter be organized, under and pursuant to Chapter 97 of the N.M. Session Laws of 1931, or amendments thereto, such conservancy district may be given the same rights, power and authority as to all underground waters within the boundaries of such conservancy district as have been or may hereafter be conferred upon such district by said legislative act, and amendments thereto, as to artesian waters; provided, however, the boundaries of such underground waters have been reasonably ascertained and the same, or a substantial portion thereof, have been beneficially appropriated * * *." Sec. 77-1322.

"Any artesian conservancy district which has heretofore been organized, or may hereafter be organized, as provided by law, shall in addition to the powers granted to such districts have the right, power and authority to protest or object to any application made to the state engineer to appropriate any waters included within the boundaries of such conservancy district which may be subject to appropriation as provided by law, and to protest or object to any application to the state engineer to change the location of any well or to change the use of waters for any purpose other than that for which originally granted, where it is determined by resolution of the board of directors of such district that the granting of such proposed application would interfere with any existing water rights or program of such conservancy district for the conservation of the waters sought to be appropriated, and such district shall have the right to appeal to the district court from the decision of the state engineer within the time and manner provided by law for appeals from such decisions." Sec. 77-1324.

The artesian well act was amended in 1935 and appears as Article 12, title Artesian Wells, in the 1941 compilation, Secs. 77-1201 to 77-1212.

"All artesian waters which have been declared to be public waters shall be under the supervision and control of the state engineer, as provided by this act, but where artesian conservancy districts have been duly or-

ganized pursuant to chapter 97 of the N.M. Session Laws of 1931 and acts amendatory thereof, such districts shall have concurrent power and authority with the state engineer to enforce the regulatory provisions, as herein provided, in so far as the waters to be conserved and controlled by the respective districts are affected. * * *." Sec. 77-1202.

"The state engineer shall prescribe and enforce reasonable rules and regulations consistent with the terms of this act governing the drilling, casing, repairing, plugging, and abandonment of artesian wells, and, where necessary, may vary such rules and regulations with the varying conditions in the different artesian basins; Provided, however, that the state engineer shall first consult with the board of directors of the artesian conservancy district in any such artesian basin to the end that such rules and regulations shall properly meet the requirements of such artesian basin. * * *." Sec. 77-1204.

"The owner of any artesian well which is being beneficially used or which under existing water rights may be beneficially used, who causes, suffers or permits the waters therefrom after coming to the surface of the earth to waste as herein defined, shall be guilty of a misdemeanor. Such waste is also hereby declared to be a public nuisance, and in the event of the failure or refusal of the owner of the well to abate the same, within ten (10) days from receipt of notice by registered mail, return receipt requested, from the state engineer, artesian well supervisor, or artesian conservancy district, if the well is situated therein, such officials having jurisdiction may abate such nuisance in a summary manner without further notice by properly fitting the well with necessary valves or other devices or doing whatever shall be necessary to control the flow of water therefrom and prevent such waste, and the cost thereof shall be a lien against the land upon which the well is situated, * * *." Sec. 77-1208.

"* * * It shall be the duty of the artesian well supervisor and officials of any artesian conservancy district or agents or employees designated for that purpose to inspect all reservoirs and main ditches and laterals connected therewith as to construction, both as to workmanship and materials used, and to determine the losses therefrom by seepage and evaporation. * * *" Sec. 77-1210.

"* * * The state engineer, artesian well supervisor, or any director of an artesian conservancy district or other officer charged with the enforcement of this act, may file a complaint with the proper official against anyone for the violation of any of the provisions hereof." Sec. 77-1212.

The definition of waste, Sec. 77-1206, is substantially the same as that of the artesian well act of 1927.

It is then provided that if a reservoir shall show a loss of twenty percent that it shall not be used in its defective condition and any use thereof "shall be deemed a misdemeanor, punishable as provided in this act, and also a public nuisance, and the state engineer, artesian well supervisor or artesian conservancy district having jurisdiction, may abate such nuisance in a summary manner." Sec. 77-1210.

The general power granted to conservancy districts is the power to conserve artesian water.

The word conserve has a number of meanings. It is defined as follows: "To keep in a safe or sound state; to save; to preserve from change or destruction." Webster's International Dictionary. "To keep in a safe or sound state, to save; preserve from loss, decay, waste or injury." Webster's 20th Century Dictionary.

It is obvious that the legislature did not mean that the water should be kept in a safe or sound state, or that it should be saved or that it was to be preserved from change. The only definition that could apply when the element to be conserved is water held for beneficial use is "to preserve from loss or waste." Irrigation water does not change, nor is it destroyed. It does not decay nor is it subject to injury.

That this was the meaning intended by the legislature is shown by a series of acts passed for the conservation of artesian water, as I have shown; also by the specific powers granted to plaintiff, each of which is authority to prevent waste as waste had been defined in every act theretofore passed. The specific powers granted by the statutes quoted are as follows:

To make leakage tests; to plug or repair leaking wells, Sec. 77-1318; concurrent power with the state engineer to enforce rules and regulations of the state engineer governing the drilling, casing, repairing, plugging and abandoning artesian wells, Secs. 77-1202 and 77-1204; to prevent waste of artesian water after it comes to the surface of the earth, Sec. 77-1208; to inspect reservoirs and ditches and prevent waste therefrom, Secs. 77-1206 and 77-1210; and to enforce the conservation of water by filing criminal complaints, Sec. 77-1212.

These are exactly the powers conferred upon the various state agencies for the conservation of artesian water by laws passed prior to the enactment of the conservancy district act.

The legislative history of water conservation shows beyond a doubt that the waste of artesian water had become so menacing, particularly that from leaky wells, that the legislature justified an appropriation of $20,000 of public money to

be used for plugging such wells by saying that

"* * * through said condition (waste from leaky wells) the waters of said reservoirs are being *wasted and depleted and it is necessary* in order, to permanently establish and *conserve the water* of said reservoirs for irrigation purposes, that all such wells be repaired or plugged." (My emphasis.)

The legislature did not appropriate $20,000 out of public funds and authorize the expenditure of many thousands more to be collected as annual taxes, to stop a mere "trickle" of water, so insignificant that the pressure of a finger would stop it.

I have hesitated to refer to the history and public knowledge of the people of the Fifth Judicial District regarding the waste of artesian water over a period of more than forty years; but I assume if there is doubt about our judicial knowledge of these facts, that it is not out of place in answer to the assertion that the loss of water through leaky well casings was insignificant, or a mere "trickle."

Through the public press, word of mouth and public records of scientific investigation made at the expense of the United States and the state, it has become common knowledge in the Fifth Judicial District at least, that to 1926 there had been drilled about 1500 artesian wells in the Pecos Valley; that of these, the plaintiff has plugged nearly one half, because the waste of water through defective or disintegrated casings was so great that it had become a menace to the artesian water supply. It may be assumed that many more wells should be plugged, and that the casing of every artesian well will rust out in the course of time, and its flow of water will ultimately be lost in the upper strata unless plugged. Many new wells have been drilled to replace those plugged, to preserve existing water rights.

Scientific investigation of the artesian water supply in the Pecos Valley was made by Albert G. Fiedler of the U. S. Geological Survey, beginning in 1925. To assist in securing data for conserving the waters of the artesian basin this state appropriated the sum of $5000 to be used by the state engineer in connection with the work of the U. S. Geological Survey. Voluminous reports were made in 1926, 1928, 1930 and 1933, which are public records in the office of the state engineer. In one of these reports it is stated, among other things:

"Underground leakage from wells may in some sections form a *larger portion of the draft* upon the artesian reservoir and without proper steps to remedy such losses the artesian supply may be *completely dissipated.*" (My emphasis.)

The loss of water through leaky casings had reached, not millions, but *billions* of gallons annually at the time the plaintiff

was organized to conserve this water. This mere "trickle" was depleting the water supply and seriously injuring a great industry.

The contention of the majority is that the power to "conserve" artesian water granted to plaintiff, constitutes it the agent of all the water right owners of the district to prosecute suits to determine title of claimants to the right to use water from wells drilled outside the boundaries of plaintiff district; and I assert that its authority is limited to the prevention of waste of artesian water.

The language of the statute should be construed in the light of its historical background, including the history of artesian water conservation laws enacted by the New Mexico legislature. Storen v. Sexton, 209 Ind. 589, 200 N.E. 251, 104 A.L.R. 1359; Matson Navigation Co. v. United States, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336; 50 A.J. "Statutes" Sec. 306. These laws, whether superseded or not, may be looked to for assistance in interpreting this statute. Prior to 1931, the legislature had enacted five conservancy statutes, each having for its purpose the prevention of waste of artesian water. In 1931 three conservancy laws were enacted, among them the act under which plaintiff was organized. At that time the artesian well act of 1925 as amended in 1927, was in force. These four acts were in force, and are in *pari materia* and should be construed as one act. Not a single power was expressly granted to any authority in the nine conservancy acts that did not have for its purpose the prevention of waste of artesian water and that alone. I have referred to these conservancy laws, and nothing further on that subject need be added. It has been said "But words are inexact tools at best and for that reason there is wisely no rule of law forbidding resort to explanatory legislative history no matter how 'clear the words may appear on "superficial examination."'" Harrison v. Northern Trust Co., 317 U.S. 476, 63 S.Ct. 361, 363, 87 L. Ed. 407; United States v. American Trucking Ass'ns, 310 U.S. 534, 60 S.Ct. 1059, 84 L.Ed. 1345.

Of course the legislative intent is the law, United States v. Hunt, 81 U.S. 550, 20 L.Ed. 739; Bates v. Brown, 72 U.S. 710, 18 L.Ed. 535; "but in cases admitting of a doubt, the intention of the lawmaker is to be sought in the entire context of the section, statutes or series of statutes in pari materia," Atkins v. Fiber Disintegrating Co., 18 Wall. 272, 21 L.Ed. 841; Hite v. Hite, 301 Mass. 294, 17 N.E.2d 176, 119 A.L.R. 517; The Conqueror, 166 U.S. 110, 17 S.Ct. 510, 41 L.Ed. 937; Hennessy v. Walker, 279 N.Y. 94, 17 N.E.2d 782, 119 A.L.R. 1029; Lambert v. Board of Trustees of Public Library, 151 Ky. 725, 152 S.W. 802, Ann.Cas.1915A, 180; 50 A.J., Statutes, Sec. 349, and single words with more than one meaning should not be iso-

lated from all the context and statutes in pari materia to give a legislative act an arbitrary meaning. Demaree v. Scates, 50 Kan. 275, 32 P. 1123, 20 L.R.A. 97, 34 Am. St.Rep. 113; In re Stryker, 158 N.Y. 526, 53 N.E. 525, 70 Am.St.Rep. 489; Harrison v. Northern Trust Co., supra.

"* * * Indeed, it is improper, in construing a statute to take a few words from its context, and, with them thus isolated, attempt to determine their meaning. Moreover, court may not, in order to give effect to particular words, virtually destroy the meaning of the entire context. In some cases, the rule that the meaning of statutory terms is determined by their context is recognized by statute." 50 A.J., Statutes, Sec. 247.

The majority opinion is built upon an unauthorized meaning arbitrarily given to the word "conserve," without regard to the canons of construction that should be resorted to if the legislative intent is in doubt.

A statute of doubtful meaning should be construed in the light of the attendant conditions and time in which it is enacted. Holy Trinity Church v. United States, 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226; United States v. Stewart, 311 U.S. 60, 61 S.Ct. 102, 85 L.Ed. 40; State ex rel. Wheat v. Moore, 154 Kan. 193, 117 P.2d 598; 50 A.J., Statutes, Sec. 237.

The attendant conditions at the time the conservation district law was passed in 1931 are shown by it and acts in pari materia, without resort to other contemporaneous history. The preamble of Ch. 70, N.M.L. 1931, passed by the same session of the legislature, stated that because of the disintegration of casings, leaks were "materially diminishing the water supply and depleting and destroying the value of the lands irrigated therefrom". It was further stated:

"Whereas, many of said wells have been abandoned and through said condition the waters of said reservoirs are being wasted and depleted and it is necessary, in order to permanently establish and conserve the water of said reservoirs for irrigation purposes, that all such wells be repaired or plugged."

Those were the attendant conditions as the legislature viewed them when the act was passed. It, and those acts in pari materia, were emergency acts passed to save the farming industry of the Pecos Valley, or the legislature so considered them.

It was thought, no doubt, that the $20,000 appropriation would soon be expended, but that casings would continue to disintegrate, and to provide a permanent remedy the conservancy district act was passed a few days later. Under it the plaintiff was authorized to levy a tax to make improvements for conserving water. Ch. 97, N.M L.1931.

It was never contemplated by the legislature that a well would be drilled outside the bounds of a conservancy district organized under this law as the first two sections of the act conclusively show. They are as follows:

"The purpose of this act is to provide for the organization of artesian conservancy districts to conserve, where necessary, the waters in any artesian basin or basins within the state, the boundaries of which have been scientifically determined by investigations, and where such waters have been beneficially appropriated for private, public, domestic, commercial or irrigation purposes, or otherwise." N.M.Sts. 1941, Sec. 77-1301.

"Any artesian conservancy district organized pursuant to the provisions of this act shall include all lands overlying any such artesian basin and any land outside of the boundaries thereof upon which waters from such basin are being used, either for private, public, commercial, domestic or irrigation purposes, or otherwise. * * *" N.M.Stats.1941, Sec. 77-1302.

Before a district could be organized the boundaries of the artesian basin or basins must have been scientifically determined; and then the district was required to include within its boundaries "all lands overlying any such artesian basin," and land outside upon which the water from the basin was used. This outside land necessarily included only land on which water from wells in the district could be used.

The mischief to be remedied was the waste of water, and every specific power granted to any authority by any of the nine conservancy acts was authority to prevent waste of artesian water, and that only.

It is the general rule that municipal corporations, in the absence of a grant otherwise, have no extra-territorial jurisdiction or authority. Not only is there an absence of such grant to artesian conservancy districts, but there are specific statements in the act itself, and other acts, showing that the general rule was intended to apply to plaintiff.

By Ch. 98, N.M.L.1941 conservancy districts were given jurisdiction over underground waters other than artesian. It was provided by Sec. 1:

"Conservancy District may be given the same rights, power and authority as to all underground waters *within the boundaries of such Conservancy District* as have been or may hereafter be conferred upon such District by said Legislative Act (Ch. 97 N.M.L.1931), and amendments thereto, as to Artesian waters." (My emphasis.)

This clearly shows the legislature intended that the authority of corporations organized under the act of 1931 did not extend beyond the boundaries of the district.

By Sec. 3 of the act of 1941 supra, it is provided that artesian conservancy districts shall have the power to protest or object to any application made to the state engineer to appropriate any waters included *within the boundaries of such conservation district.* The artesian well act of 1925 was re-enacted with some changes in 1935, by Ch. 43, N.M.Laws of that year.

By Sec. 7 of that act the conservancy district is given authority to abate any well *located in that district* that is wasting water.

By Sec. 8 of that act a conservancy district is authorized to prevent waste of water that comes to the surface of the earth "if *the well is situated" in the district;* and by Sec. 10 the state engineer, artesian well supervisor, or *"Conservancy District having jurisdiction"* may abate as a nuisance ditches and storage reservoirs that are wasting more than 20% of the appropriated water.

The original act of 1931 provided that the district should, from year to year, outline a program of water conservation, estimate the cost of administration, equipment, and improvements necessary therefor; which it is provided, shall be paid for by a tax levy on the property *within the district;* and may include the plugging of wells *within the district.* See Sec. 77-1318, copied herein, and Sec. 77-1319.

Every specific grant of power limits the activities of the district to the prevention of waste from wells within its boundaries.

It is a general rule of construction of statutes that when general and specific provisions of a statute are associated therein, that the general words are restricted to a sense analogous to the specific provisions, and may be regarded as thereby limited. Re Stryker, supra.

The plaintiff cites certain irrigation district cases which I discussed in my original dissent. None of these cases support the plaintiff's contention. Ordinarily such districts are under contract to impound and deliver water to their water users, and therefore have a special interest therein.

Plaintiff's reliance, however, is on the case of Coachella Valley County Water District v. Stevens, 206 Cal. 400, 274 P. 538, 540, the facts of which are almost identical with those in this case; but the statutes under which the California district was organized are entirely different from the laws here involved. There is no authority, specific or general, in the New Mexico statutes which authorizes the plaintiff to prosecute this suit, whereas the California district was granted specific authority to prosecute suits to try title to the use of water.

The following quotation from the opinion of the California court in the Coachella

Valley case should satisfy anyone that it is not authority here:

"* * * In this connection it is claimed that it is not shown that there are any lands or other property rights owned by the district which will be injured by the alleged threatened acts of the defendant, and that therefore the defendant is not being sued by the real party or parties in interest. It must be conceded that there is an absence in the complaint of any allegation showing that title to any land or other property is held by the district as such; consequently the authority to maintain the action must appear in the act under which the district was organized, or under that act as supplemented by other statutes bearing on the subject. Otherwise, it has no legal capacity to maintain the action. * * *

"Section 1 of the act provides that 'a county water district may be organized and incorporated and managed as herein expressly provided and may exercise the powers herein expressly granted or necessarily implied.' Section 12 enumerates the powers of the district. Subdivision 2 of that section provides that the district shall have power 'to sue and be sued, except as otherwise provided herein or by law, in all actions and proceedings in all courts and tribunals of competent jurisdiction.' Subdivision 6 of that section as originally enacted provided that the district should have power 'to store water for the benefit of the district, and to conserve water for future use and to appropriate, acquire and preserve water and water rights and for this purpose to sue, intervene and compromise, in the name of the district, and assume the costs of litigation involving the ownership of waters or water rights within the district and those used and useful for the purposes of the district or of any of the lands situated therein.' In 1923 said section 12 was amended. Stats.1923, p. 312. By the amendment, subdivision 6 was re-enacted in substantially the original form, except that the following was added to the same subdivision, relating to the powers of the district: 'To commence, maintain, intervene in, defend and compromise actions and proceedings to prevent interference with or diminution of the natural flow of any stream or natural subterranean supply of waters used or useful for any purpose of the district or a common benefit to the lands within the district or its inhabitants; and to commence, maintain and defend actions and proceedings to prevent any such interference with the aforesaid waters as may endanger the inhabitants or lands of the district.'"

The Supreme Court of California concluded that the district was *expressly authorized by statute* to bring the suit and therefore under the California law it could do so as agent of the water users. It is said in the majority opinion "It is true that the language conferring statutory authority

to sue in the California case is *more explicit* than any to be found in the act before us." This seems to assume that there is some explicit statutory authority in New Mexico authorizing this suit. No such authority is cited, and there is nothing stated, generally or specifically, in the statutes that indicates the district's authority extends further than the prevention of waste. The only real parties in interest are the water users. The water in question is not wasted, the record shows that it is applied to a beneficial use in irrigating crops. It is obvious that if specific authority had not been granted to the California district to prosecute the suit in the Coachella Valley case, the Supreme Court of that state would have held against the district. It so states in the opinion. We have substantially the same statute in New Mexico. It is as follows:

"That every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a *party authorized by statute* may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the state so *provides,* an action for the benefit of another shall be brought in the name of the state." 1941 Comp. § 19-101, Rule 17(a).

This is a copy of the Federal Rules of Civil Procedure, rule 17(a), 28 U.S.C.A. following section 723c, but we have no statute which authorizes the plaintiff to prosecute a suit in its own name, the purpose of which is to try rights to the use of artesian water. The district itself has no title or right to the use of the water of the artesian basin. It does not and cannot own water rights. It is not a real party in interest, and no statute authorizes it to bring this suit. The majority opinion confers upon plaintiff powers that only water users are entitled to exercise when and as they please.

The decree of the district court was correct and appellee should be granted a rehearing.

173 P.2d 612

STAPLETON v. HUFF et al.

No. 4934.

Supreme Court of New Mexico.

Oct. 17, 1946.

Dailey & Rogers, Jethro S. Vaught, Jr., and N. L. Stedman, Jr., all of Albuquerque, for appellant.

Martin A. Threet, of Albuquerque, and Robert W. Ward, Asst. Atty. Gen., for appellees.

LUJAN, Justice.

Petitioner-appellant filed a petition in the lower court seeking a writ of mandamus against the State Board of Education, Socorro Municipal Board of Education, and Rex F. Bell, as Superintendent of the Socorro Public Schools, respondents-appellees, to compel them to tender him a written contract to teach school in the City of Socorro, New Mexico, for the school year 1945–46, which he claims was renewed by operation of law. The case was tried upon the pleadings, with the result that the trial court quashed the alternative writ theretofore entered and dismissed the petition. Plaintiff appeals.

The record discloses that appellant is the holder of a professional teacher's certificate and that he taught in the city schools of Socorro, New Mexico, continuously for twenty two years prior to the filing of his petition.

The lower court made the following findings of fact:

"1. That on the 3rd day of May, 1945, the Petitioner Ernest Stapleton, was given notice in writing by the Socorro Municipal Board that his contract would not be renewed, said notice specifying a time and place of hearing.

"2. That on the 22nd day of May, 1945, he appeared in person and by counsel for the promised hearing, but he was not confronted with the witnesses against him and the hearing was not a public hearing. That he appealed to the State Board and the so-called hearing which they granted him was similar to the one granted by the Local Board, in that the witnesses testifying against him did not so testify in his presence, and he was again denied the right to cross examine the witnesses appearing against him."

Applying the law to the facts so found, the court concluded:

"1. That the hearing conducted by the Socorro Municipal Board of Education on May 22nd, 1945, was not held in the manner required by Chapter 60 of the Laws of 1943.

"2. That petitioner was entitled to a trial and hearing de novo before the State Board of Education, and having taken an appeal from the action of the Socorro Municipal School Board he waived any error committed by the respondent, the Socorro Municipal School Board.

"3. That the hearing held by the State Board of Education was not held in the manner required by Chapter 60 of the Laws of 1943.

"4. That the Alternative Writ of Mandamus must be dismissed as the only power resting with the Court is to order a rehearing under proper proceedings before the State Board of Education."

The power to employ and discharge teachers and other employees is reposed in

municipal boards of education. N.M.S. 1941 A. 55-807 and 55-907.

The legislature has recognized the sound public policy of retaining in the public school system teachers who have become increasingly valuable by reason of their experience and has, by statute, assured these public servants an indefinite tenure of position during satisfactory performance of their duties. Ortega et al. v. Otero, 48 N. M. 588, 154 P.2d 252; Reed v. Orleans Parish School Board, La.App., 21 So.2d 895. In order to protect this tenure, the legislature has provided that a teacher who has been properly notified that his services will not be continued for the ensuing year, may, at his own discretion appear before the local board for a hearing.

The purpose of the hearing provided by the Statute is to develop the reasons or grounds which have moved the local board to notice the teacher of its desire to discontinue his services and afford him an opportunity to test the good faith and sufficiency of same. It must be fair and just, conducted in good faith and dominated throughout by a sincere effort to ascertain whether good cause exists for the notice given. If it does not or if the hearing conducted was a mere sham, then justification for the local board's action is lacking.

In 47 A.J., page 398, Section 140, the writer states:

"The purpose of the procedure prescribed by tenure statutes for the dismissal of a teacher or other professional employee is to prevent arbitrary action by school boards; to afford a fair hearing before dismissal, and to provide for full, impartial, and unbiased consideration of the testimony produced. * * *"

Chapter 60, Laws of 1943, in its essential provisions provides as follows:

"Section 1. That Section 55-1111 of the New Mexico Compiled Statutes of 1941 being Section 1, Chapter 202 of the New Mexico Session Laws of 1941 be and the same is hereby amended so as to read as follows:

" '55-1111. On or before the closing day of school in each school district in the State, whether rural, municipal or otherwise, the governing board shall serve written notice upon each teacher or other employee certified as qualified to teach in the schools of the State and by it then employed, stating whether it desires to continue or discontinue the services of such teacher or employee for the ensuing school year. Notice to discontinue the service of a teacher properly certified and who has served a probationary period of two years in a particular district shall specify a place and date, not less than five (5) days nor more than ten (10) days from the date of mailing such notice, at which time said teacher may, at his discretion, appear be-

fore the Board for a hearing. If the decision of the governing board is not satisfactory to the teacher, he may appeal to the State Board of Education within ten days from date of hearing and should the State Board of Education find alleged causes insufficient for termination of his services, said teacher shall be considered employed for the following year under the terms of his then existing contract. * * *

"'Failure to serve such notice shall be construed as a renewal of such employment for the ensuing year, unless, within fifteen (15) days after the closing date of school within the district, such employee shall serve written notice upon such governing authority that he or she does not desire such contract to be renewed.'"

It will be observed that the foregoing Act grants qualified teachers among other things, three distinct rights:

1. That notice be given to the teacher on or before the closing day of school of the local Board's desire to discontinue his services. This right is given to all teachers certified to teach, whether they have served one or ten years. The court found, and it is agreed by all parties, that the local board complied with this provision of law.

2. The right, upon discharge, to be heard by the local board, if he so desires. This right is not given to all teachers who are entitled to the above provision, but only to teachers who have served a probationary period of two years. The record discloses that appellant was not afforded a fair and legal hearing by the local board, as provided for by law. However, this does not become material in the case at bar, in as much as appellant appealed this action to the State Board of Education. We are of the opinion, that when he appealed he waived the errors committed by the local board.

3. The right of appeal. Under this provision appellant was entitled to a fair and legal hearing before the State Board of Education with an opportunity accorded him to present his evidence in defense of the charges lodged against him and the right to be confronted by witnesses testifying against him and be allowed to cross examine them. If after the hearing, the State Board should find the alleged causes insufficient for termination of his services, then and in that event the teacher shall be considered employed for the following year under the terms of his then existing contract. The record reveals, and the lower court so found, that the State Board of Education did not comply with this provision in that it did not afford appellant a hearing as is provided by law.

Appellant earnestly contends that the written contract which he held at the close of the 1944–45 school term was renewed by operation of law, for the reason that the notice and hearing required by the

act are so inextricably inter-related and mutually dependant one upon the other, that the failure to afford appellant a hearing rendered the notice void and an absolute nullity in law. With this contention we do not agree.

If the legislature had intended that failure to afford the teacher a proper hearing should operate automatically to renew the contract of employment, as in the case of failure to serve notice of the local board's desire with reference to continuance or discontinuance of the services of such teacher, it would have been a very simple matter to make known this intention by merely inserting the language "or afford such hearing" after the phrase "failure to serve such notice," followed by the declaration that the omission should be construed as a renewal of the contract of employment for the ensuing year. This it did not do and we should not perform the legislative function of supplying the omission.

The petitioner was entitled to a fair and legal hearing and to know all of the evidence upon which the State Board of Education based its findings and decision. The plain dictates of justice required it to disclose the facts it knew, if it intended to consider them, also to permit appellant to present his side of the case and to cross-examine witnesses testifying against him. If the hearing was conducted in the manner borne out by the record, then appellant was deprived of the right given him by the Act which prohibited his removal unless the alleged causes were substantiated by evidence at the hearing. American Employers' Ins. Co. v. Commissioner of Insurance, 298 Mass. 161, 10 N.E.2d 76; Boott Mills v. Board of Conciliation and Arbitration, 311 Mass. 223, 40 N.E.2d 870; Graves v. School Committee of Wellesley, 299 Mass. 80, 12 N.E.2d 176; Burns et al. v. Thomas Cook & Sons, Inc., et al., 317 Mass. 398, 58 N.E.2d 150.

It is our opinion, and we so hold, that the failure of the State Board of Education to afford appellant a fair and legal hearing as required by the Act did not of itself renew his contract by operation of law. What the petitioner has been denied is the hearing before State Board of Education to which he was entitled under the law. This being a clear legal right is enforcible by mandamus (Carson Reclamation District v. Vigil, 31 N.M. 402, 246 P. 907), a remedy to which he may be entitled still.

Finding no error the judgment of the district court is affirmed.

It is so ordered.

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

BICKLEY, Justice (dissenting).

The difference of viewpoint of the majority and my own is basic and fundament-

al. The value, if any, of a dissenting opinion concerning the meaning of legislative enactments, if there is room for argument, is, that our leaders may lay the matter before the Legislature for clarification.

Prior to the enactment of Ch. 60, L. 1943, which amended Sec. 55-1111 of N.M.S.A. 1941, the governing school board was required on or before the closing day of school in each school district in the State to make up its mind which of the teachers it desired to continue in the service and the services of which of them it desired should be discontinued. Following the formation of a desire, the school board was required to serve written notice upon each teacher on or before the closing day of school containing a statement of its desire one way or the other.

The law required nothing of the board with respect to its mental processes or procedures in reaching decisions as to its desires. The decision of the board preceded the notice to the teacher. The board was not required to state the reasons or causes for its decision. Such decision was final and not subject to review. That statute was a part of the Teachers' Tenure Law which is justified upon the theory that its purpose is to promote good order and the welfare of the State and of the School System by preventing the removal of capable and experienced teachers at the political or personal whim of changing office holders. See State ex rel. Anderson v. Brand, 214 Ind. 347, 5 N.E.2d 531, 913, 7 N.E.2d 777, 13 N.E.2d 955, 110 A.L.R. 778.

Further, as to the purpose of such laws we said in Ortega v. Otero, 48 N.M. 588, 154 P.2d 252, 255:

"What is known as Teachers' Tenure Acts have been adopted in most of the states of our union, the objects of which are to encourage men and women to make a lifetime profession of teaching and to stimulate them to seek positions in the school system requiring the qualifications of teachers, and to protect them in their employment from the whims of those possibly politically minded, and to insure their continuance in such employment."

And in Hogsett v. Beverly School Dist., 1936, 11 Cal.App.2d 328, 53 P.2d 1009, 1011, the court remarked that the provisions of the School Code for permanent tenure of employees should receive a construction "in harmony with their well-understood purpose." And the Court in State ex rel. Clark v. Stout, 206 Ind. 58, 187 N.E. 267, held that the Teachers' Tenure Statute should not be strictly but liberally construed as against a teacher to affect the general purpose of such acts, since they are legislation in which the public at large is interested

With this background as a guide to its purpose the Legislature of 1943 introduced the amendment as follows:

"Notice to discontinue the service of a teacher properly certified and who has served a probationary period of two years in a particular district shall specify a place and date, not less than five (5) days nor more than ten (10) days from the date of mailing such notice, at which time said teacher may, at his discretion, appear before the Board for a hearing. If the decision of the governing board is not satisfactory to the teacher, he may appeal to the State Board of Education within ten days from date of hearing and should the State Board of Education find alleged causes insufficient for termination of his services, said teacher shall be considered employed for the following year under the terms of his then existing contract. Provided said teacher shall be entitled to any additional compensation allowed other teachers of like qualifications and experience employed in the same unit or system. Provided further that teachers holding war emergency certificates and teachers whose professional qualifications are otherwise below those normally required by the governing boards, and teachers employed to fill positions of teachers who have entered the military service, shall not be entitled to the benefits specified in this act."

Thus the Legislature tightened up the Teachers' Tenure Act and put further restraints upon the exercise of power by the local school boards to interfere with the continuity of the teachers' tenure.

As to "a teacher properly certified and who has served a probationary period of two years in a particular district," the board could form a desire to discontinue the services of such a teacher, but such desire and the expression thereof would only be tentative, contingent and interlocutory, coupled with a fulfillment of conditions precedent and attached, before the nebulous desire could ripen into a *decision* to discontinue the services of such a teacher.

It is clear from the amendatory act that the effective decision to discontinue such services must be reached *after* a hearing is conducted by the board to consider the alleged causes for discontinuance.

It is this *decision* made after hearing that has the effect to terminate or continue the services of the teacher under investigation. No procedure preliminary to this decision has that effect.

Under the former practice and directions a desire to discontinue a teacher's services carried with it an uncontrolled predetermined decision to discontinue such services. The notice to the teacher was merely the verdict. That is not now so as to teachers in the probationary class. The notice of a desire to discontinue the teacher's services which must contain or be accompanied by specifications of alleged causes for termination of the services is in no way final, but is merely a preliminary

step in the statutory procedure, which when followed *may* result in a *decision* to discontinue such services.

In conference some of my able associates expressed the view that under this statute the teacher is merely accorded an opportunity to explain away groundless causes which may have motivated the giving of the notice. That would be placing the burden on the teacher where in my opinion it does not rest. It is rather in accord with our American concepts that they who assert causes for depriving one of a substantial right must discharge the burden of substantiating the charges. The procedure is harsh enough in that the members of the school board formulate the specifications of causes for termination of the services of the teacher and also sit as the trial men at the hearing to determine whether the truth thereof is established, and then to render a decision whether to continue or discontinue the teacher's services. In these circumstances the board ought to be held to a full measure of performance of everything that is required of it. To my mind the Legislature has said in effect that the school board cannot discontinue the services of a teacher who has served the probationary period in a particular district except in the mode and manner specified in the statute.

In the case at bar the school board did not reach the required decision to discontinue the services of Mr. Stapleton, the Petitioner, who has served nearly a quarter of a century as a school man and who is within the protection of the 1943 amendment quoted supra. All, including the District Court, have concluded that this teacher was not accorded a hearing as required by the mandate of the statute.

It follows that any purported decision of the school board is a nullity and that the services of this teacher—petitioner have not been terminated.

It is my view that even if the teacher who has been notified that he may, at his discretion, appear before the school board for a hearing on the *alleged causes* for the termination of his services, fails to appear the board is not relieved of its duty to the public to conduct a hearing to sift out and determine the sufficiency and truth of the specification of the alleged causes. Until they do that they are not circumstanced to make a decision that the services of the teacher shall be terminated. For want of a better term, I think a decision *after hearing* to discontinue such services is jurisdictional and until made as provided by law the employment of the teacher continues until discontinued in the mode and manner specified in the statute.

The majority state appellant's contention thus:

"Appellant earnestly contends that the written contract which he held at the close

of the 1944–45 school term was renewed by operation of law, for the reason that the notice and hearing required by the act are so inextricably inter-related and mutually dependant one upon the other, that the failure to afford appellant a hearing rendered the notice void and an absolute nullity in law."

I agree with this contention although as heretofore seen, I do not find it necessary to rely upon language of the statute which accords the teacher a presumption of renewal of employment. I go a bit further and say that as to teachers of Mr. Stapleton's status the notice referred to in the 1943 Amendment serves no effective purpose except as a notice of hearing with a specification of the alleged causes for discontinuance of services and absent a hearing is entirely inefficacious to disturb the status of the teacher in his contract relations with the school board.

Lengthy quotations from authorities in support of my views would be out of place. I refer the reader to an annotation in 110 A.L.R. entitled "Teachers' tenure statutes" and a supplementary annotation on the same subject in 113 A.L.R., page 1485 and a further supplementary annotation on the same subject in 127 A.L.R., page 1298.

Another thing in the majority opinion that I cannot agree with is the decision that on a teacher's appeal from the action of a local school board in undertaking to terminate his services he is entitled to a trial de novo.

I think that too little attention has been given by the majority to the absence of the trial of the alleged causes before the local school board, perhaps due to the fact that everybody connected with the case in the District Court seemed to agree with a dictum of counsel for respondents in referring to the hearing at the meeting of the local board that, "it doesn't make any difference what happened there if he is entitled to a trial de novo at the State Board." This might be true for practical purposes except for the needless and burdensome expenditure of money and time and effort. But if the teacher is not entitled to a trial de novo, as a matter of right, the argument is not a valid one. The majority state it as their opinion that the failure of the local board to give petitioner a hearing is immaterial since when he appealed he waived the errors committed by the local board. This is based on the view that he would be entitled to a trial de novo on appeal.

In Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640, we decided that an appeal to the District Court from an order of the Chief of Division of Liquor Control does not allow a trial de novo simply because the statute does not provide therefor. This seems to be in accord with the general

rule. In 5 C.J.S., Appeal and Error, § 1525, it is said:

"Under statutes giving the right of appeal no case can be tried de novo in the appellate court unless such statute expressly permits or directs such a course to be pursued;"

I think the same principle prevails where the appeal is taken from one administrative board to another administrative board. Our statutes provide in a number of instances for trial de novo on appeal from the actions of administrative boards. On the other hand, in other instances a limited review is provided for upon the record made in the inferior tribunal. See Chiordi v. Jernigan, supra. Another illustration may be found in the School Code. Under 1941 Comp. Sec. 55-1113 it is provided that no teacher having a written contract shall be *discharged* except upon good cause and after hearing on written charges. And, it is further provided:

"Such teacher shall have the right to appeal within ten (10) days to the state board of education, which board shall hear the matter de novo at a time and place to be fixed, etc."

In Bourne v. Board of Education of City of Roswell, 46 N.M. 310, 128 P.2d 733, we decided:

"Statute requiring notice and hearing before a teacher with a contract may be discharged and preserving right of appeal to state board of education relates to a different subject matter than that contained in statute creating a presumption of re-employment under certain circumstances and does not operate to give state board of education control of discretion of local boards in matters of employment of teachers. Laws 1941, c. 202, §§ 1, 3."

And, in our opinion we said:

"There is quite a difference between discharge from employment and not being reemployed. It is noted even in the case of implied renewal of employment, the teacher is not obliged to enter into a renewal of the contract.

"No unfavorable implications necessarily arise from not being re-employed, whereas discharge from existing employment without good cause, explanation, or a hearing, would be attended with injustice and hardship."

I see no good reasons for attempting to assimilate the procedure under Sec. 55-1113 to Sec. 55-1111, which is silent on the subject of trial de novo. This case arises under Sec. 55-1111 and is so treated in the majority opinion and elsewhere.

In my judgment the review by the state board is a limited one to enable such state board to conclude whether even assuming the "alleged causes" are substantiated by evidence in the record of the hearing before the local board, such alleged causes are sufficient to warrant the termination

of the services of the teacher under investigation. At most it seems to me that the power of the state board is limited to a review of the facts as developed in the hearing before the local board with a view of determining whether the "alleged causes" are (a) sufficient for termination of the teacher's services and (b), if so, whether such alleged causes are established by substantial evidence at a hearing by the local board.

I am reliably informed that the state board has generally asserted the view that they are not authorized on such appeals under Sec. 55-1111 to proceed with a trial de novo and that it has been the usual practice in case the local board has failed or refused to conduct a hearing to conclude that such teacher is entitled to a renewal of employment for the ensuing year.

It is my view that if in case of an appeal by the teacher under Sec. 55-1111, it appears that no hearing was conducted by the local school board, the state board does not have original jurisdiction or power to terminate the teacher's services. In other words, there not having been a hearing by the local board as required by Sec. 55-1111 and consequently no effectual *decision* of such local board to terminate the services of the teacher having been made, there is nothing for the state board to review or do except possibly to dismiss the proceeding and the teacher's services have not been terminated. The situation is controlled by the principle announced in Chaves v. Perea, 3 N.M. (Gild.) 89, 2 P. 73, that the appellate tribunal cannot take jurisdiction except for the purpose of dismissal unless the inferior tribunal had acquired jurisdiction. The local school board did not acquire jurisdiction to reach a decision to discontinue the service of petitioner without first conducting a hearing as provided by the statute.

For the reasons stated, I dissent.

173 P.2d 720

ANDERSON v. ALLEN.

No. 4940.

Supreme Court of New Mexico.

Oct. 23, 1946.

Neal & Girand, of Hobbs, for appellant.

Harris & Williams, of Hobbs, for appellee.

LUJAN, Justice.

This is an action to recover rent alleged to be due upon an oral grazing lease.

The case was tried by the court, without a jury, and judgment was entered in favor of appellee for the full term claimed, and appellant appeals.

The following are the trial court's findings of fact and conclusions of law:

"1. That during the month of December, 1943, Plaintiff and defendant entered into a verbal contract for the leasing by the Plaintiff to the Defendant of the grazing land described in Plaintiff's complaint, under the terms of which the defendant agreed to use said grazing land for the period of time beginning January 1, 1944, and ending May 1, 1944, and to pasture upon said land during all of said period of time not less than 325 nor more than 330 head of cattle, and to pay as the consideration for the use of said leased premises the sum of 75 cents per head per month for the cattle so pastured or agreed to be pastured during the term of the lease.

"2. That pursuant to said contract, the Defendant entered upon and took possession of said leased premises and used the same pursuant to the contract for a limited period of time, but that before the expiration of the lease term, the defendant removed his cattle from the premises and abandoned the property.

"3. That the Plaintiff, after notice of such abandonment of said premises by Defendant, made effort to secure another lessee, and to secure other livestock for pasteurage upon said premises during the remaining period of the lease between the Plaintiff and Defendant; but that he was unable to do so.

"4. That no part of the rental consideration has been paid, although the Defendant did tender a check for $113.00 which was refused because it was offered in full settlement. That under the terms of the contract the Defendant is indebted to the Plaintiff in the sum of $975.00.

"Conclusion of Law

"1. That the Plaintiff is entitled to judgment against the Defendant in the sum of $975.00 and for his costs in this action."

Defendant assigns four errors which are grouped for argument under one point, as follows: It was the duty of Anderson, as

landlord, to procure a tenant after the premises had been vacated by the defendant Allen and mitigate or extinguish the damage if he could do so. This is an affirmative defense and appellant should have pleaded it in mitigation of damages if he was intending to rely upon it. He did not plead in mitigation of damages nor did he introduce any testimony on the question.

In the case of Higgins v. Cauhape, 33 N. M. 11, 261 P. 813, 814, considering an appeal from a judgment for an unpaid balance growing out of an oral contract for a grazing privilege, the trial court found that plaintiff made no effort after breach of contract to mitigate the damages by leasing the salt grass to other persons, and we stated:

"Appellant contends that, having so found, the court erred in giving judgment for the full amount of the balance. The trouble with this position is twofold: Appellant did not plead in mitigation; nor did he produce any competent evidence tending to show what amount, if any, appellee, by reasonable effort, might have realized from the grass."

For other cases holding to the same effect see: Federal Reserve Bank of Dallas v. Upton, 34 N.M. 509, 285 P. 494; McMichael v. Price, 177 Okl. 186, 58 P.2d 549; Sharpless Separator Co. v. Gray, 62 Okl. 73, 161 P. 1074; Rich v. Daily Creamery Co., 296 Mich. 270, 296 N.W. 253, 134 A.L.R. 232, and annotation thereto; Amarillo Oil Co. v. Ranch Creek Oil & Gas Co., Tex.Civ.App., 271 S.W. 145; McDaniel Bros. v. Wilson, Tex.Civ.App., 70 S.W.2d 618; Moore v. Shell Oil Co., 139 Ore. 72, 6 P.2d 216; DeWiner v. Nelson, 54 Idaho 560, 33 P.2d 356.

In the case at bar, appellant did not plead in mitigation of damages nor did he offer any evidence tending to show by what amount, if any, appellee, by reasonable effort, could have reduced his damages by leasing the pasture for the unexpired period of the lease. Notwithstanding such omission, some evidence was introduced by appellee tending to show that he had endeavored to rent said pasture for the unexpired term, and the court made a finding to this effect.

We hold, that appellant, not having pleaded in mitigation of damages, cannot now rely on it as a defense.

Finding no error, the judgment will be affirmed and the cause remanded, with direction to the district court to enter judgment against appellant and his supersedeas sureties, and it is so ordered.

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

174 P.2d 564

McDONALD v. SENN.

No. 4967.

Supreme Court of New Mexico.

Nov. 22, 1946.

E. E. Young, of Roswell, for appellant.

Frazier & Quantius, of Roswell, for appellee.

BRICE, Justice.

This action was brought by plaintiff (appellee) to recover damages for injuries to him, alleged to have been inflicted by defendant in the negligent operation of her automobile. The case was tried to a jury which returned a verdict for $3521.11. The defendant has appealed from a judgment entered in that amount. The only error assigned is as follows: "The court erred in denying defendant's motion for an instructed verdict at the close of plaintiff's case." After the plaintiff closed his case, the defendant introduced evidence in her behalf.

It has been held by this court in a number of cases that where a motion is made for an instructed verdict at the close of the plaintiff's case (as in this case), and defendant fails to renew the motion at the close of the whole case, any error made by the court in overruling such motion is waived. State v. Phipps, 47 N.M. 316, 142 P.2d 550, 551, citing a number of cases decided by this court so holding. The defendant has invoked this rule, and asserts that as the error assigned was waived, there is nothing before this court for consideration. We stated in the Phipps case:

"The denial of appellant's motion for a directed verdict is the sole error assigned. The application of the foregoing rule would be sufficient to dispose of this appeal, but since the State does not invoke it, and both parties seek a review of the question of the sufficiency of the evidence to sustain a conviction of the offense charged, we proceed to a consideration of that question."

The testimony in the Phipps case was reviewed by this court because the State did not invoke the rule, and both parties sought a consideration of the facts. But here the appellee has invoked the rule. We agree

with appellee that if the trial court erred in overruling defendant's motion for an instructed verdict, the error was waived, and the judgment of the district court should be affirmed.

Notwithstanding our conclusion stated, the testimony has been read and we find in it substantial evidence that supports the judgment.

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

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

174 P.2d 826

PAVLETICH v. PAVLETICH et al.

No. 4929.

Supreme Court of New Mexico.

Nov. 26, 1946.

Robert A. Morrow, of Raton, for appellant.

Fred C. Stringfellow, of Raton, for plaintiff appellee.

Daniel W. Caldwell, of Springer, for cross-defendant appellee.

HUDSPETH, Justice.

On the 9th of April, 1942, appellee filed suit for divorce. Appellant, on the 26th of February, 1945, filed her amended and supplemental answer and cross-complaint denying material allegations of the complaint and raising the doctrine of recrimination. She charged that appellee committed adultery and lived with Lucille Worrell, whom she made cross-defendant. She also alleged that certain property standing in the name of Lucille Worrell was community property of appellant and appellee. Issues were joined and the case was tried to the court without a jury. Decree adjudging the title of all the property in controversy in cross-defendant, granting appellee a divorce on the ground of incompatibility, and dismissing the cross-complaint of appellant was entered the 26th day of April, 1945. Defendant and cross-complainant appeals.

A great deal of testimony in the 336 page transcript relates to the ownership of the property in controversy. The Court found:

"11. That the cross-defendant, Lucille Worrell, commenced the operation of the premises known as 'Club 85' at Springer, Colfax County, New Mexico, on or about the 1st day of July, 1940 and that ever since that time she has operated the said club and paid all taxes and other expenses in connection with the operation of said club and that the license for the operation of said club has been in her name and that Nick Pavletich did not have any interest in said club as owner since July 1, 1940.

"12. That the premises known as 'Nick's Club 85' was taken over by R. E. Adams on or about the 25th day of April, 1940, and that R. E. Adams is the present owner of said premises; that on or about July 1, 1940, the building was leased by said R. E. Adams to Lucille Worrell for an agreed rental of $50.00 per month and that she has continued to lease said building and pay said rent since that time; that Nick Pavletich did not have any interest in such building since it was taken over by R. E. Adams on or about April 25, 1940.

"13. That since the 1st day of July, 1940 Nick Pavletich has been employed to work as a bartender and manager of the premises known as 'Club 85' owned and operated by Lucille Worrell.

"14. That there was no fraud, collusion or conspiracy practiced by and between Nick Pavletich and the cross-defendant to

conceal the property of Nick Pavletich; that all loans and purchases made in the name of Lucille Worrell were made with money belonging to Lucille Worrell and that Nick Pavletich has no interest therein.

"15. That the Club 85 located near Springer, Colfax County, New Mexico, and all property used in connection therewith is the sole and separate property of Lucille Worrell; that all property described in paragraph 9 of defendant's Amended and Supplemental Answer is the sole and separate property of Lucille Worrell, and that the plaintiff and defendant own only the community property specifically described herein in paragraph 8 hereof."

Appellant maintains: "The court should have decreed that Club 85 and any profits from its operations, or any property into which such profits were invested, was the community property of appellant and appellee."

It appears that plaintiff-appellee, a coal miner, left the mines, after suffering a physical injury, a number of years ago and thereafter engaged in business. His several small business ventures seem to have been financial failures. He built "Nick's Club 85," a saloon and dance-hall, in the year 1939, and ran the place for several months. On or about July 1, 1940, the business was transferred to Lucille Worrell.

Appellant's counsel, in his excellent brief, referring to plaintiff's financial condition at that time, says:

"Appellee was insolvent. His place at Eagle Nest had been sold on mechanic's lien foreclosure January 4, 1940 in a suit by R. E. Adams. Appellee had turned the building in which Club 85 was operated over to Mr. Adams because Appellee could not pay the material bills against it. While thus involved and while the litigations above mentioned were pending, appellee sold Club 85 to cross defendant on July 1, 1940. It is evident that this sale, or pretended sale, was made at that particular time in order to place the property beyond the reach of creditors and beyond the reach of appellant on her claim for alimony, both in the future and the $245.00 which was delinquent, * * *"

Plaintiff-appellee, in addition to being insolvent, was confronted with contempt proceedings because of his failure to meet alimony payments due appellant under an order made in a suit for separate maintenance brought by appellant in the year 1938. Appellee had little to sell. The fixtures were mortgaged, and there is no evidence that the small stock of merchandise and the equity in the fixtures which appellee testified he sold to the cross-defendant, Worrell, were worth more than the purchase price. Cross-defendant borrowed money about the time of the purchase.

"Club 85" had not been a business success, and the profits of her business were quite small for the first year or two. She testified that she built up the business and profits were much larger thereafter.

The trial court in his opinion says:

"I appreciate the fact that Mr. Morrow has done a very thorough and excellent job in attempting to show fraud and collusion between Mrs. Worrell and Mr. Pavletich, but I think the intimation which he has made that Mr. Pavletich and Mrs. Worrell conspired to get the Club 85 in Mrs. Worrell's name for both their benefits has been strongly belied by the testimony of Mr. Adams. I think his testimony is worth considerable weight in this case because of the fact he is essentially a disinterested party who has nothing to gain one way or the other by a decision in this case. He is president of a couple of banks and a lumber yard, and so far as I can determine has no reason to be biased or prejudiced in his testimony. In his testimony he stated he might have been hard on Nick, but he took the place away from him. * * * I cannot see that the acquisition by Mrs. Worrell could have been in any way a preconceived plan. I think the evidence primarily shows that Mr. Adams, as he stated on the stand, didn't have much faith in Nick, * * *"

Appellee, on his own account, acted as livestock broker, and bought and sold cattle. He had a bank account, in which he deposited $39,597.97 from January 1940 to March 17, 1945, but the trial court found that these deposits were not income from Club 85, but money that passed through appellee's hands as the results of various cattle dealings, and the buying of cattle for others, "the money remaining in said account for only a short period of time." Appellant proved that approximately one-tenth of the bills of wholesale liquor dealers for liquor furnished Club 85 after July 1, 1940, were paid by checks on this bank account; that the sign on the club had not been changed; that some accounts for goods furnished Club 85 continued to be carried in the name of appellee; that in the negotiation for the purchase of property appellee did not disclose that he was acting for cross-defendant until final papers were drawn; that appellee negotiated for the lease and sale of this purchased property as if it belonged to him (but not in the presence of cross-defendant) and other incidents to which appellant points as badges of fraud. And members of appellee's family testified that he had stated that he owned the Nicholson Place and other property in controversy purchased after cross-defendant took over Club 85.

On the other hand, appellee and cross-defendant testified that appellee started working for cross-defendant July 1, 1940, as bartender and manager of Club 85 at a

salary of $125 per month and all expenses—later increased to $135 per month; that appellee was reimbursed for money advanced in her absence and used in payment of bills of Club 85, and, generally, offered satisfactory explanations—if their testimony is to be believed—of the suspicious circumstances shown by witnesses for appellant. However, appellant strenuously argues that they are not credible witnesses, and that there is not substantial evidence to support the findings of the court.

The salary of appellee was less than the pay of a good coal miner at that period. But appellee testified that he could not get a job in the mines because he could not pass the physical examination. There is little evidence in the record of his earning capacity. Appellee was insolvent, and could not obtain a lease of Club 85, and apparently had reached the end of his rope, so far as that property was concerned. Appellant requested the trial court to conclude:

"That Lucille Worrell should be compelled to transfer the business known as Club 85 or Nick's Club 85 to plaintiff and defendant, and account for all moneys derived from the operation of said business, and that such business and the moneys derived therefrom are community property of plaintiff and defendant."

The first question for the trial things were what they seemed on July 1, court's consideration was whether or not 1940—whether the ownership of Club 85 was in the cross-defendant. So far as the record shows the cross-defendant had paid full value for what she received. We held in National Mut. Savings & Loan Ass'n v. Lake et al., 47 N.M. 223, 141 P.2d 188 (Syl.):

"Conveyance made on full consideration was supported by presumption of honesty and legality which attends actions of men until contrary is clearly shown."

Viewing the matter from the standpoint of the cross-defendant, it appears that she had decided to chance her small capital and credit in a business yet to be proven profitable. The trial court decided that she had sufficient judgment to act at that time as a businessman would have acted; that is, in her own interest, and acquired the property in fact as well as in name. The other theory is that she is a foolish woman and contributed her savings, credit and services for five years to appellee, and lent him her name for the purpose of carrying on the business. This is the crucial question in the case so far as the property is concerned. If she owned the business all the net profits, of course, were hers. It is the duty of the trier of facts to weigh the evidence and determine the witness's credibility. Rice v. First National Bank in Albuquerque, 50 N.M. 99, 171 P.2d 318. Every presumption is indulged in favor of the correctness of the

judgment, if there is substantial evidence to support the decision. Consolidated Placers, Inc., v. Grant, 48 N.M. 340, 151 P.2d 48.

When the trial court resolved the question of the ownership of Club 85 he practically decided the other questions relating to property, since it is the theory of appellant that appellee acquired the Nicholson Place, the Smith Place, and notes with the profits of Club 85. Appellee's salary was largely consumed in the payment of alimony to appellant, which was never less than $100 per month. The money with which these properties were acquired was evidently furnished by cross-defendant in whose name the titles were taken.

We are constrained to hold that the judgment in favor of cross defendant is supported by substantial evidence, and must, therefore, be affirmed.

The appellee and appellant intermarried in the year 1917, and separated in May, 1937. They had four children, at the time of the trial, the oldest was twenty-four years of age and the youngest nineteen years of age, all self-supporting. The court granted appellee a divorce on the ground of incompatibility, and ordered him to pay appellant alimony in the sum of $100 per month. The court found:

"4. That for a long time prior to the filing of the complaint herein, and for approximately seven years prior to the 15th day of May, 1937, the home conditions of the parties heretofore were insufferable and that the parties hereto are incompatible and incapable of harmonious cohabitation or coexistence and at this time the parties hereto are so incompatible as to make cohabitation and coexistence and the performance of marital duties impractical and impossible, and that the parties hereto at this time are irreconcilable."

These findings, including the finding that the parties are irreconcilable, are supported by substantial evidence—much of it sordid—which it is unnecessary to set out here.

Trial court in his opinion said:

"At this time I may as well state that I do not intend to make a finding of adultery, because I do not believe that adultery existing after a separation and state of incompatibility, with the parties living separate and apart, is material to the decision of the court in granting a divorce; and, in the event this case goes to the Supreme Court, I would state now that whether or not the Supreme Court feels that there is sufficient ground to make a finding of adultery, if I made a finding of adultery in this case, after the separation, I would nevertheless conclude as a matter of law that the plaintiff was entitled to a divorce on the ground of incompatibility, and I feel this is in line with the Poteet case and it is the proper stand to take in the interest of the public

welfare,—I think that is the theory behind the Poteet case. I cannot feel that when parties are living separate and apart, and one or the other, or both are guilty of adultery, that the courts can serve any good purpose by forcing them to live for the rest of their lives as husband and wife, separate and apart, and thereby create a situation which can do nothing but cause sorrow and unhappiness, and an intolerable moral situation as long as those parties live and are physically capable of the sexual act; and I take that position in the face of the Chavez case, which says, more or less, if both parties are guilty a court shall hold them together whether they want to live together or ever intend to live together again. I think it is a cruel and inhuman law, if such is the law, and I do not believe it is the law of New Mexico at the present time and I think the Justices who decided the Poteet case will agree with this principle.

"The reason I have stated that I will make no finding on adultery even if the Supreme Court should decide the evidence was so strong that it would necessitate such a finding, is I believe it is immaterial and I do not see the necessity of making a public record of such a finding, and I do not believe it is necessary to the issues in this case."

The views of the people and courts of the world on recrimination as a bar to divorce are slowly changing. In England, since 1857, the court has not been bound to deny a divorce to a petitioner guilty of adultery (Reddington v. Reddington, 317 Mass. 760, 59 N.E.2d 775, page 777 note, 159 A.L.R. 1448) and in France under the law passed in July, 1884, the Supreme Court of Appeals has abandoned to the lower courts the final evaluation of the injures graves. 28 Iowa L. Review p. 301. And of Sweden, Germany and Russia the following appears in an article entitled "Divorce Without Fault," 29 Iowa Law Review, p. 526:

"The striking contracts between the liberal and socialistic idea of the Swedish law, the anarchistic element of the Russian law, and the hyper-etatistic ideology of the German legislation, is undeniable. In spite of these intellectual and political differences, the idea of factual marriage and divorce without fault prevails in the three countries. * * *

"The importance of the fault principle is thus reduced, from a logical viewpoint, to nothingness, from a practical viewpoint, to a minimum. It could in itself be considered only in cases in which the State is absolutely disinterested. But are there such cases at all in a totalitarian State? * * *

"Nowhere is the justification for such a change of attitude more obvious than in the law of divorce. The psychology of marriage is less accessible to the judge than that of other domains of the law. Agenor Krafft's words are well in point: '* * *

Is it really believed that spouses who have engaged in litigation, sometimes for years, are going to take up their marital relationship because seven federal judges have decided, sometimes in a few minutes, that they ought to try again, that it was not proved, etc. * * *' And yet, countries which refuse to impose a business partnership on an unwilling party, do not hesitate to impose on unwilling spouses this most intimate of human relations."

There seems to be a change in our own country as evidenced by the act of Congress, D. C. Code 1940, Sec. 16—403. In Vanderhuff v. Vanderhuff, 79 U.S.App.D.C. 153, 144 F.2d 509, the United States Court of Appeals, District of Columbia, said:

"From a social point of view it is hard to defend a rule that recrimination is an absolute bar to the granting of a divorce. It requires parties who are guilty of conduct which makes their marriage impossible of success to continue their marital relationship as a sort of punishment for their sins. Nevertheless, under our former divorce statute it was apparent that Congress had expressed just such a public policy. The only ground for divorce under that statute was adultery. It was further provided that the guilty party should not remarry. This indicated the clear intent to prevent a spouse who was guilty of adultery from being free from the consequences of a former marriage.

"We believe our present statute has changed the policy which made recrimination an absolute bar to divorce."

In Volume 10, Kansas City Law Review, page 213, there is an article by J. G. Beamer entitled: "The Doctrine of Recrimination in Divorce Proceedings," in which he says:

"Recrimination is one of four bars to a divorce action conjured up first from Roman property law by 12th Century canonists in order that the Church might intervene in a divorce suit which, if successful, would have turned a wife loose on a society in which unattached women had no place. Today it is a legal foil, furnished to the defendant by the 'common law' or statute, by means of which he can admit even the most repellent charges made in the complaint and still prevent the plaintiff from securing a divorce. * * *

"Three possible sociological justifications for the doctrine of recrimination can be dimly discerned behind the empty incantations with which the courts rationalize its existence and application to the cases before them. The first is that it tends to hold the family together; the second, that it serves as a check upon immorality; the third, that it protects the property rights of the wife.

"The family is still the fundamental sociological unit of our civilization. For the purposes of this discussion, it is assumed

that it should be preserved and that the state has a vital interest in its preservation.

"In its largest aspect the problem involved here is whether divorce, under any circumstances, should be permitted. Fortunately, we need not attempt an answer. For our limited purposes the question has already been answered. Forty-seven out of the forty-eight of our state governments, and a respectable majority of foreign governments all of whom, it is assumed, have a vital interest in the maintenance of the family—have decided that the interests of both the family and of the state can best be served by permitting divorce in certain situations. And the present tendency seems to be toward a further liberalization of the divorce laws. This decision and tendency may be said to be due to a slowly awakening realization that denial of divorce seldom restores life to families sociologically dead when they come into court, and that if anything is preserved it is but the dead and empty shell of what has been and is no longer—a realization that upon the refusal of divorce, those things which cannot be done legally are often done illegally, those which cannot be done openly are done clandestinely; that other relationships are formed, nameless children born; and that even if the parties force themselves to remain together, their children probably will not thank them for it or even be imbued with any high and lasting ideals about their family, or the family as a sociological concept.

"If this is the justification for permitting divorce where only one party is at fault, how much more reasonable is it to permit divorce where both parties hold their marriage vows in contempt, and the likelihood that attempts at reconciliation will fail are thereby doubled. Possibly at one time—when a party convicted of adultery was prohibited from marrying again—a distinction could be made. But if so, it is no longer valid today. With a few limitations, the defendant as well as the successful petitioner is permitted to remarry and possibly achieve the happiness he failed to find in his first marriage.

"This pursuit of happiness is natural in man and it is desirable that it take place within the law rather than outside. The guilt or innocence of the other spouse should be immaterial. Indeed, one may well ask whether there is such a thing as an innocent spouse—especially in those states where numerous grounds for divorce are provided. It is difficult to understand, for instance, how a divorce can be granted on such a reciprocal ground as incompatibility without the plaintiff being just as incompatible as the defendant. Permitting a divorce on this ground would seem to indicate a legislative intent to abolish the doctrine of recrimination, but, unfortunately, it has been held otherwise. The result

is that the artificial distinction made between those cases where both parties are proven guilty of some marital misconduct, and the cases where the guilt of only one party can be established is retained—to the detriment of the parties, the family, and the state.

"Perhaps the solution to the problem of divorce, as many writers upon the subject have suggested, lies in preventive rather than curative legal processes. To be successful, such programs require not only cooperation and understanding between the court, the social worker, the doctor and psychologist, but also that the court and its aid have the complete confidence of the parties themselves. This confidence will not be given so long as the parties are afraid that they might be denied relief—even though a divorce is advised by the court's aids—if the parties reveal too much. Far-sighted programs of this sort do not envisage a dime-novel demarcation of hero and villain, and the advance in sociological treatment which they make possible is destroyed if such melodramatic mummery is insisted upon in the trial or appellate courts. * * *

"Finally, the doctrine of recrimination, as outlined by the appellate courts, does not obtain in actual practice. It is common knowledge that most divorce suits are not contested, and that in the few which are, recrimination is seldom mentioned. The result is that our divorce courts operate upon unsound foundations, contempt for the law and for the courts is bred in the minds of the people, the parties themselves are forced to conceal matters which should be decided by an impartial tribunal, and a petty form of blackmail is encouraged."

In Poteet v. Poteet, 45 N.M. 214, 114 P.2d 91, 96, the court, speaking through Mr. Justice Bickley, reviewed the legislation and decisions of this commonwealth, on divorce, and many of the authorities on recrimination as a bar to divorce. In speaking of incompatibility as a ground for divorce, we said:

"We have no doubt the District Judges understand the wide signification of the word and will apply it understandingly to the facts of a particular case. Some of the lexicographers give 'irreconcilableness' as a synonym. We venture the suggestion that this is an important factor to be considered in granting or refusing divorces upon the ground of incompatibility."

If the chancellor believes the parties are reconcilable, he will, no doubt, endeavor to bring about a reconciliation. But where the parties are irreconcilable we believe that the public policy of this state as expressed by the legislature, is against denying a divorce on the doctrine of recrimination. Chavez v. Chavez, 39 N.M. 480, 50 P.2d 264, 101 A.L.R. 635, in so far as it holds it to be the imperative duty of

the chancellor to deny a divorce upon a showing of recrimination, should no longer be followed.

The trial court, therefore, correctly ruled that the question of the adultery of appellee was immaterial. Finding no error in the record, the judgment and decree of the trial court is affirmed.

It is so ordered.

BICKLEY, BRICE and LUJAN, JJ., concur.

SADLER, Chief Justice (dissenting).

When the legislature added incompatibility as a ground for divorce to those already named in the statute, it greatly facilitated the ease with which a divorce from the bonds of matrimony may be secured. Indeed, in practical application statutory authority to procure a divorce upon this ground brings us to the very border, if not into the actual domain, of trial marriage. Nevertheless, wisdom of the policy which authorizes divorce on this ground is for the legislature, not this Court, to decide.

My objection to the prevailing opinion is that it pioneers the subject of divorce beyond anything attempted by the legislature itself. Recrimination as a defense to a bill for divorce came to us with our adoption of the common law in 1876 and as a part of that law. L.1875–1876, c. 2, § 2, 1941 Comp., § 19-303. The statute on incompatibility says nothing about doing away with recrimination as a defense. Under the weight of authority, it exists as such except where denied by express statutory enactment. 17 Am.Jur. 267 and 27 C. J.S., Divorce, § 67, p. 623. As a part of the common law its repeal should rest on express statutory or constitutional declaration or arise by necessary implication. 15 C.J.S., Common Law, § 12, p. 619; Ickes v. Brimhall, 42 N.M. 412, 79 P.2d 942. Here there is neither.

Indeed, in Chavez v. Chavez, 39 N.M. 480, 50 P.2d 264, 101 A.L.R. 635, decided since adoption of the incompatibility statute, we expressly upheld recrimination as a defense to a plea for divorce, reaffirming the correctness of that decision a few years later in Tenorio v. Tenorio, 44 N.M. 89, 105, 98 P.2d 838, 848, in language, as follows:

"It is argued under another claim of error that 'recrimination is not a defense to divorce in this state'. But it is, unless the court wishes to overrule Chavez v. Chavez, 39 N.M. 480, 50 P.2d 264, 101 A.L.R. 635, and it is not now so disposed."

We expressly declined to pass upon the question in Poteet v. Poteet, 45 N.M. 214, 114 P.2d 91, 96, in stating: "We need not now decide whether recrimination is a defense in a divorce action." We already had held that it is in the Chavez and Tenorio cases a short time before.

The far reaching effect of today's holding on the law of marriage and divorce in New Mexico is easy to see. The statutes authorize divorce on ten separate grounds. 1941 Comp., §§ 25-701 and 25-710. Incompatibility is one of the ten and came in along with incurable insanity, in 1933. L. 1933, c. 54, § 1; L.1933, c. 27, § 1. Thus it is that incompatibility, latest to arrive as a ground of divorce, if freely employed, will eliminate all others save possibly incurable insanity as a basis for divorce, by giving it into the hands of the chancellor to ignore the defense of recrimination and award a divorce, if so moved by the irreconcilable nature of the family differences, even though the incompatibility found may have arisen over the commission by one of the spouses of a capital sin of the marriage relation. It is doubtful if the legislature enacting the statute ever visualized that such a possibility could result therefrom.

In my opinion, the trial court erred in declining to entertain the defense of recrimination. Its decree should be reversed and the cause remanded for a new trial at which the issues on the defense of recrimination shall be found and a decree entered conformably thereto. The majority concluding otherwise, I dissent.

175 P.2d 196

POLHAMUS et al. v. ROBERTS.

No. 4977.

Supreme Court of New Mexico.

Nov. 23, 1946.

Rehearing Denied Dec. 31, 1946.

Reese & Reese, of Roswell, for appellant.

Frazier & Quantius, of Roswell, for appellees.

BRICE, Justice.

This action in ejectment was instituted by plaintiffs (appellees) to recover from defendant possession of certain real estate situated in Roswell, New Mexico, and to

recover damages for its retention. Defendant claims the right to possession under an alleged lease from plaintiffs. From a judgment for plaintiffs defendant has prosecuted this appeal.

The facts necessary to a decision are substantially as follows:

The property in question is owned one-half by the plaintiff, Birdie Polhamus, and the other one-half by plaintiffs Norma Jane Savage and Martha Lee Savage, who are minors and plaintiff's wards.

The defendant had been in possession of the building and operating a saloon therein under a lease from plaintiffs since 1941, paying monthly rental in advance. On or about January 15, 1945 he entered into an agreement to sell his saloon to J. A. Terry and Rulon Moody for $14,500 to be effective if the proposed purchasers could secure a lease of the real property in suit for a period of two years. The plaintiffs lived in Eureka, Kansas, and the defendant in Roswell, New Mexico.

On January 13, 1945 the defendant sent the following telegram to plaintiff:

"I have a chance to sell to two good men. They would like a two year lease or assurance of keeping the location. I am sick and have to sell my place. Please wire immediately."

On the 15th day of January, 1945, the plaintiff replied to the telegram as follows:

"Will give two year lease on premises you occupy at $175 monthly. I am also ill and contemplate sale of the building as soon as possible. If you want lease please advise."

The telegram was received by defendant on the same day; and upon its receipt Terry and Moody paid him $7500 as part of the purchase price of the saloon, and were let into possession of the property.

Late in the afternoon of January 16, 1945, the defendant deposited in the United States Post Office at Roswell, postage prepaid, an air mail letter in answer to plaintiff's telegram, as follows:

"Received your wire dated January 15, 1945, agreeing to lease me the Green Lantern for two years at $175 per month. I accept the lease proposition but as I wrote you before I am assigning all of my lease rights to the parties to whom I sold the bar, a Mr. J. A. Terry and Mr. Rulon Moody, and they desire to have a written lease from you, and consequently I have had a lease drawn up between you and Terry and Moody leasing this property for a term of two years.

"They have signed the lease in duplicate and when you sign the same it will be complete. You can keep one copy and mail the other copy back to me for the purchasers.

"I am also enclosing check of Moody and Terry for $175 for the first month's rent beginning January 20, 1945.

"I am sure these parties I am selling to will keep all rental paid promptly each month and will take good care of the premises.

"If the lease is not satisfactory you can draw a new lease and send it down, but I think the lease is okey.

"Trusting I may hear from you by return mail returning the signed copy of the lease, and with best regards, I am, Etc."

A proposed lease to Terry and Moody, to be executed by plaintiff, with Terry's check for $175, was enclosed in the letter, which was received by plaintiff on the 19th day of January 1945.

On the 18th day of January 1945, and prior to the receipt of defendant's letter, plaintiff telegraphed the defendant as follows:

"Please disregard my wire of January 15 regarding lease. Believe building has been sold and will advise you of new owner as soon as possible."

The proposed lease sent to the plaintiff by defendant, and J. A. Terry's check for $175 for one month's rent, enclosed therewith, were returned to the defendant and the offer to lease the property was rejected. The contemplated sale mentioned in plaintiff's telegram was not consummated. The plaintiff on May 28, 1945, leased the building to another for a period of ten years from that date, at $250 per month.

The defendant was duly served with notice to vacate and of the termination of tenancy to be effective July 23, 1945. In answer defendant offered to pay rent at $175 per month from January 20, 1945, to that date, upon condition that plaintiff should recognize a two year lease in defendant, which tender was rejected.

The defendant paid no rent after January 20, 1945, and the court determined that the rental value of the property was $200 per month; that the plaintiff was entitled to recover possession of the property, together with $135 per month from January 22, 1945 until July 23, 1945, and $200 per month thereafter until the premises should be yielded to plaintiff.

Terry and Moody do not claim, and never have claimed, any lease on the premises. Upon their demand the defendant returned to them the $7500 which they had paid on the purchase price of the saloon, the reasonable market value of which in the meantime had depreciated $8000.

The trial court concluded from the foregoing facts, as follows:

"That the defendant having initiated the negotiations by telegraph and Birdie Polhamus having answered by wire offering a two-year lease at $175 per month and stating 'If you want lease please advise,' and the defendant having elected to answer by mail, Birdie Polhamus was within her

rights in withdrawing her offer prior to the receipt of the defendant's letter.

"That no lease contract * * * and no contract to lease * * * resulted from the telegrams and correspondence, and that no lease resulted from such negotiations.

"* * * The defendant having failed to accept the counter offer made by Birdie Polhamus by telegram, and Birdie Polhamus having revoked such offer prior to the receipt of the letter, the defendant is without standing to assert that he has a lease on the property."

The question is whether the telegrams and letter we have copied herein constituted a lease contract between the parties.

The defendant's telegram of January 13 was an inquiry as to whether the plaintiff would lease her property to two unnamed persons to whom he "had a chance" to sell his saloon. He did not contemplate leasing the property himself.

The plaintiff's answer was an offer to lease the property at $175 per month, but the lessee was not named. It would ordinarily be assumed that her offer to lease the property was tendered to the unnamed persons mentioned in defendant's telegram, notwithstanding after the offer she added, "If you want lease please advise." It was defendant who applied for the unnamed persons and the reply was properly addressed to him. But the parties and the trial court have construed the language as an offer to defendant, and we will accept their construction.

It is the rule that an offer to enter into a bilateral contract must be accepted unconditionally and unqualifiedly by the offeree, and substantially as made, to constitute the negotiations a contract. Iselin v. United States, 271 U.S. 136, 46 S.Ct. 458, 70 L.Ed. 872; Minneapolis, Etc., R. Co. v. Columbus Rolling-Mill Co., 119 U.S. 149, 7 S.Ct. 168, 30 L.Ed. 376; United States v. Mitchell, 8 Cir., 104 F.2d 343; Canton Cotton Mills v. S. W. Overall Co., 8 Cir., 8 F.2d 807; Marshall Mfg. Co. v. Berrien County Package Co., 269 Mich. 337, 257 N.W. 714; Southern Real Estate & Finance Co. v. Park Drug Co., 344 Mo. 397, 126 S.W.2d 1169; 1 Williston on Contracts, Secs. 70, 72 and 73.

"A reply to an offer *though purporting to accept it,* which adds qualifications or requires performance of conditions is not an acceptance but is a counter offer." (Our emphasis) Restatement of Law of Contracts, Sec. 60.

Also see 12 A.J. "Contracts" Sec. 53; 17 C.J.S., Contracts, § 43.

"An offeror is entitled to know in clear terms whether the offeree accepts his proposal. It is not enough that the words of a reply justify a probable inference of assent." Restatement of Law of Contracts, Sec. 58.

The defendant's letter was not an unconditional and unqualified acceptance of plaintiff's offer. It required the performance of terms not included in the offer. If the acceptance had concluded with the words, "I accept your lease proposition" then it would have been unconditional and unqualified. But defendant added the condition that a written lease be made to third persons to whom he was assigning his "lease rights." At that time no rights had accrued to him by virtue of the telegrams exchanged.

The offer called for no formal written lease. Defendant stated in his letter transmitting a proposed lease for plaintiff to sign, "If the lease is not satisfactory, you can draw a new lease," which implied that a written lease was required; not to defendant, but to persons to whom plaintiff had never made an offer.

"An offer can be accepted only by the offeree. To constitute a valid contract, the minds of the parties must have met on the identity of the persons with whom they are dealing. Everyone has a right to select and determine with whom he will contract and another cannot be thrust upon him without his consent. It is immaterial whether the offerer had special reasons for contracting with the offeree rather than with someone else. * * *." 12 A.J., Contracts, Sec. 38.

"One of the necessary terms of any proposed contract is the person with whom the contract is to be made. Accordingly an offer made to one person cannot be accepted by another, even though the offeree purports to assign it. * * *." 1 Williston on Contracts, Sec. 80.

If the defendant had accepted the lease unconditionally and unqualifiedly and requested as a favor that it be made to Moody and Terry because of the circumstances stated in the letter, making it plain that it was not a condition, but a request to be complied with or not at plaintiff's option, then, assuming that the time and manner of acceptance was authorized, the defendant's contention would be correct. 1 Williston on Contracts, Sec. 79.

We are of the opinion that plaintiff's offer as made was not accepted, and that no contract resulted from their correspondence. See 1 Williston on Contracts, Sec. 77 and cases cited thereunder.

The plaintiff telegraphed her offer to defendant two days after she received his telegram, stating "If you want the lease please advise." She did not limit the time, or prescribe the medium of acceptance.

The trial court concluded that as the offer was transmitted by a telegram, that an acceptance by letter could not become effective by depositing the letter in the United States mail for transmission; but only upon its receipt by plaintiff before a revocation of the offer.

There is authority so holding. The case of Lucas v. Western Union Telegraph Co., 131 Iowa 669, 109 N.W. 191, 6 L.R.A.,N.S., 1016, seems to support the theory of the trial court. In that case the question was whether an offer sent by mail and accepted by telegraph completed a contract upon the filing of the telegram for transmission. The court held that the offerer by depositing his letter in the post office selected a common agency through which to conduct the negotiations and the delivery of a letter of acceptance to that agency (the post office) was in effect a delivery to the offerer. The Lucas case is supported by Dickey v. Hurd et al., 1 Cir., 33 F.2d 415.

But we are of the opinion that the following text states the correct and majority rule on the question:

"The reason given in modern cases for the doctrine that a contract may be completed by mailing a letter of acceptance, or by dispatching a telegraphic acceptance, is that the use of the post office or telegraph company has been authorized or indicated by the offeror as the means of communication, and that the acceptor is complying with a request made to him or authority given to him by the offeror in sending his acceptance in that way. If the offeror himself sends his offer by mail, this of itself implies authority to answer by the same channel of communication. Similarly, if an offer is sent by telegraph, authority to reply by the same means will be implied. If an offer is made in person, but is left open for subsequent acceptance, and the parties reside at a distance, so that no subsequent personal meeting is apparently contemplated, an acceptance by mail would be authorized; and similar principles would govern the use of the telegraph. Where the offeror has not himself made use of the medium of communication, adopted by the offeree, the question whether the means adopted was authorized is one of fact, depending upon what would reasonably be expected by one in the position of the contracting parties, in view of prevailing business usages, and other surrounding circumstances." 1 Williston on Contracts, Sec. 83.

The plaintiff did not use the medium of communication adopted by the defendant. The question therefore, whether the means adopted by defendant was authorized, is one of fact, depending upon what would reasonably be expected by persons in the position of the contracting parties, in view of prevailing business usages and other surrounding circumstances. As otherwise stated in Shubert Theatrical Co. v. Rath, 2 Cir., 271 F. 827, 834, 20 A.L.R. 846:

"Authorization to communicate acceptance by mail is implied in two cases: (1) Where the post is used to make the offer and says nothing as to how the answer is to

be sent. (2) Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance."

Also see the following cases regarding this question: Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L.Ed. 187; Caldwell v. Cline, 109 W.Va. 553, 156 S.E. 55, 72 A.L.R. 1211; Farmers Produce Co. v. McAlester Storage & Commission Co., 48 Okl. 488, 150 P. 483, L.R.A.1916A, 1297; Farmers Equity Co-op. Creamery Ass'n v. United States, 10 Cir., 132 F.2d 738; Painter v. Brainard-Cedar Realty Co., 29 Ohio App. 123, 163 N.E. 57; Burton v. United States, 202 U.S. 344, 26 S.Ct. 688, 50 L.Ed. 1057, 6 Ann.Cas. 362; Restatement of Law Contracts, Sec. 66.

But as the plaintiff's offer was not accepted the erroneous conclusion of the trial court on this question, if error it was, does not affect the result.

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

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

175 P.2d 395

HELMS v. NEW MEXICO ORE PROCESSING CO. et al.

No. 4927.

Supreme Court of New Mexico.

Dec. 19, 1946.

Hubert O. Robertson, of Silver City, for appellants and cross-appellees.

Woodbury & Shantz, of Silver City, and Tom R. Files, of El Paso, Tex., for appellee and cross-appellant.

HUDSPETH, Justice.

This is an appeal by the defendants and a cross-appeal by the plaintiff from a judgment granted plaintiff on the basis of 40% total disability by reason of a right indirect inguinal hernia sustained by him in an accident arising out of and in the course of his employment.

Defendants' main contention is that under the hernia paragraph of the Workmen's Compensation Act, N.M.S.A., 1941 Comp. Sec. 57-918, plaintiff was not entitled to compensation for permanent disability upon his refusal to submit to an operation upon the tender by defendants of the sum fixed by statute for medical and hospital expense. Plaintiff's theory is that his claim filed in the District Court for total permanent disability, or 100% instead of 40%, should have been allowed and judgment granted therefor.

Plaintiff, a man 59 years of age with fourth grade education, had been employed by defendant for about five months prior to the accident, Nov. 27, 1944. He immediately reported to his employer's surgeon, who advised him to rest for a few days, after which he resumed work, at a "sitting job," and continued at that supervisory work for a few weeks. He then bought a small restaurant which his family conducted with a little help from plaintiff until April 28, 1945, when he sold it.

Plaintiff did no other work between November 27, 1944, the date of the accident and the date of the trial, July 11, 1945. He testified that he applied for work at two mines but was refused employment because of the hernia.

A surgeon consulted by plaintiff and employer's doctor both recommended surgery. Doctor Watts, plaintiff's witness, testified, in part, as follows:

"Q. In such an operation, the intestines of the patient are touched, or exposed, or moved, are they not? A. Not necessarily.

"Q. Would you state that in Mr. Helms' case that might be necessary? A. No, we only expose the intestines in case there is a strangulation of the intestine, or strangulation of the omentum. * * *

"Q. Do you always give a general anesthetic, doctor, when you do a hernia operation? A. Not always. I have done several herniae under strictly local anesthesia while the majority of herniae are performed under a spinal anesthesia. Anesthesia in such cases involves only the lower segments of the spinal cord and the patient has sensation from the umbilicus upward, but none from the umbilicus down.

"Q. Doctor, what percentage of the hernia operations that you have done made a full and complete recovery? A. I have had 5% recurrence. * * * I may add that practically all of the recurrences which competent surgeons confront have to do with the direct, rather than the indirect type of hernia. * * *

"Q. Doctor, assuming a man 59 years of age, who had done hard, manual labor all his life, suffering from a right inguinal hernia, if he were not operated on, could you state whether or not he would be totally disabled to do hard labor? A. There are, I presume, many thousands of men working today who do have herniae, some of whom are doing industrial work, and many of these employees obtained employment without physical examination and herniae have been discovered later on when industrial laws made it necessary to have a complete physical examination. In examining such employees, we find a rather large percentage of herniae, some of which are giving symptoms and some of which employees state are symptom free;

some employees get by by using a well-fitting truss; some wear no support at all; so, after all, each complaint resolves itself into a personal equation—some employees will have symptoms and some will not.

"Q. Back to Mr. Helms; would you advise him, doctor, to do heavy, manual work in his present condition? A. No, not without the use of a truss.

"Q. Do you feel that a truss would be a successful support for him in doing heavy, manual labor? A. I do not recommend a truss in any instance where surgery can be utilized with a fair promise of success."

Dr. Frazen, defendants' witness, testified, in part, as follows:

"My findings at that time were right inguinal hernia. Treatment advised was surgery. Treatment needed is surgery performed; in hospital two weeks; light work six weeks, and regular work in three months. * * *

"I told him, as I understood our compensation law, that they allowed $100.00 for surgery, $50.00 for hospitalization, which I explained to him was not enough—didn't cover it—and also that from the other cases that we had had, they allowed $3.00 a day for disability compensation until he resumed work, which was usually three months. He said he didn't feel at that time that he would like to lay off that length of time for two reasons: 1) Scarcity of labor, and 2) from a financial standpoint, * * *

"In industrial work, we classify men for light work, average work, or heavy work. Seldom, if ever, do I classify a man for heavy, manual work at the age of Mr. Helms. Industrial organizations will not take a man of that age for what they consider heavy, manual labor.

"The Court: In your opinion, he can now do average work?

"The Witness: He can do average work."

The trial court found that plaintiff had worked all his life at hard manual labor, that he had no special skill or ability to do any other type of work, and is only fitted to do hard manual labor; that the injury and resulting hernia had rendered plaintiff unable to do hard manual labor; that plaintiff's refusal to submit to a surgical operation was not unreasonable, and that the injury and resulting hernia had caused partial permanent disability of plaintiff to the extent of 40% of total disability.

There is practically no conflict in the expert testimony, and it is admitted that plaintiff sustained the injury in the course of his employment.

The hernia paragraph of the Workmen's Compensation Act, N.M.S.A., 1941 Comp., Sec. 57-918, is as follows:

"A workman in order to be entitled to compensation for a hernia, must clearly prove: (1) that the hernia is of recent origin, (2) that its appearance was accompanied by pain, (3) that it was immediately preceded by some accidental strain suffered in the course of the employment, and (4) that it did not exist prior to the date of the alleged injury. If a workman, after establishing his right to compensation for hernia as above provided, elects to be operated upon, a special operating fee of not to exceed one hundred dollars ($100.00) and reasonable hospital expenses not exceeding ($50.00) fifty dollars shall be paid by the employer or his or its insurer. In case such workman elects not to be operated upon and the hernia becomes strangulated in the future, the results from such strangulation shall not be compensated; Provided, that before said workman shall be compelled to prove the facts above mentioned in order to be entitled to compensation for hernia the employer must first prove that he caused the workman to be physically examined previous to his employment for the existence of a hernia, and provided further that where the employer has not made provisions for, and does not have at the service of the workman adequate surgical, hospital and medical facilities and attention, or fails to offer such during the period necessary said workman shall have the right to select the surgeon operating upon him and/or the hospital wherein such operation is performed and said workman is treated therefor."

Defendants maintain the hernia paragraph quoted above is not intended to provide plaintiff with compensation for permanent disability upon his refusal to submit to recommended surgical treatment for hernia. The question is one of first impression in this state, although defendants cite many cases from other jurisdictions supporting their theory.

The Supreme Court of Iowa in Stufflebean v. City of Fort Dodge et al., 233 Iowa 438, 9 N.W.2d 281, 283, said:

"Counsel on both sides concede that which our investigation of the decisions tends to verify, namely, that this precise question has not been previously presented to this court. In most of the states, the compensation statutes specifically provide that an arbitrary or unreasonable refusal to submit to offered medical or surgical treatment, which does not seriously endanger claimant's life or health and which is shown to be reasonably certain to minimize or cure the disability for which compensation is sought, will warrant reduction, suspension or forfeiture of such compensation. In a number of states where there is

no such express statutory provision, a similar rule appears to prevail by reason of judicial decision. Strong v. Sonken-Galamba [Iron & Metal] Co., 109 Kan. 117, 198 P. 182, 18 A.L.R. 415; Gentry v. Williams Bros., 135 Kan. 408, 10 P.2d 856; Schiller v. Baltimore & O. R. Co., 137 Md. 235, 246, 112 A. 272, 276; Pritchard v. Ford Motor Co., 276 Mich. 246, 267 N.W. 622; Myers v. Wadsworth Mfg. Co., 214 Mich. 636, 183 N.W. 913; O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, 172 N.W. 601, 6 A.L.R. 1257; Kricinovich v. American Car & Foundry Co., 192 Mich. 687, 691, 159 N.W. 362; Dosen v. East Butte Copper Min. Co., 78 Mont. 579, 254 P. 880; Neault v. Parker-Young Co., 86 N.H. 231, 166 A. 289; American Smelting & Refining Co. v. Industrial Comm., 76 Utah 503, 290 P. 770.

"While the rule appears to be generally recognized and applied, there is of course some variation in its application. Where the evidence is undisputed on the issue, the question becomes one of law; where there is a conflict in the evidence, it is one of fact. Where a question of law is presented, the courts may make a final determination of it. Pritchard v. Ford Motor Co., supra. Where disputed questions of fact are present and undecided, it is necessary to remand the case for further proceedings. Whittika v. Industrial Comm., 322 Ill. 368, 153 N.E. 708."

Counsel for both parties concede that the meaning of the hernia paragraph quoted above is not clear. Colorado, from which state we are informed the act was taken, has amended the original act by eliminating the limitation on the operating fee. Spirakoff v. Pluto Coal Mining Co., 105 Colo. 552, 100 P.2d 154. The act must be construed as a whole and given a liberal construction. Martin v. White Pine Lumber Co. et al., 34 N.M. 483, 284 P. 115.

The limitation of the operating fee and hospital expenses to $150 appearing in the hernia paragraph was evidently written into the act at the instance of employers. It is not adequate, according to defendants' own physician, who insisted that the after care of the surgical operation is as important in a hernia case as the operation itself.

While another section of the act (N.M.S. A., 1941 Comp., Section 57-920) contains the usual provision to the effect that if an injured employee shall refuse to submit to medical or surgical treatment reasonably essential to promote his recovery, the court may, in its discretion, reduce or suspend his compensation (Bethlehem Steel Company v. Industrial Accident Commission et al., 70 Cal.App.2d 382, 161 P.2d 59), the employer in order to be able to invoke that provision must tender the entire cost of the operation. Only upon such tender

and when the operation is one which a person of ordinary prudence and courage would undergo for his own betterment regardless of compensation, the rule applies. Shrewsbury v. State Compensation Com'r et al., 127 W.Va. 360, 32 S.E.2d 361.

The niggardly policy of employers toward their injured workmen has contributed to the growth of prejudice which is manifested in such verdicts as that rendered in Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000. Too close connection between the medical staff and the claim adjuster has like effect. Wilson et al. v. Sinclaire et al., 109 Colo. 592, 128 P.2d 996; Bethlehem Steel Co. v. Industrial Accident Commission et al., supra.

The question whether plaintiff acted reasonably or not in refusing the operation is a question of fact and the trial court was not limited to expert testimony in considering the question. Under the facts in this case we cannot say that plaintiff's refusal was, as a matter of law, unreasonable, and the finding of the court, being supported by substantial evidence, is conclusive in this court.

The award made by the trial court to plaintiff on the basis of 40% permanent disability is attacked by both parties. Plaintiff maintains that the findings as to his age, education, etc., in connection with the finding that he is unable to do hard manual labor, entitles him to an award on the basis of total permanent disability as a matter of law.

On the other hand, the defendants point out that plaintiff has a mild form of hernia, not necessarily disabling, and the kind easiest to repair; that under the judgment in this case plaintiff will receive payments which will total $3,960 which is $720 more than the maximum specified for the loss of an arm at the shoulder, or a leg at the hip, and $1,710 more than for the loss of an eye, measured by the specific schedule of losses set out in the statute; that if he should prevail in his cross-appeal and be awarded payments on the basis of total permanent disability, they would total $9,900; that all the evidence is to the effect that he can do average work as distinguished from light or heavy work; that large industrial organizations in normal times do not employ men of his age to do hard manual labor.

There is much discussion in the briefs of the spirit or policy of our Workmen's Compensation Act. An examination of cases involving herniae in other jurisdictions show that the triers of facts have assessed the industrial disability of the workers who have suffered such injuries from 5% to 100%. In some cases a distinction is made between skilled workers and common laborers. Differences in these statutes aside, it is evident that local conditions and prevailing notions of economic justice have had a bearing on the determination of the

questions. In large industrial centers where one employer has 100,000 or more men on his payroll little thought is given to the ability of the employer to pay or the industry to bear generous awards to injured workmen.

A case reflecting these views is that of Hebert v. Ford Motor Co., 1938, 285 Mich. 607, 281 N.W. 374, 375, where two awards of total permanent disability were given the same workman against the same employer within eleven years. The court said:

"Defendant contends plaintiff has split his cause of action.

"Obviously, plaintiff had no cause of action against his employer in the sense of the common law, or any amendment thereto, to split. Proceedings under the workmen's compensation act, Comp. Laws 1929, Sec. 8407 et seq., have nothing to do with common-law actions for damages for negligence on the part of the employer. Its enactment marked the crystallization into a legislative enactment of the economic fact that the ultimate consumer pays for the compensation of injured employees in the increased cost of the product. It aims at compensation, not damage. It is wholly substitutional in character and displaces the common-law liability for negligence. It should be administered substantially as insurance of a social character. * * *

"The fact that in 1927 plaintiff, engaged in skilled employment, suffered an accidental injury which totally destroyed his earning capacity in the employment in which he was working at the time of the accident does not preclude him from recovering compensation for total disability arising from an accident in another kind of employment in which he was engaged under the act as it now stands."

See Kadykowski v. Briggs Mfg. Co. et al., 304 Mich. 503, 8 N.W.2d 154.

Plaintiff's theory, supported by line of cases from other states, is that an employer engages a workman with all his infirmities, including the infirmities of age, and upon the occurrence of an accident arising out of his employment the employer is responsible and liable for the ultimate effect upon his ability to find employment in and engage in his usual occupation—that if the sum total of his infirmities prevents him from finding employment in his usual occupation or engaging in it, he is entitled to be classed as totally and permanently disabled and compensated accordingly.

The conditions in New Mexico are quite different from those prevailing in industrial centers. According to United States Bureau of Labor statistics, there were employed in August of this year only 19,100 workers in mining and manufacturing in this state—a small percent of the working population of the commonwealth, and much less than half the number of New Mexicans

who have been discharged from the armed forces, many of them with infirmities.

Under plaintiff's interpretation of our law, the employers of these infirm men would be liable for their war infirmities in case of accidents to them arising in the course of their employment. The result of such holding would be that many of these men would be refused employment. Moreover, the employers of this state, with few exceptions, fall in the class of "small business," the survival of which has lately been the subject of discussion and legislation in the Congress.

The legislators who enacted our Workmen's Compensation Act were largely the sons of pioneers, who are slowly being educated out of the ideas of their fathers who believed that "every tub must stand upon its bottom." Instead of providing that the test should be the ability of the workman who had suffered an injury to resume his place in his *usual* employment, the act provided: "The purpose of such examination shall be to determine whether the workman has recovered so that his earning power *at any kind of work* is restored * * *" N.M. S.A., 1941 Comp., Sec. 57-925. (Emphasis added.)

This and other provisions of the statute clearly indicate that the proper test is not whether the injured workman is able to do the same kind of work as he did before the injury, but whether he is able to do any kind of work. Gonzales v. Pecos Valley Packing Co. et al., 48 N.M. 185, 146 P.2d 1017. The following comment states the case clearly:

"We have several times criticized the expression 'cannot compete in the open labor market'. It has no place in the workmen's compensation law. Of course, a man who has been disabled to the extent of 50 per cent of his earning capacity cannot compete in the open labor market with an equally good uninjured person. Nor can a man who has lost an eye, a leg or an arm, compete in the open labor market with men of equal ability who are sound in all their members. But that is not the criterion. If they are only partially disabled by their accidental injuries they receive compensation to the extent of their partial disability for the period fixed by law. If the injury is the permanent loss of a member, they are paid compensation for the number of weeks arbitrarily fixed by the statute (sec. 306c, 77 P.S. § 513). If the injury does not amount to the permanent loss of a member, but the disability is not total, they receive compensation, proportioned to their disability, during the period of such partial disability not exceeding 400 weeks (sec. 306b, 77 P.S. § 512). Where the claimant has received an accidental injury which lessens his earning power but still leaves him able to do some work, neither the board nor a court has authority to extend the pro-

visions of the Workmen's Compensation Act and award him compensation for total disability, instead of for partial disability, because, on account of his injury and consequent partial disability, he 'cannot compete in the open labor market' with normal, sound and uninjured persons. The Workmen's Compensation Act establishes no such standard and it is time that the use of this unauthorized and misleading phrase be discontinued. There is no warrant for it in the statute." Allen v. Dravo Corporation et al., 149 Pa.Super. 188, 27 A.2d 491, 492.

Nor does the testimony of plaintiff that he sought work and was unable to procure it entitle him to an award on the basis of total, permanent disability. The fact that he did not procure work does not prove that he could not perform it. Krnetich v. Oliver Iron Mining Co., 202 Minn. 158, 277 N.W. 525. Provision is now made by other legislation for losses due to unemployment.

Whether disability is total or partial is a fact question to be determined by the trier of the facts. The trial court saw and heard the plaintiff and determined that his industrial disability was 40%, and awarded him judgment on that basis. A compensation award must be sustained if there is substantial evidence supporting the conclusion of the court, even though the reviewing court might have arrived at a different conclusion if it had been the fact finding body. Lipe v. Bradbury, supra.

Finding no reversible error in the record, the judgment will be sustained. And an additional fee of $300.00 is hereby fixed and allowed plaintiff's attorneys on account of defendants' appeal. It is so ordered.

BICKLEY, J., CONCURS.

BRICE, Justice (concurring specially).

The workman is a common laborer, and the trial court has determined that while he could not do *hard work,* yet he had lost only forty percent of his earning capacity. This finding and the evidence satisfies me that he can still do the work of a common laborer, though not "hard work." The finding of the court mentioned is supported by substantial evidence, and therefore I agree that the judgment of the district court should be affirmed.

In my opinion it is not necessary to construe the words "permanent, total disability" as used in the Workmen's Compensation Act. This question has been posed in at least three cases (Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000; New Mexico State Highway Dept. v. Bible, 38 N.M. 372, 34 P.2d 295; Bubany v. New York Life Ins. Co., 39 N.M. 560, 51 P.2d 864) and not decided because unnecessary to a decision in any of them. While the question was

raised in this case, it is unnecessary to a decision and I see no reason for deciding it at this time.

There is much confusion among the authorities as to the meaning of this phrase. It is held by some courts that a workman is totally disabled if he cannot perform the duties for which he had fitted himself by training and experience, or work of a similar character, and not whether he can engage in some other occupation foreign to his experience and training. Thompson v. Leach & McClain, La.App., 11 So.2d 109. Other courts hold it to mean the loss of one's earning power as a workman whether manifested by inability to perform work obtainable, or inability to secure work on that account. Consolidation Coal Co. v. Ditty, 286 Ky. 395, 150 S.W.2d 672. Another court holds that it must appear from the evidence either that the workman is not able to do even light work of a general character and that his earning capacity is entirely destroyed, or that remunerative employment is not available to him. Hughes v. H. Kellogg & Sons, 139 Pa. Super. 580, 13 A.2d 98.

Our workmen's compensation statutes are copied largely from the laws of Colorado, and the Supreme Court of that state doubts if any of these rules are satisfactory for all cases. That court said, in Globe Indemnity Co. v. Industrial Commission of Colorado, 67 Colo. 526, 186 P. 522, 523:

"It appears that the rule contended for by plaintiffs in error for determining the 'impairment of earning capacity of claimants,' and which we will designate as 'Rule No. 1,' is, 'The degree of disability is to be determined by the claimant's general impairment of earning capacity without respect to any particular kind of labor,' to support which the following, among other authorities, are cited: Grammici v. Zinn, 219 N.Y. 322, 114 N.E. 397; Boscarino et al. v. Carfagno & Dragonette, Inc., 220 N. Y. 323, 115 N.E. 710, Ann.Cas.1918A, 530; Modra v. Little, 223 N.Y. 452, 119 N.E. 853, Ann.Cas.1918D, 177. Whereas, the rule contended for by defendants in error, and which we will designate as 'Rule No. 2,' is, 'The degree of disability is to be determined by the claimant's impairment of earning capacity as it relates to the kind of labor at which he was employed when injured,' to support which the following, among other authorities, are cited: Duprey v. Maryland Cas. Co., 219 Mass. 189, 106 N.E. 686; Gillen v. O. A. & G. Corp., 215 Mass. 96, 102 N.E. 346, L.R.A.1916A, 371. Both of these contentions may be wrong, as a simple illustration will demonstrate.

"An expert engraver, past middle age, engaged for years in that business, commanding high wages thereat and having no other special skill and no other regular occupation, is temporarily employed at very low wages carrying brick and mortar in a wheelbarrow in building construction.

While so employed he sustains an injury to his right hand, trivial in its effect to incapacitate him for general work, but making it wholly impossible for him ever again to secure employment as an engraver. Both the language and spirit of the act would be violated in his case by the application of Rule No. 1.

"The same man, under the same circumstances, engaged in the same occupation, sustains an injury to his foot of such a character as to permanently incapacitate him from running a wheelbarrow, but having no effect whatever upon his earning capacity as an engraver. Both the language and spirit of the act would be violated in his case by the application of Rule No. 2.

"We are of the opinion that the widest possible discretion is vested in the commission to determine whether, under a given set of circumstances and a particular state of the evidence, the first or second rule, or a combination of both, should be applied. Age, education, training, general physical and mental capacity, and adaptability, may, and often should, be taken into consideration in arriving at a just conclusion as to the percentage of impairment of earning capacity."

I do not pass upon the question; but I do not subscribe to the doctrine stated by Mr. Justice HUDSPETH, "This and other provisions of the statute clearly indicate that the proper test is not whether the injured workman is able to do the same kind of work as he did before the injury, but whether he is able to do *any kind of work*."

That this statement is too broad is quite evident. I know of no case going so far. The workman would have to be paralyzed before it could be said that he was totally disabled. See Cleland v. Verona Radio, 130 N.J.L. 588, 33 A.2d 712.

SADLER, C. J., and LUJAN, J., concur.

175 P.2d 684

SUNDT v. TOBIN QUARRIES, Inc.

No. 4939.

Supreme Court of New Mexico.
Dec. 20, 1946.

Simms, Modrall, Seymour & Simms, Irwin S. Moise and Joseph T. Cole, Jr., all of Albuquerque, and Roy W. Crimm, of Kansas City, Mo., for appellant.

Quincy D. Adams and Edward P. Chase, both of Albuquerque, and William W. Gilbert, of Santa Fe, for appellee.

BRICE, Justice.

The plaintiff (appellee) sued the defendant (appellant), to recover damages alleged to have been sustained because of defendant's breach of a contract, by the terms of which the defendant agreed to deliver to plaintiff approximately 10,000 cubic yards of screened sand, to be used by plaintiff in the preparation of sealing material for the resurfacing of two portions of state highways; also to recover for the use of certain equipment used by defendant, and the value of labor performed for defendant by employees of plaintiff.

The facts found by the trial court necessary to a decision are substantially as follows:

On June 23, 1944, the plaintiff was awarded by the New Mexico State Highway Commission contracts for resurfacing two sections of highways in New Mexico, to be completed according to specifications within sixty "weather working days." A part of the material required for the resurfacing projects was approximately 10,000 cu. yds. of screened sand. On July 5, 1944 the State Highway Commission notified the plaintiff to commence the work of resurfacing under his contracts, and in compliance therewith he commenced work on July 14, 1944. On July 24, 1944 he ordered in writing from the defendant 8913 cu. yds. of screened sand to be used on the road projects, which order the defendant accepted, and thereupon agreed to deliver the sand to plaintiff, F. O. B. Logan, New Mexico, for $1.25 per cu. yd.

The defendant was informed "at or prior to the time the orders were placed" that the plaintiff was under contract to complete the road projects within sixty "weather working days." Although defendant may not have known the exact time limit on the contracts, it did know that the time for completing the resurfacing projects was short, and was approximately the time stated in the contracts; that is, "sixty weather working days."

The plaintiff obtained the screened sand required for the resurfacing of the two highway projects mentioned, by other means and from other sources than from the defendant (except 938.9 cu. yds. furnished by defendant under the contract) at a cost in excess of the price at which defendant had agreed to furnish it. Upon being required to start the work of resurfacing under his contract, the plaintiff, on his own account and with his own labor and equipment, began the production of screened sand. By July 28, 1944, he had produced 660 cu. yds. In the latter part of August, and until September 6, 1944 he produced 976 cu. yds. Between September 8 and September 22, 1944, he produced 1492 cu. yds. Between September 1 and September 15, 1944 (at another mine) he produced 1443 cu. yds. The remainder of the screened sand necessary for completing plaintiff's resurfacing

contracts was bought on the market from dealers.

Commencing September 15, 1944, plaintiff could have obtained the full amount of screened sand from commercial producers in Amarillo, Texas at $1.15 per ton F. O. B. Amarillo. None of the screened sand was used in the highway resurfacing in question until October 7, 1944.

The defendant is indebted to the plaintiff in the sum of $2996.04 for the use of men and equipment in the production of screened sand in an attempt to carry out his agreement with plaintiff.

The following findings of the Court are copied in full, as it is asserted by defendant that they are not supported by substantial evidence, to-wit:

"IV. That although plaintiff was ready, willing and able, at all times while said highway projects were in course of construction, that is, from about July 24, 1944 to about November 21, 1944, to accept delivery of said sealing material and pay for same upon delivery as agreed, defendant wholly failed to deliver any of said sealing material ordered except 938.9 cubic yards thereof."

"XX. That plaintiff would have completed the two highway projects, for which it was under contract with the Highway Department of New Mexico, on or prior to October 12, 1944, had it not been for defendant's breach of its contract with plaintiff."

"XXI. That the delay in completion of the two highway projects by plaintiff, caused by defendant's breach of contract, damaged plaintiff."

"XXII. That the delay in completion of the two highway projects by plaintiff, caused by defendant's breach of contract, damaged plaintiff to the extent of $1000.00."

"XXIV. That the cost of the 1443 cubic yards of material produced by plaintiff between September 1, 1944 and September 15, 1944 was in excess of the contract price of the material to be furnished by defendant, considering freight."

"XXVI. That the excess of the market price of sealing material, ordered by plaintiff from defendant but not delivered, over the contract price, considering freight, amounts to $13,678.89."

The defendant is entitled to a credit of $1173.63 for the 938.9 cubic yards of sand delivered to, and accepted by, the plaintiff. That there is a balance due the plaintiff by the defendant of $16,501.30, for which he is entitled to judgment.

The defendant asserts that the trial court erred in refusing to make its requested findings of fact, numbers 12, 13, 15, 18, 19, 20, 21, and 24. Assuming that the facts therein stated were so conclusively proven that this court should accept them as true,

we find that all except request No. 18 were statements of evidentiary facts. The trial court is required by the rule to make findings of ultimate facts only. We do not find it necessary to consider these requests specifically, but see Christmas v. Cowden, 44 N.M. 517, 105 P.2d 484, 487, where we stated that "The trial court is called upon to make findings of the ultimate facts only." See also Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636, 142 A.L.R. 1237.

Requested Finding of Fact No. 18 is as follows: "That on the evening of October 3, 1944, Gene Sundt called Chet Roweth by telephone and made certain agreements substantially as set forth in plaintiff's Exhibit 'O.'"

A finding of fact must be complete within itself, without reference to the testimony. If it was the intention of defendant by this request to propose a finding that would amount to a modification of the original contract, as we assume from defendant's argument that it was, its requested finding should have stated that the contract had been modified and in what particular.

On October 4, 1944 plaintiff wrote defendant a letter in which he stated that the parties had a telephone conversation and "from this conversation it is our understanding that:

1. In spite of the fact that you now face a probable loss in this venture you are willing to go on through with these orders, and will permit the operation of the sealing material setup to be carried on simultaneously with the ballast operation so that there will be no further shut downs in sealing material production.

2. We will submit to Frank May a statement of back-charges through September 30th, and thereafter at the conclusion of each calendar week. These charges will be checked by May and okayed if found to be in order.

3. Back-charges for use of our equipment shall be based on less than OPA Maximum rentals and shall be charged only for time operated. If Tobin Quarries do not feel that they can pay the rental charge on the Portable Screening Plant, we will donate the use of this plant at no charge. A list of rental rates for various pieces of equipment which are or might be required is attached hereto.

4. When the necessary quantity of material has been produced we will not make a drayage charge for removing our equipment except that equipment which, due to weight, cannot be transported across the Highway bridge at Logan, shall be delivered to us at Tucumcari at no cost to us. (Railroad delivered to Pit on deadhead freight). The boiler which belongs to Nate Skousen in Albuquerque, N. M. shall be returned to him at Tobin Quarries expense."

We will assume as a fact that the parties had the "understanding" set out in the letter mentioned. In regard to this "understanding" defendant states:

"Under the original orders as placed by plaintiff with the defendant, there was an obligation on the part of the defendant to furnish 8,913 cubic yards of material, and on the part of the plaintiff to receive and pay for the same. By the terms of the letter of October 4, the defendant was to furnish a lesser quantity over a different period of time, using men and a separate screening plant furnished by plaintiff at defendant's expense. * * * After October 4, when the plaintiff had waived the time elements in the original contract, the plaintiff states in its letter of that date that he has 'another setup running' and that this results in 'somewhat reduced' quantities required from the defendant and that nevertheless the defendant has agreed to go ahead. It should be clear that after accepting these new terms as set out in the letter of October 4, the defendant could not longer insist upon the plaintiff receiving and paying for approximately 8913 cubic yards of material."

After stating the "understanding" of the parties, plaintiff stated in the letter: "We wish to assure you of our willingness to cooperate with you in any way that we can, and regret that you have encountered so much difficulty in getting started. As Frank May told you, we have another setup running, production from which though meager and costly, has somewhat reduced the quantities required from you. However, with oil now arriving, and more coming daily it will take our combined and continuous production to stay ahead of the oil. Should it prove however, that you can ship fast enough to keep ahead, we would be willing to suspend our other operation. In the meantime, please push your production as fast as possible."

It is obvious that the "understanding" stated in the four numbered paragraphs we have copied, contained no change in the terms of the contract; and it is equally obvious that the statement in the letter following the four numbered paragraphs which we have quoted, was not intended to be part of the "understanding;" and if it was, it is not a waiver of performance or a modification of the contract. Plaintiff advised the defendant that it would take their "combined and continuous production to stay ahead of the oil. Should it prove, however, that you (defendant) can ship fast enough to keep ahead, we would be willing to suspend our other operations." There was no proof that this statement was intended as a modification of the contract or a waiver of performance, except as to extension of time.

The plaintiff's contract with the state provided: "This contract must be completed in sixty (60) weather working days. Liquidated damages in the amount of one hundred

($100) per day will be collected for each weather working day necessary to complete the contract after the expiration of the allotted time."

Almost from the beginning it was apparent that defendant would not be able to fulfill its contract to furnish all of the sand it had contracted to furnish; also that plaintiff would either have to provide against such eventuality, or risk the loss of $100 per day for delays beyond sixty weather working days in the performance of his contract with the state.

If the defendant could have delivered the 8913 cubic yards of sand in time for use on the highway projects the plaintiff would have been liable therefor, even though he had produced sufficient himself for the projects; for the time of performance had been extended.

The statement in the letter referred to by defendant, "We have another setup running, production from which, though meager and costly, has somewhat reduced the quantities required from you," must be read in connection with the remainder of the letter on the subject of production. It stated further: "In spite of the fact that you now face a probable loss in this venture (showing damages were not waived), you are willing to go on through with these orders." (showing performance was not waived).

The letter, in addition to setting out the understanding or agreement, stated, "We * * * regret that you have encountered so much difficulty in getting started. * * * We have another setup running, production from which though meager and costly, has somewhat *reduced the quantities required from you.*" Standing alone, as it is stated in the defendant's argument, there is some ground for defendant's contention. But the plaintiff continued: "* * * It will take our combined and continuous production to stay ahead of the oil." This clearly indicates that plaintiff was producing to prevent delays which would inevitably result if defendant alone produced. But to assure the defendant that plaintiff expected it to comply with its contract as nearly as possible, it was assured that plaintiff's production would not interfere with its performance. Plaintiff stated, "Should it prove, however, that *you can ship fast enough* to keep ahead, we would be willing to suspend our other operation. In the meantime, *please push your production as fast as possible.*" (Our emphasis.)

The situation of the parties must be taken into consideration in construing the contents of the letter. The plaintiff was required to finish the resurfacing projects within sixty weather working days or forfeit $100 per day for the excess time required. Defendant had been unable to produce sand as contemplated, and by October 4, it was plaintiff's belief that defendant would not be able to furnish it all as required. To protect himself against damages for delay he set up

his own production outfit, with the understanding, however, that it would cease operating if defendant could supply sand sufficient to meet the construction requirements, which it was never able to do. Plaintiff's extension of time of performance will be referred to hereafter.

In the absence of some evidence that the sand delivered was accepted in full compliance with the contract, or that performance or time of performance after extension had been waived, the defendant is liable to the damages incurred by its breach of contract. There is no statement in the letter (Exhibit "O") from which it could be inferred that the contract had been modified, or the plaintiff had waived damages, or had accepted the sand delivered in full compliance with the contract. The letter and other evidence indicates that plaintiff did all in his power to assist defendant in the production of the required sand. Under these facts, we conclude that there was no waiver of performance or damages, or modification of the contract except as to extension of time.

"There is no reason why the rule in the law of sales should differ from that elsewhere in the law of contracts. When insufficient performance is received by the buyer he should not be debarred from recovering damages because of the insufficiency, unless he has agreed to accept what has been offered him as full satisfaction of all his rights, or the seller's default is caused by excusable impossibility. There seems no ground for saying that the mere fact that he has taken the goods manifests such assent unless the parties have agreed that it shall. If ten barrels of flour are contracted for and five are sent, the fact that the buyer takes the five forwarded certainly does not indicate that he assents to the performance as a full satisfaction * * *." Williston on Contracts (Rev. ed.) § 702.

"The buyer need not accept any performance if the goods offered are too many or too few to satisfy the contract. Sometimes, however, he does take what is offered to him, but in such a case it is safe to assume that it would generally be held in the absence of other evidence of accord and satisfaction that the buyer could recover damages for the failure to deliver as much as the seller had agreed to deliver, though liable for the price or value of the portion actually delivered." Id. § 703.

Defendant's Point V is based upon an assumption that there had been a modification of the contract, or a waiver of performance of some of its terms; and since we hold that the contract had not been modified or performance waived, it need not be further considered.

The defendant asserts:

"The Court erred in refusing to make defendant's requested finding numbered 24,

which reads as follows: '24. That before another boiler could be procured by defendant, and on October 17, 1944, plaintiff dismantled his equipment which had been set up at gravel pit, New Mexico, and immediately thereafter caused the same to be loaded upon railroad cars to be shipped to another location, and removed all of plaintiff's men who had theretofore been furnished defendant in the production of seal coat material at gravel pit, New Mexico.'
and in making in lieu thereof its findings numbered XX, XXI, and XXII, which are quoted as follows:

"'XX. That plaintiff would have completed the two highway projects, for which it was under contract with the Highway Department of New Mexico, on or prior to October 12, 1944, had it not been for defendant's breach of its contract with plaintiff.

"'XXI. That the delay in completion of the two highway projects by plaintiff, caused by defendant's breach of contract, damaged plaintiff.

"'XXII. That the delay in completion of the two highway projects by plaintiff, caused by defendant's breach of contract, damaged plaintiff to the extent of $1000.-00.'"

We will assume that requested finding No. 24 is supported by substantial evidence; but so assuming, we are of the opinion that it is not material to a decision. From the argument in support of this requested finding, it would seem that defendant wishes to establish that its delay in performance was caused by the acts of plaintiff stated. But the fact that plaintiff removed his equipment and men from defendant's gravel pit establishes nothing material, in the absence of further findings to the effect that plaintiff was legally obligated to furnish defendant such labor and equipment; that such removal was without defendant's consent, and that it was the cause of defendant's delay in fulfilling its contract to deliver sand. The trial court did not err in refusing the request.

Regarding Findings Nos. XX, XXI and XXII, the defendant did not comply with Supreme Court Rule 15 in its attack thereon. We stated in Arias v. Springer, 42 N.M. 350, 78 P.2d 153, 157: "We are not authorized to review 'the evidence in the record.' The court made findings of fact and these findings are the facts of the case in this court unless set aside by this court upon direct attack, following Section 6 of Rule 15, which is as follows: 'A contention that a verdict, judgment or finding of fact is not supported by substantial evidence will not ordinarily be entertained, unless the party so contending shall have stated in his brief the substance of all evidence bearing upon the proposition, with proper references to the transcript.'"

The defendant stated the substance of the testimony favorable to its con-

tention that requested finding 24 should have been accepted; but, as plaintiff states, it made no reference to much that supports findings XX, XXI and XXII. In reviewing an attack upon a finding it is the supporting evidence, not that adverse to the finding, that ordinarily determines the issue. The record contains more than 500 pages of typewriting, and for the members of this court to read the entire record in considering each finding attacked to discover whether it is supported by substantial evidence would entail an unnecessary burden on the members of the court. However, we have examined the record sufficiently to satisfy us that the findings in question are supported by substantial evidence.

The trial court did not err in making Finding of Fact No. IV. It is supported by substantial evidence. The plaintiff's agent in charge of this business testified that if the sand had been delivered as agreed between the dates mentioned, it would have been paid for; that he advised defendant he would be glad to take anything it could furnish until the job was completed.

The trial court did not err in making Finding of Fact No. XXVI as follows: "That the excess of the market price of sealing material ordered by plaintiff from defendant but not delivered, over the contract price, considering freight, was $13,678.89."

Regarding this finding the defendant states: "The objection to this finding is based upon the fact that the trial court used as a basis for computation of the damages, the total maximum amount of materials ordered originally by the plaintiff, deducted therefrom the amount delivered by the defendant and multiplied this figure by the difference in cost between the price at which plaintiff could have obtained the material and $1.25 per cubic yard as set forth in the original orders.

"The trial court used this as its measure of damages, totally disregarding the course of dealings between the parties and the letter of October 4 (Plaintiff's Exhibit 'O') which as will be hereinafter pointed out under Point V resulted in a modification of the contract as to the quantity to be delivered, among other things (See also Point I above)."

But as we have held there was no modification of the contract, and find the basis of computation correct, the objection to the finding cannot be sustained.

The defendant asserts that the trial court erred in failing to make the following requested conclusion of law: "The plaintiff breached the modified agreement between the parties by the removal of his equipment and men from the gravel pit on October 17, 1944." As we have concluded that the contract in question was not modi-

fied by any subsequent agreement, the requested conclusion of law is without basis in fact. The trial court did not err in refusing the request.

It is asserted by defendant that the trial court erred in its conclusion that the plaintiff was entitled to interest on $15,501.-30 at the rate of six per cent per annum from and after November 21, 1944 until the date of judgment; that interest should have been allowed from the date of judgment only because, as it claims, the suit was on an unliquidated demand. The plaintiff's cause of action accrued on the date last mentioned, and judgment was entered six months and three days thereafter, on May 24, 1945.

The quantity of sand not delivered was a mere matter of calculation; and the court found that on and after Sept. 15, 1944, there was a market at Amarillo, Texas, at which the sand could be purchased at a price less than it had cost plaintiff to produce it. Using the Amarillo market price, with delivery adjustments, as the value factor, the court found "That the excess of the market price of sealing material ordered by plaintiff from defendant but not delivered over the contract price, considering freight, amounts to $13,678.89."

The following appears among the trial court's conclusions of law: "That the specific times for completing the furnishing of materials as indicated in the purchase orders given by plaintiff to defendant were waived by plaintiff."

The accepted orders provided that defendant should complete the delivery of 4380 cu. yds. of sand by October 12, and 4533 cu. yds. by October 26, 1944. We conclude from the letter of October 4 and the course of dealing between plaintiff and defendant that there was manifested on the part of plaintiff a willingness to accept the sand if delivered by defendant in time to be used on the resurfacing work, and defendant continued his efforts to deliver. The plaintiff began the use of sand on this work on October 7, 1944. If defendant had produced the sand that could have been transported to the places for use so that the work of resurfacing would not have been impeded, plaintiff would have been under obligation to have accepted it; for it is fair to assume from the evidence that it was the intention of the parties that any sand furnished by defendant that could be used on the job would be accepted as a partial fulfillment of the contract.

This extension of time, however, was not a waiver of damages for defendant's failure to deliver the sand it contracted to deliver; there is no evidence of such intention. "While delay may be disregarded by a manifestation of a willingness to extend the time of performance, the waiving party is not altogether precluded from insisting upon performance within a fixed

period; he can by informing the other party of his purpose fix a reasonable time within which the condition or promise must be performed. Failure to perform within that time has the same effect as if the time had been originally stated in the contract and made of the essence." III Williston on Contracts (Rev. Ed.) § 856.

There was no market in New Mexico wherein such sand was sold; but from and after September 15, 1944, there was a market in Amarillo Texas, where it could be bought at less than it could be produced in New Mexico; and this, it appears, was the nearest and best market. The price on the Amarillo market, with freight adjustments, was a competent factor for determining value, and the amount of sand undelivered was certain. From this information there was no difficulty in calculating the value of the sand at the time and place used on the date that the resurfacing was finished, which the court determined was the date that plaintiff's cause of action accrued. Under such circumstances the court did not err in allowing interest on the $13,678.87 from that date. State Trust & Sav. Bank v. Hermosa Land & Cattle Co., 30 N.M. 566, 240 P. 469; Faber v. New York, 222 N.Y. 255, 118 N.E. 609.

We do not hold that under the facts of this case the trial court would not have been justified in allowing interest as an element of damages had the amount thereof been more difficult to determine; that question is not decided, but see State Trust & Sav. Bank v. Hermosa Land & Cattle Co., supra; Littlefield v. Perry, 21 Wall. 205, 22 L.Ed. 577; De La Rama v. De La Rama, 241 U.S. 154, 36 S.Ct. 518, 60 L.Ed. 932; Miller v. Robertson, 266 U.S. 243, 45 S.Ct. 73, 69 L. Ed. 265; 25 C.J.S., Damages § 53 p. 540; Restatement of Law of Contracts, § 337.

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

SADLER, C. J., and L. BICKLEY, LUJAN, and HUDSPETH, JJ.

175 P.2d 998

FERRAN v. TRUJILLO.

No. 4948.

Supreme Court of New Mexico.

Dec. 26, 1946.

Reed Holloman and M. W. Hamilton, both of Santa Fe, for appellant-contestant.

Seth & Montgomery and Joseph M. Montoya, all of Santa Fe, for appellee-contestee.

BICKLEY, Justice.

Ferran and Trujillo were opposing candidates in the general election of 1944 for the office of County Commissioner of the second district of Rio Arriba County. Trujillo was declared elected on a canvass of the poll-book returns. Having (presumably) received his commission, qualified and entered on the performance of his official duties, in due time Ferran brought proceedings of contest by causing to be served on Trujillo a notice of contest, stating generally that if all legal votes cast in

such election had been properly received, counted, tallied, and returned, it would appear that he, Ferran, had a majority of 231. This statement is supplemented by similar statements relating to each of nineteen voting precincts in the county. As to each of these precincts it is alleged generally, (but for the number of votes involved filled in between the time of typing and filing the notice) as follows:

"That in Precinct —, ———, of said County, the election officials of said precinct certified to the County Canvassing Board that contestant had received —— votes and that contestee had received —— votes in said precinct for said office; *but that in said precinct contestant actually received* —— votes and contestee actually received —— votes; *that by reason of the erroneous receiving, counting, tallying, and returning of the votes* in said precinct the correct result thereof was not certified to the County Canvassing Board; that by reason thereof said Canvassing Board did not include said —— votes in the total number of votes received by contestant, nor deduct said —— votes from the total number of votes received by contestee in said county for said office; that said —— votes should be credited to contestant and said —— votes should be deducted from contestee making the correct vote in said precinct for said office as hereinbefore specified." (Italics ours.)

The appellee filed his answer, setting forth several defenses, the second of which, so far as material, is as follows:

"Without waiving his First Defense, but insisting upon same, this Contestee states the Notice of Contest fails to state facts upon which relief may be granted for the following reasons:

"1. Said Notice shows upon its face in paragraphs III to XXII inclusive, that contestant's ground of contest as therein alleged is nothing more than an application for a recount of the ballots of the various precincts therein specified; that said allegations in said paragraphs are merely general allegations of error without pointing out any specific mistake or fraud, or the substance of the facts upon which his belief is founded, and therefore such general allegations of error believed to exist is not sufficient ground upon which to base a contest proceeding under the statutes of New Mexico.

"2. That said Notice of Contest amounts to nothing more than an application for recount in said precincts and may not be maintained for the reason that the Legislature has made ample provision for such recount and such statutory enactment provides the exclusive remedy for such recounts.

"3. That said Notice of Contest in said paragraphs alleges 'erroneous receiving' of

ballots by said election officials, and wholly fails to comply with section 56-604 New Mexico Statutes 1941 Annotated, by specifying the name of each person whose vote was so illegally cast or counted, and the facts showing such illegality; that as to the remaining allegations of error by said election officials contained in said paragraphs in the 'counting, tallying and returning of the votes,' such alleged errors are to be corrected under the recount statutes and not by contest proceedings.

"4. That said Notice of Contest fails to allege which ballots in the various precincts were 'erroneously received', and fails to allege any fraudulent act by any election official in said precincts, and therefore fails to specify grounds upon which a contest may be based under the laws of New Mexico."

The trial court, considering the matter upon the affirmative legal defenses in the answer, entered an order of dismissal of the cause, in which appears the following: "and the court having heard argument of counsel and having announced his decision that the SECOND DEFENSE in the Answer of said Contestee is well founded in law and should be sustained, for the reasons that the Notice of Contest does not specify sufficient facts upon which to base a contest proceeding in New Mexico; and for the further reason said Notice of Contest can not be substituted as an application for a recount of votes under the laws of New Mexico;

"It is therefore ordered that the Notice of Contest be and the same is hereby dismissed."

From that order this appeal was taken. For the purpose of this review, we find it sufficient to consider only contestant's first assignment of error, which is as follows:

"I. The Court erred in holding that the notice of contest does not specify sufficient facts upon which to base a contest proceeding under the Laws of New Mexico."

Plaintiff's challenge is presented under Art. 6 of the Election Code entitled "Contested Elections," 1941 Comp. 56-601 et seq. Section 56-604 is as follows:

"Contents of notice.—The notice shall specify the grounds upon which the claim of the contestant is based, and if he claims that illegal votes have been cast or counted for the contestee, he must specify the name of each person whose vote was so illegally cast or counted, the precinct or election district where he voted, and the facts showing such illegality. (Laws 1927, ch. 41, § 604, p. 62; C.S.1929, § 41-604.)"

Under our method of contesting elections, the notice of contest takes the place of a complaint in an ordinary suit. Therefore it must contain a plain statement of the claim showing that the pleader is entitled to relief. See 1941 Comp. 19-

101(8). The compiler's note says that par. (a) of the rule and Rule 10(a), (c), are deemed to supersede secs. 105-404, 105-501, 105-511, 105-525, Comp.Stat.1929, a portion of which follows:

"Second. A statement of the facts constituting the cause of action, in ordinary and concise language."

While the form of the rule has been changed, we do not understand that the necessity for pleading with particularity the facts upon which the claim or conclusion of the pleader is based, so as to give notice of what the adverse party may expect to meet, has been dispensed with.

In Missouri, there was an election contest statute similar to ours, and in Hale v. Stimson, 1906, 198 Mo. 134, 95 S.W. 885, 887, the Supreme Court unanimously held that a notice of contest must "set forth facts constituting grounds of contest." The court said:

"The statutes require the 'grounds' to be stated. Grounds, in the law, can only mean substantive averments, informal, maybe, but yet in plain terms setting forth a cause of action upon which issue may be joined, and which may, at least, tend to notify contestee of the charges he must face. Upon what theory can mere conclusions, such as constitute some of the framework of this notice, be considered issuable averments? As to the rest of the framework, oddly enough, it is built on ignorance—lack of knowledge. The description of unknown voters by name, color, size, or other earmarks; the precincts where they cast their votes; diligence to ascertain a description of name, number of precinct—all are unknown, unaverred, and left in impenetrable fog, and this, ex industria. To open all the ballot boxes of Phelps county for a general recount under the averments of this notice of contest was a leap in the dark—a shot in the bush; was to use the proceeding as a quasi bill of discovery based on fishing generalities, in the hope, apparently, some culpable thing might be hooked in the depths of the great unknown and unseen and brought to the surface of the seen and known."

And nearly forty years later, in Armantrout v. Bohon, 349 Mo. 667, 162 S.W.2d 867, 869, that court again stated:

"The 'grounds' required to be stated 'can only mean substantive averments—informal, maybe, but yet in plain terms setting forth a cause of action upon which issue may be joined.' There is always the question, does 'said notice set forth facts constituting grounds of contest?' Since the notice in an election contest takes the place of a petition in an ordinary suit it 'must be judged by the rules pertaining to the sufficiency of a petition' and therefore must contain a statement of facts, not mere conclusions, which give rise to his right of

contest or action and these grounds or facts must show the violation of some mandatory provision of the statute law relating to elections or such other conduct as usually invalidates an election. If the notice of contest does not contain such averments it is subject to being dismissed on demurrer."

The foregoing is persuasive reasoning, otherwise, confronted with the statement of contestant in the notice that: "by reason of the erroneous receiving, counting, tallying and return of the votes in said precinct(s) the correct result thereof was not certified to the County Canvassing Board," the contestee may well inquire in his perplexity: "What does contestant mean by "erroneously received? Does he mean that the votes received were those of non-registered voters? Or does he mean that votes of voters were received, who, though registered, were nevertheless ineligible to vote? What are the names of the voters whose votes were erroneously received? In what did the error consist? Which of the votes said generally should be credited to contestant were erroneously received and which were erroneously credited because not properly counted or tallied?" The answers to these and similar material questions are not forthcoming.

Vol. 1 Bouv.Law Dict., Rawle's Third Revision, defines Ground of Action as "The foundation, basis, or data upon which a cause of action rests." In 38 C.J. S., Ground, page 1085, defining the word "Ground," it is said:

"The term is ordinarily used in the sense of basis; foundation, or support. It is occasionally used in the sense of 'reason;' but not frequently. It has also been defined as a circumstance on which an opinion, inference, argument, statement or claim is founded, or which has given rise to an action, procedure, or mental feeling; * *."

For an instance of the words "grounds" and "facts" having been used interchangeably in our decisions, relating to this statute, see Rogers v. Scott, 35 N.M. 446, 300 P. 441, 442, where the court said:

"It necessarily follows that the contestant may set up in his notice any *facts* showing that he is legally entitled to the office * * *." (Emphasis supplied.)

Further in support of the view that the use of the word "grounds" in Sec. 56-604 does not dispense with allegations of specific facts upon which the grounds are based, see Sec. 56-606 of 1941 Comp., which provides:

"* * * any material fact alleged in the notice of contest not specifically denied by the answer within the time aforesaid shall be taken and considered as true."

We think an election contest, although one in which the public should be deeply concerned, is actually and usually a battle

between adversary candidates and opponents. A contestant seeks to overthrow the actions and certifications of the election officials charged with the duty of holding and canvassing elections.

There is an important decision by the Supreme Court of our neighboring state of Oklahoma rendered in 1942, in a situation very similar to that in the case at bar. The case is reported in Otjen v. Kerr, 191 Okl. 628, 136 P.2d 411, 413, and abounds in learned discussion, most of which we approve. In that state, the notice of contest must set forth:

"A state of facts, which, if true, would change the result or a state of facts showing fraud which would bring about the same result."

The sole question for decision by the Supreme Court was whether or not the petition contained a sufficient statement of facts upon which to base an election contest. The report shows the petition alleged the returns of each precinct involved were inaccurate and erroneous; that many votes in each precinct were counted for Mr. Kerr though cast for other candidates; that mistakes, errors or omissions in each precinct resulted in erroneous counting in favor of Mr. Kerr; that in the returns, erroneous credit for votes was given Mr. Kerr in each precinct; that by errors, less than the correct credit was given the contestant in each precinct on the returns; that in each precinct, many persons, not qualified electors, were permitted to vote; that in each precinct many illegal ballots were counted; and so on, including erroneous tally sheets, returns and certifications, concluding with the allegation that the contestant received the majority of votes and was elected.

The court observed that it was the public policy as declared by their several election laws (as in New Mexico) to diligently safeguard the sanctity of the secret ballot, which is a treasured heritage of America. The court called attention to the fact that there (as here) the dominant political parties have representation on the election boards of the several counties and each of the precinct boards which have active charge of all elections. These election officials must subscribe to a constitutional oath of office. Careful and detailed provision is made for casting and preservation of the ballots and for counting, checking the voted ballots, and making public the results thereof; provision is made for representation of the dominant political parties among the counties; each political party may appoint a watcher with authority to observe each count in detail; penalties are provided for misconduct. The court then says:

"With the election so carefully attended by the law, the result as tabulated and published by those officials is deemed worthy of verity. Election results so officially declared and established are final except

where it is made to appear by verified statement, setting forth a state of facts, which, if true, would change the result or a state of facts showing fraud which would bring about the same result. * * * The dignity and finality of the election returns is founded upon the prerogative and will of the people speaking by secret ballot in the exact manner which they have prescribed through the Legislature. These returns cannot lightly be set aside or overthrown. That can be done only as the legislation on the subject has provided."

It would unduly lengthen this opinion to copy here the reasoning and quotations of judicial expression and from text books upon which the court reached the conclusion that the notice of contest did not contain any allegations of fact to be tried at a hearing. The court summed up as follows:

"From the decisions and texts cited certain rules are apparent. The contestant must have some knowledge or means of information as to facts that would change the election result or as to facts that show fraud; and he must allege or state such facts with sufficient certainty to show what facts he will seek to prove at the hearing, thus warning his opponent as to what alleged facts he should there prepare to meet by counter proof. General statements and all embracing statements which demonstrate lack of factual foundation and in themselves exclude probability of information or knowledge thereof in entirety may fall far short of the simple requirements, no matter in how forceful or extravagant language the statement is written."

We think that the foregoing summary is applicable to our election contest statute.

The counsel for contestant-appellant has cited decisions of courts announcing a contrary view. These we have considered but find not persuasive.

What we have said makes it unnecessary to consider other assignments of error presented by contestant-appellant.

From all of the foregoing, it appears that the judgment must be affirmed, and

It is so ordered.

SADLER, C. J., and BRICE, LUJAN, and HUDSPETH, JJ., concur.

175 P.2d 1002

Jose Abad MAESTAS, Contestant and Appellant, v. Amarante CASIAS, Contestee and Appellee.

No. 4951.

Supreme Court of New Mexico.

Dec. 26, 1946.

Reed Holloman and M. W. Hamilton, both of Santa Fe, for appellant-contestant.

Seth & Montgomery and Joseph M. Montoya, all of Santa Fe, for appellee-contestee.

BICKLEY, Justice.

Maestas and Casias were opposing candidates in the general election of 1944 for the office of Probate Judge of Rio Arriba County. Casias was declared elected on the face of the returns. Maestas commenced election contest proceedings, serving on Casias a notice of contest, the sufficiency of which was challenged by contestee. The trial court sustained the challenge and dismissed the proceedings, from which action of the court, this appeal was taken. Upon stipulation of the parties, this and the cognate case of Ferran v. Trujillo, No. 4948, 175 P.2d 998, were consolidated. It was further stipulated and ordered that the decision in said Cause No. 4948 should be taken and considered as our decision in this cause.

It follows that the judgment must be affirmed, and

It is so ordered.

SADLER, C. J., and BRICE, LUJAN, and HUDSPETH, JJ., concur.

175 P.2d 1002

Jose Onesimo LUJAN, Contestant and Appellant, v. Ernesto LOPEZ, Contestee and Appellee.

No. 4949.

Supreme Court of New Mexico.

Dec. 26, 1946.

Reed Holloman and M. W. Hamilton, both of Santa Fe, for appellant-contestant.

Seth & Montgomery and Joseph M. Montoya, all of Santa Fe, for appellee-contestee.

BICKLEY, Justice.

Lujan and Lopez were opposing candidates in the general election of 1944 for the office of Sheriff of Rio Arriba County. Lopez was declared elected on the face of the returns. Lujan commenced election contest proceedings, serving on Lopez a notice of contest, the sufficiency of which was challenged by contestee. The trial court sustained the challenge and dismissed the proceedings, from which action of the court, this appeal was taken. Upon stipulation of the parties, this and the cognate case of Ferran v. Trujillo, No. 4948, 175 P.2d 998, were consolidated. It was further stipulated and ordered that the decision in said Cause No. 4948 should be taken and considered as our decision in this cause.

It follows that the judgment must be affirmed, and

It is so ordered.

SADLER, C. J., and BRICE, LUJAN, and HUDSPETH, JJ., concur.

175 P.2d 1003

Frank A. GARCIA, Contestant and Appellant, v. Paulin ALIRE, Contestee and Appellee.

No. 4950.

Supreme Court of New Mexico.

Dec. 26, 1946.

Reed Holloman and M. W. Hamilton, both of Santa Fe, for appellant-contestant.

Seth & Montgomery and Joseph M. Montoya, all of Santa Fe, for appellee-contestee.

BICKLEY, Justice.

Garcia and Alire were opposing candidates in the general election of 1944 for the office of County Commissioner of the Third District of Rio Arriba County. Alire was declared elected on the face of the returns. Garcia commenced election contest proceedings, serving on Alire a notice of contest, the sufficiency of which was challenged by contestee. The trial court sustained the challenge and dismissed the proceedings, from which action of the court, this appeal was taken. Upon stipulation of the parties, this and the cognate case of Ferran v. Trujillo, No. 4948, 175 P.2d 998, were consolidated. It was further stipulated and ordered that the decision in said Cause No. 4948 should be taken and considered as our decision in this cause.

It follows that the judgment must be affirmed, and

It is so ordered.

SADLER, C. J., and BRICE, LUJAN, and HUDSPETH, JJ., concur.

175 P.2d 1003

MAESTAS v. MAESTAS et al.

No. 4931.

Supreme Court of New Mexico.

Dec. 17, 1946.

Manuel A. Sanchez, of Santa Fe, for appellants.

Seth and Montgomery, of Santa Fe, for appellee.

MARSHALL, District Judge.

This is an action brought by appellee (plaintiff below) to enjoin the appellants (defendants below) from fencing a tract of land owned by appellants over which the appellee claims an easement of passage by prescription, alleging the use of said easement has been for more than twenty-five years, and had been open, uninterrupted, peaceable, notorious, adverse and under a claim of right, with knowledge of appellants, and their predecessors in title. Pedro A. Maestas and Gorgonio Maestas are brothers. Their father died in July, 1922. Upon trial, the Court entered judgment for appellee establishing appellee's right of easement fifteen feet in width over appellants' land and enjoining appellants from fencing the same. From the judgment of the Court, the appellants appeal.

Pedro A. Maestas, appellee, owns two tracts of land, tract "A" and tract "B," which are separated from each other by a very narrow strip of land, which is tract "C," belonging to appellants. Tracts "A" and "B" parallel each other from north to south, tract "A" lying to the east of tract "B," with the narrow strip tract "C" separating them. Appellee's house is on tract "A," his chicken house, corral and toilet are on tract "B." Since 1917 or 1918 appellee and members of his household have crossed over tract "C" in their daily activities. Appellants acquired tract "C" in 1927. In 1930, shortly after the death of the father, appellants erected a post at the southeast corner of tract "C." Appellee objected because it interfered with freedom of his crossing from tract "A" to tract "B." But appellants did not remove the post and appellee kept crossing over along side of it. In 1942 appellants began erecting a fence along tract "C" which, if completed, would compel appellee to go approximately one-quarter mile from his residence to his outbuildings.

The question now presented to this Court is whether or not the evidence adduced in the trial court is sufficient to sustain that Court's finding that crossing of tract "C" by appellee, since date of conversation between appellee and appellants in 1930, had been open, uninterrupted, adverse, under claim of right hostile to appellants, changing appellee's permissive right of easement to a prescriptive right of easement.

A review of the salient points of evidence will demonstrate whether or not appellee by his statements and his acts as under the facts in this case, brought himself within

the rule, as recognized in this State, permitting him to establish adverse user under a claim of right hostile to appellants.

Was the evidence in the Court below sufficient to sustain the findings and judgment of the trial court? The testimony of appellee and his witnesses, which is substantially uncontradicted, shows that appellee pursued a regular course of conduct, in crossing from tract "A" to tract "B" over tract "C" since 1917 or 1918 which was opposed to the rights of and adverse to the appellants and to those who had been their predecessors in title. Appellee, without real interference from appellants or others, had used appellants' tract "C" for a crossing between his buildings located on tract "A" and tract "B" to the same extent as if he were the owner thereof. He crossed regularly at any and all times, in the sight of appellants, with full knowledge of appellants, and without any regard for appellants' presence or for their rights. Appellants stood by and so permitted appellee to cross without interruption and by their failure to interrupt appellee's crossing, acquiesced in the conduct of the appellee. The only act that appellants performed, to in any way indicate that they disapproved of appellee's crossing of tract "C," was to set a post at the southeasterly corner of the strip. It was not connected with anything else and in itself could form no barrier. The post according to appellee's testimony, was set by appellant Gorgonio Maestas in the year 1929. The following conversation between appellee and appellant was testified to by appellee as being at the time in 1929 when appellant set up this post. Appellee testified:

"Q. Did you have any conversation with Gorgonio (appellant) at the time about the post? A. Some.

"Q. State what it was? A. I told him that I did not want him to set that post there because it would be in my way, and then he answered that he was making his road from there, and I will not take it off, and I left it there through the consideration that I did not want to have any trouble.

"Q. Did you tell him, did you say anything to him about your right to use it? About your right to cross there? A. Yes, sir.

"Q. What did you tell him? A. To get that post out of there because it would be in my way and I considered that was the place we use as egress and ingress."

This discussion took place after many years of use of tract "C" as a means of passageway by appellee. In the case of such user by appellee and his continued assumption of claim of right, it then becomes incumbent upon appellants to present evidence to rebut the presumption, that appellee's claim is a claim of right. Appellant in his evidence presented at the trial did not meet the positive evidence of appellee that the user was adverse. The ap-

pellant, Gorgonio, testified, showing the use by appellee was open and notorious to him; appellant stated—

"Q. All right, you knew that Pedro had been crossing there with his livestock and for other purposes right along? A. He would cross whichever way he felt like crossing.

"Q. And you saw him doing it? A. Yes. I did not have the need to protect my property, just then, but when I saw that I had to protect my property otherwise, then I thought of building a fence."

The uncontradicted testimony of appellee shows that his use of tract "C" as a passageway was uninterrupted. The out buildings and corrals on tract "A" and tract "B" were built in 1917 and appellee had been crossing over tract "C" at will ever since. Appellee testified:

"Q. Did you go across secretly or whenever you wanted to cross? A. Whenever I want to cross, I cross."

And further:

"Q. Has anybody ever stopped you from crossing? A. No. I am still crossing between the posts.

"Q. And have you done so ever since you built the corral? A. Yes, sir."

The foregoing as well as other testimony in the case fully demonstrates that appellee's user of the strip was peaceable. The case of Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 651, 112 A.L.R. 536, heretofore decided by this Court, lays down the following requirements as to adverse user to-wit:

The user must be open, notorious, uninterrupted, under claim of right, adverse and peaceable for a period of more than ten years.

While it is true that tract "C," the land under discussion in the instant case, is a narrow strip and unenclosed, it is in a built up area and appellants lived only one hundred and fifty yards distant therefrom. Appellants over a period of many years could and did observe the daily systematic use of this strip as a passageway by appellee; in fact ever since 1917 and further from 1929–1930 when conversations were had about it between the parties and when appellee put appellant orally upon notice of his claim to it by adverse user. Appellants' contention that "to permit plaintiff (appellee) to establish an easement over defendants' (appellants) property under the loose evidence in the record would subject every owner of a vacant lot to the danger of having his property subjected to rights of which he never heard and the right of such owners recklessly destroyed," is untenable here. Hester v. Sawyers is distinguishable on its facts from the case at bar, in that in Hester v. Sawyers large bodies of unenclosed land were contemplat-

ed where the owners thereof could not reasonably know of passings over said lands. In this case a relatively narrow strip of land is involved, adjacent to the appellants' domicile, the crossings over which were made daily, in actual presence of the appellants for a period of more than ten years, with their acquiescence and under a verbally stated claim of right thereto by appellee made to one of the appellants.

There is substantial evidence in the case at bar to sustain the findings and judgment of the trial court. We cannot find evidence, presented at the trial by appellants, which contradicts positive evidence of the appellee that the user was adverse, under a claim of right. The facts and circumstances in the instant case meet the requirements of the rule laid down in Hester v. Sawyers heretofore set forth. The rule promulgated in Hester v. Sawyers is applicable here:

"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 use was permissive."

"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."

Assuming that the use had been permissive up to 1929 or 1930, the continued adverse use by appellee plus his positive declaration in 1929 up to the time this suit was filed would clearly establish a prescriptive right in appellee from 1929 for a period of more than ten years prior to the institution of this action. Whether or not there was a prescriptive right initiated by appellee in 1917 is immaterial since such a right was initiated and continued from 1929 to the present time. The trial Court was correct in entering its decree for appellee establishing a fifteen-foot easement over tract "C" and enjoining appellants from interfering with it. There is substantial evidence to support the judgment of the District Court, and the same will be affirmed.

It is so ordered.

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

176 P.2d 173

VALDEZ v. GONZALES et al.

No. 4924.

Supreme Court of New Mexico.

Dec. 31, 1946.

Manuel A. Sanchez, of Santa Fe, for appellant.

C. C. McCulloh, Atty. Gen., and Robert W. Ward, Asst. Atty. Gen., for Jessie M. Gonzales.

Seth and Montgomery of Santa Fe, for Madrid & U. S. F. & G. Co.

Rodey, Dickason & Sloan and Frank Mims, all of Albuquerque, for New Amsterdam Casualty Co.

HUDSPETH, Justice.

Appellant Tito Valdez, a candidate for public office, commenced this action as plaintiff against appellees, Jessie M. Gonzales, Secretary of the State of New Mexico, Gaby B. Madrid, County Clerk of Rio Arriba County, New Mexico, and the sureties on their official bonds as defendants to recover damages for negligent printing and delivering of false instructions to precinct election judges.

Motions to dismiss upon the grounds that the complaint did not state facts sufficient to constitute a cause of action were sustained and this appeal followed. The facts are substantially as follows:

The plaintiff was a candidate for the office of county school superintendent of Rio Arriba County, New Mexico, at the general election of 1942. At that time and until January 1 thereafter the defendant Gonzales was the Secretary of State of New Mexico, and the defendant Madrid was the County Clerk of Rio Arriba County, New Mexico. The clerk was charged by law with the duty of delivering to the precinct election officials in Rio Arriba County, supplies and instructions for the conducting of the election in each election precinct. The secretary of state prepared and delivered to the clerk, as part of the election supplies, instructions to voters, and poll books on which were printed instructions to the precinct election officials regarding their duties. (N.M.S.A. 1941 Comp., Sec. 56-319). Among these instructions were the following:

"INSTRUCTIONS TO ELECTION OFFICERS" and above these instructions is printed in as large type as space will permit:

"DO NOT FAIL TO READ ALOUD INSTRUCTIONS INSIDE"

Instructions numbers one and four are as follows:

"READ INSTRUCTIONS ALOUD

1. Read aloud to all election officers these instructions and instructions to voters on cards, furnished you by the County

Clerk, before opening the polls for voting. * * *

CHECK ELECTION SUPPLIES

"4. Inspect and see that you have the necessary election supplies, consisting of:" (here follows a list of necessary election supplies, but an envelope for mailing the poll books to the county clerk is not mentioned.)

"DISPOSITION OF POLL BOOKS, ETC.

27. Return ballot box immediately to the county clerk. The person delivering the ballot box should also take with him for delivery to said county clerk, not enclosed in the ballot box, one key in an envelope addressed to said clerk, one poll book certified by the judges of election, the bound book of affidavits of registration, and all unused election supplies. Where there are counting judges, said person should also take with him one poll book certified by the counting judges. Place in the mailing tube furnished the other poll book, or other two poll books where there are counting judges, and mail to the secretary of state at Santa Fe. Place the other key in an envelope addressed to the district judge, and mail the same."

"BALLOT BOXES MUST BE DELIVERED WITHIN TWENTY-FOUR HOURS

28. If the voting place is not more than twenty-five miles from the county seat, the ballot box, key, poll book, etc., shall be delivered forthwith to the county clerk by one or more judges of election in person; if a greater distance, by messenger selected by the judges of election for that purpose. Where any ballot box, any poll book, or 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."

"PENALTIES

31. Wilful disobedience to the law by an election officer will subject him to heavy penalties.

"WARNING

32. Failure to follow the foregoing instructions may result in the rejection of the entire vote in your voting division. These instructions must be followed carefully."

The Secretary of State, without authority of law, sent with the poll books envelopes on each of which was printed in large letters the following: "To judges of election: Place one poll book (two if there are

counting judges) flat in the envelope and seal and fasten and mail at once to the county clerk of your county." One of these envelopes with the usual election supplies was delivered by the clerk to the election officials of each election precinct, prior to the date fixed by law for holding the election. The election officials of each of three precincts in Rio Arriba County placed its poll book in the envelope described and mailed it to the County Clerk of Rio Arriba County as thereon instructed. In the regular course of mail the poll books could not, and did not, reach the County Clerk's office within 24 hours after the closing of the polls on election day.

In each of the precincts mentioned the plaintiff received a substantial majority of votes over his opponent; and received a majority of the votes cast in Rio Arriba County. But because the returns were delayed more than 24 hours after the close of the polls, the county canvassing board refused to canvass and count the votes cast in the three precincts mentioned, with the result that the certificate of election for plaintiff's office was issued to the plaintiff's opponent Bernabe Herrera. If the ballots cast in the three precincts had been canvassed and counted the plaintiff would have received the certificate, and subsequent delays and litigation would have been avoided.

A proceeding was instituted in the District Court of Rio Arriba County to require the canvassing board to count the ballots cast in the three precincts, notwithstanding they were delayed more than 24 hours, but the District Court erroneously ruled that the ballots should not be counted.

Thereafter the plaintiff filed a statutory contest, in which the decisive question was whether the ballots in the boxes mentioned should be canvassed and counted; which question the district court answered in the negative; and judgment was entered for contestee Herrera. An appeal from this judgment was prosecuted to the Supreme Court, and on February 28, 1944, a decision was therein rendered (Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864) by which the judgment below was reversed, with instructions to the district court to render its judgment for plaintiff. He took possession of the office on March 1, 1944.

Plaintiff exercised all possible diligence in all proceedings to secure title to and possession of the office to which he had been elected; but notwithstanding such diligence he was deprived of his office from January 1, 1943 to March 1, 1944. While in possession of plaintiff's office the contestee Herrera received $2,916.67 of its emoluments, and the costs of court paid by the plaintiff were $132, for all of which plaintiff obtained judgment against the contestee Herrera. An execution was issued thereon and returned nulla bona, and subsequently contestee Herrera filed bankruptcy proceed-

ings, from which nothing can be realized on the plaintiff's claim.

It is asserted by the plaintiff that all of the defendants are liable to plaintiff for damages sustained by him, to wit, the sum of $3,048.67, with interest at six per cent per annum from February 28, 1944, until paid.

One of the grounds on which the motions to dismiss was sustained is that the defendant officers were not liable in damages to third persons for their negligence.

While envelopes for poll books are not listed among the supplies there could have been no objection to including blank envelopes to be used for the purpose of enclosing the poll books. In fact, the poll books should be securely enveloped and sealed before they are turned over to messengers for delivery to the County Clerk. So the negligence consisted of words—instructions to the judges of election to mail the poll books—contrary to the statutory instructions printed in the poll books, and quoted above.

There is no contract liability to third parties. 1 Restatement of the Law of Contracts, Sec. 145, and there is no allegation of fraud or intentional wrong in plaintiff's complaint. 4 Restatement of the Law of Torts, Sec. 865, reads as follows: "Interference with a Right to Vote or Hold Office. A person who by a consciously wrongful act intentionally deprives another of a right to vote in a public election or to hold public office is liable to the other in an action of tort."

Assuming that the defendant officers owed a duty to these election officials, the presence of that duty to use care depended upon the relation of the parties. Courteen Seed Co. v. Hong Kong & Shanghai Banking Corp., 245 N.Y. 377, 157 N.E. 272, 56 A.L.R. 1186.

A question of the liability for negligent language to third persons was involved in the case of Fidelity & Deposit Co. of Maryland v. Atherton, 47 N.M. 443, 144 P.2d 157, 161, where we said: "The appellees owed to the board of county commissioners a legal duty to make their reports without fraud, and a contractual duty to make them, under the terms of their contract, with the care and caution required of experts. They likewise owed a duty to third persons, if any, to whom they knew, or reasonably should have known, their employer intended to exhibit their reports, and upon which they might act to their injury, to make such reports without fraud. But there is no finding that appellees made a fraudulent report, or of a reliance upon appellees' report by either the appellant or Armijo, nor, of course, that they, or either of them, was injured by such reliance, so as to bring the case within the doctrine of Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 74 A.L.R. 1139."

Ultramares Corporation v. Touche, supra, is the leading case on the subject of liability for negligent language. In the unanimous opinion of the court Chief Justice Cardozo stated [255 N.Y. 170, 174 N.E. 445]:

"The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion. Williston, Liability for Honest Misrepresentation, 24 Harv.L.Rev. 415, 433; Bohlen, Studies in the Law of Torts, pp. 150, 151; Bohlen, Misrepresentation as Deceit, Negligence or Warranty, 42 Harv.L.Rev. 733; Smith, Liability for Negligent Language, 14 Harv. L.Rev. 184; Green, Judge and Jury, chapter Deceit, p. 280; 16 Va.Law Rev. 749. In the field of the law of contract there has been a gradual widening of the doctrine of Lawrence v. Fox, 20 N.Y. 268, until today the beneficiary of a promise, clearly designated as such, is seldom left without a remedy. Seaver v. Ransom, 224 N.Y. 233, 238, 120 N.E. 639, 2 A.L.R. 1187. Even in that field, however, the remedy is narrower where the beneficiaries of the promise are indeterminate or general. Something more must then appear than an intention that the promise shall redound to the benefit of the public or to that of a class of indefinite extension. The promise must be such as to 'bespeak the assumption of a duty to make reparation directly to the individual members of the public if the benefit is lost.' Moch Co. v. Rennsselaer Water Co., 247 N.Y. 160, 164, 159 N.E. 896, 897, 62 A.L.R. 1199; American Law Institute, Restatement of the Law of Contracts, § 145. * * *

"We are now asked to say that a like liability attaches to the circulation of a thought or a release of the explosive power resident in words.

"Three cases in this court are said by the plaintiff to have committed us to the doctrine that words, written or oral, if negligently published with the expectation that the reader or listener will transmit them to another, will lay a basis for liability though privity be lacking. These are Glanzer v. Shepard, 233 N.Y. 236, 238, 135 N.E. 275, 23 A.L.R. 1425; International Products Co. v. Erie R. R. Co., 244 N.Y. 331, 155 N.E. 662, 56 A.L.R. 1377, and Doyle v. Chatham & Phenix Nat. Bank, 253 N.Y. 369, 171 N.E. 574, [71 A.L.R. 1405.] * * *

"From the foregoing analysis the conclusion is, we think, inevitable that nothing in our previous decisions commits us to a holding of liability for negligence in the circumstances of the case at hand, and that such liability, if recognized, will be an extension of the principle of those decisions to different conditions, even if more or less analogous. The question then is whether such an extension shall be made.

"The extension, if made, will so expand the field of liability for negligent speech as to make it nearly, if not quite, coterminous with that of liability for fraud. Again and again, in decisions of this court, the bounds of this latter liability have been set up, with futility the fate of every endeavor to dislodge them. * * *

"Liability for negligence if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser. * * *

"'The assumption of one relation will mean the involuntary assumption of a series of new relations, inescapably hooked together' Moch Co. v. Rensselaer Water Co., supra, at page 168 of 247 N.Y., 159 N.E. 896, 899. 'The law does not spread its protection so far' Robins Dry Dock & Repair Co. v. Flint, supra, at page 309 of 275 U.S., 48 S.Ct. 134, 135 [72 L.Ed. 290]."

See also State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416, 120 A.L.R. 1250, and O'Connor v. Ludlam, 2 Cir., 92 F.2d 50. Vol. I, Shearman and Redfield on Negligence, Sec. 30, says:

"A negligent statement, whether spoken or written, may be the basis for a recovery of damages. Not every casual response, not every idle word, however damaging the result, gives rise to a cause of action. Liability arises when the person furnishing information owes a duty to give it with care and the person receiving it has a right to rely and act upon it and does so to his damage. * * *

"The foregoing presents the American as distinguished from the contrary English rule. Under the latter 'there is no such thing as liability for negligence in word as distinguished from act.'" * * *

"In the absence of a duty, resting upon the party sought to be charged by reason of a contractual relation or something in the nature of an equivalent to privity, negligent words are not actionable. * * *

"The service was primarily for the benefit of the employer, and only incidentally or collaterally for the use of such others. There was no 'liability in an indeterminate amount for an indeterminate time to an indeterminate class.' (Citing Ultramares Corp. v. Touche, supra.)

"The court in the last cited case recognizes a distinct need that liability for negligent language be kept within reasonable limitations. Some such restrictive idea might well be applied to the entire field of negligence. The trend toward increasing liability should be checked."

Another ground on which the motion to dismiss was sustained is that the negligence complained of was not the proximate cause of plaintiff's injury. It merely furnished the condition under which the injury was received but did not put in motion the agency by which the injury was inflicted. 38 Am.Jur. p. 702, General American Life Ins. Co. v. Stadiem et al., 223 N. C. 49, 25 S.E.2d 202; Briske v. Village of Burnham, 379 Ill. 193, 39 N.E.2d 976; Annotation 64 A.L.R. 519. That was the act of the precinct judges of election who mailed the envelopes containing the poll books instead of delivering them by messenger, as the law and instructions printed in the poll books provided.

The "forseeability" rule has long prevailed in this state. Lutz v. Atlantic & Pacific R. Co., 6 N.M. 496, 30 P. 912, 16 L.R.A. 819; Reif v. Morrison, 44 N.M. 201, 100 P.2d 229. "Unless the tort is willful, the wrongdoer is liable only for such consequences as were or should have been contemplated or might have been foreseen." 25 C.J.S., Damages § 25, p. 488.

Should the defendant officers have foreseen that the district court would make an erroneous ruling on the question as to whether the ballots in the boxes from the three precincts should be counted? We think not. The defendant officials had the right to indulge the same presumption that the bench and bar do, namely, that the judge would perform his duty properly. Carini v. Beaven, Roman Catholic Bishop of Springfield, 219 Mass. 117, 106 N.E. 589, L.R.A.1915B 825. Counsel for plaintiff argues that the trial court could not say, as a matter of law, that plaintiff's loss was not the proximate result of the defendant officers' negligence. The case seems to come within the rule stated in Vol. 1 Cooley on Torts (4th Ed.) p. 121, as follows: "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."

Other points are argued, but in view of our conclusion it will not be necessary to consider them.

Finding no error, the judgment of the district court will be affirmed.

It is so ordered.

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

BRICE, J., dissenting.

BRICE, Justice (dissenting).

As I understand the majority opinion, it is held that (1) there was no contractual liability to plaintiff and therefore defendants were liable only in case of fraud or intentional wrong, and (2) that the acts of defendants were not the proximate cause of plaintiff's injury.

The several motions to dismiss, made by the respective defendants, were sustained by the trial court upon the following grounds:

"First: The complaint herein should be dismissed as to the defendants herein because the obligee named in said bonds is the State of New Mexico, and the Court rules that no action can be maintained on such official bonds other than by the obligee in the absence of statutory authority.

"Second: That the actions of neither of the defendants, Gaby B. Madrid nor Jessie M. Gonzales, were the proximate cause of the plaintiff's alleged damages complained of.

"Third: That the defendants, Jessie M. Gonzales and Gaby B. Madrid, could not have reasonably foreseen that any injury would result from the printing of improper instructions upon the mailing envelopes" for reasons hereinafter stated.

"Fourth: The complaint fails to allege any statutory duty resting upon the said Gaby B. Madrid or Jessie M. Gonzales affording plaintiff a right of action against said defendants, or either or them, in the absence of any allegation of malice, dishonesty, or wilfulness on the part of said public officials.

"Fifth: Under the allegations of the complaint and the laws of New Mexico, there is no liability against the said Gaby B. Madrid by reason of her having delivered election supplies prepared and furnished by the Secretary of State as alleged in the complaint."

The Secretary of State is required, at least three months prior to an election, to have poll books printed and to send each county clerk a sufficient number of them for use in holding elections in the several voting precincts and election districts of his county. (Sec. 56-312). In each poll book is printed: "INSTRUCTIONS TO ELECTION OFFICERS" and above these instructions is printed in as large type as space will permit:

"DO NOT FAIL TO READ ALOUD INSTRUCTIONS INSIDE"

Instructions numbers one and four are as follows:

"READ INSTRUCTIONS ALOUD.

1. Read aloud to all elections officers these instructions and instructions to voters on cards furnished you by the county clerk, before opening the polls for voting. * * *

"CHECK ELECTION SUPPLIES.

4. Inspect And See That You Have The Necessary Election Supplies Consisting Of:" (here follows a list of necessary election supplies, but an envelope for mailing the poll books to the county clerk is not mentioned.)

The only supplies which the Secretary of State is authorized to furnish the county clerks for distribution are cards on which is printed instructions to voters, and the poll books. The county clerks are required to send a designated number of these with other specifically enumerated supplies to be provided by him, to the election judges of each of the several voting precincts and election districts of his county; but an envelope for the return of the poll books or the mailing thereof is not among the supplies so enumerated. Sec. 56-324.

It thus appears that the Secretary of State was not authorized to send to the county clerk with the poll books and instructions to voters the envelope in question, nor was the county clerk authorized to send such an envelope to the election judges of the respective voting precincts and election districts of Rio Arriba County.

The following statutes are material to a decision:

"Immediately upon the conclusion of the counting and tallying of the votes and certifying the same and placing the ballots, affidavits for assistance, and envelopes in the ballot box, said ballot box, all election supplies, and one [1] poll book, or where there are counting judges one [1] poll book certified by each set of election officers, and the book of bound original affidavits of registration shall be immediately returned to the county clerk by the judges, and the other poll book or books shall be immediately placed in the mailing tube and mailed to the secretary of state. The poll book, registration book, and unused election supplies returned to the county clerk shall not be placed in the ballot box * * *.

"If the voting place is not more than twenty-five [25] miles distant from the county seat, the ballot box, key, poll book, the book of bound original affidavits of registration and unused supplies shall be delivered forthwith to the county clerk by one [1] 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 [25] miles distant.

"Where any ballot box, any poll book, book of bound original affidavits of registration, are not delivered in accordance with these instructions within twenty-four [24] 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." N.M.Sts.1941 Sec. 56-344.

"Within six [6] days after the election, the board of county commissioners of each county sitting as a county canvassing board, shall proceed to canvass the returns of such elections, and declare and certify the result thereof in the following manner * * *". (Here follows in detail the manner in which the county canvassing board is required to canvass the election returns.) N.M.Sts.1941 Sec. 56-349.

The first ground of demurrer is as follows: "First: The complaint herein should be dismissed as to the defendants herein because the obligee named in said bonds is the State of New Mexico, and the Court rules that no action can be maintained on such official bonds other than by the obligee in the absence of statutory authority."

The common law rule that only the obligee named in the bond of a public official can maintain a suit thereon, is not the law in this state, unless the obligee named is the sole beneficiary. If such bond is executed for the benefit of a third person, that person can sue thereon in a proper case.

A rule that permits actions on contracts by third persons for whose benefit they are made (known as the American Rule) has long been the law in a majority of the American states and in the courts of the United States. Pomeroy's Code Rem. (5th Ed.) Sec. 77; Howard v. United States, 184 U.S. 676, 22 S.Ct. 543, 46 L.Ed. 754; Pickle Marble & Granite Co. v. McClay, 54 Neb. 661, 74 N.W. 1062; McDonald v. Davey, 22 Wash. 366, 60 P. 1116; Burr. Admx. v. Beers, 24 N.Y. 178, 80 Am.Dec. 327. "The result of these and other decisions is that the third person for whose benefit an undertaking is entered into between other parties, may sue upon it although such undertaking is an instrument in writing and under seal. This doctrine is plainly a departure from technical notions of the common law, which did not permit a person to sue upon a contract unless he was a party to it, or unless the consideration moved from him, and which expressly forbade an action upon a sealed undertaking by a stranger." Pom.Code Rem.(5th Ed.) Sec. 77.

But I need not resort to that rule. A person for whose benefit a contract is made is the real party in interest, and as such is the proper party to prosecute an action thereon. Rule of Civil Proc. 17(a). The rule has application to bonds of public officials in which third persons are beneficiaries. Lynch v. Burgess, 40 Wyo. 30, 273 P. 691, 62 A.L.R. 849; Bollin v. Blythe, C.C., 46 F. 181; Stewart v. Carter, 4

Neb. 564; Hollister v. Hubbard, 11 S.D. 461, 78 N.W. 949. The trial court erred in sustaining the motion to dismiss on the first ground stated in his order.

The following are the second and third grounds upon which the order of dismissal was based:

"Second. That the actions of neither of the defendants Gaby B. Madrid and Jessie M. Gonzales, were the proximate cause of plaintiff's alleged damages complained of.

"Third. That the defendants, Jessie M. Gonzales and Gaby B. Madrid, could not have reasonably foreseen that any injury would result from the printing of improper instructions upon the mailing envelopes, for the following reasons:

(a) That it was not foreseeable that the precinct election officials would ignore their statutory duty, or ignore the official instructions contained in the poll books.

(b) That they could not foresee that the county canvassing board would improperly refuse to canvass and count the results from the four precincts involved in this action.

(c) That they could not foresee that the district judge would improperly construe the law in either the recount proceedings or contest proceedings.

(d) That they could not foresee that Herrera would become insolvent or take out bankruptcy."

These grounds of dismissal each go to the question of "proximate cause."

Whether a negligent act is the proximate cause of an injury is a question of ultimate fact, and not of law, if reasonable men would differ in their answers.

"The true rule is, that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft cited case of the squib thrown in the market place. Scot v. Shepherd (Squib Case) 2 W.Bl. 892. The question always is: was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause, intervening between the wrong and the injury?" Milwaukee & St. P. R. Co. v. Kellogg, 94 U.S. 469, 24 L.Ed. 256.

The "proximate cause" of an injury is "that which in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which the result would not have occurred, Gilbert v. New Mexico Const. Co., 39 N.M. 216, 44 P.2d 489. "It is not meant the last act of cause or nearest act to the injury, but such act as actually aided in producing the result as a direct and existing cause. It need not be the sole cause, but it must be a concurring cause." Quoted with approval in Rix v. Town of Alamogordo, 42 N.M. 325, 77 P.2d 765, 769. See an interesting article entitled "Proximate cause in Negligence" by Prof. Charles O. Gregory, 6 University of Chicago Law Review, p. 36. After discussing various rules, the author concludes by quoting from 1 Street's Foundations of Legal Liability 110, as follows: "The terms 'proximate' and 'remote' are thus respectively applied to recoverable and non-recoverable damages. * * * It is unfortunate that no definite principle can be laid down by which to determine this question. It is always to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. * * * The best use that can be made of the authorities on proximate cause is merely to furnish illustrations of situations which judicious men upon careful consideration have adjudged to be on one side of the line or the other."

The defendants assert that certain intervening acts of others were the proximate cause of the plaintiff's injury; that their acts could not have been foreseen or anticipated, and therefore under the rule adopted by this court in Gilbert v. New Mexico Const. Co., 39 N.M. 216, 44 P.2d 489, and Reif v. Morrison, 44 N.M. 201, 100 P.2d 229, the acts of the defendant officers were at most the remote cause.

It is said that "The modern trend of judicial opinion is in favor of eliminating foreseeable consequences as a test of proximate cause, except where an independent, responsible intervening cause is involved." 38 A.J. "Negligence" Sec. 58; Sec. 435 Restatement of the Law of Torts; Mourison v. Hansen, 128 Conn. 62, 20 A.2d 84, 136 A.L.R. 413. This seems to be the ruling in a recent English Case, Hambrook v. Stokes (1925) 1 K.B. 141.

What can be "foreseen" (or "anticipated" if we are bound by that rule) has never been determined so that either can be measured by a fixed rule.

The canvassing board was prohibited from canvassing the delayed returns or counting the votes in question, unless and until authorized by the district judge of the district after resort to the procedure provided for by Sec. 56-344 N.M.Sts. supra; and as the district judge, after a hearing so provided for, refused "To find and make an order that the votes cast in said pre-

cincts should be canvassed and become part of the final election result," because of the delay (Sec. 56-344 N.M.Sts.1941), the plaintiff's only remedy was by the contest which he filed and successfully prosecuted. See Valdez v. Herrera, 48 N.M. 45, 145 P.2d 864.

It is obvious that if the envelopes with printed instructions thereon had not been sent to the election judges with the specified election supplies, they *could not,* and therefore would not, have been used for mailing the poll books of the four districts to the county clerk. And it may be assumed that but for the unauthorized acts of the defendant officers in sending contradictory instructions the poll books would have been delivered to the county clerk in due time and as the law directs; in which event plaintiff would have received the certificate entitling him to possession of the office to which he had been elected, without the delay caused by litigation to which he was compelled to resort, else lose his office.

Some of the questions here involved were decided in Reif v. Morrison, 44 N.M. 201, 100 P.2d 229. The defendant had placed in another's pasture poisoned bran, to kill an infestation of grasshoppers. At that time the land was not being used, and there was no danger of injuring any one's livestock. Later the plaintiff leased the land from the owner, and his cattle grazing thereon ate of the poison and died. One of the defenses was that the leasing of the land by the plaintiff was an intervening cause which the defendant could not have anticipated and therefore he owed no duty to the plaintiff. We stated: "The universal rule for whose support there need be no full citation is that: 'If the occurrence of the intervening cause upon which defendant would rely, might reasonably have been anticipated, such intervening cause will not interrupt the connection between the original cause and the injury.'"

The defendant further asserted that he could not foresee that the plaintiff would graze his livestock upon the land, and therefore could not anticipate the injury. In answer to this we stated: "The rule is universal that the injury resulting from any act of negligence must, however, have been such as a reasonably prudent person should have anticipated. * * * "If it may be said that under the circumstances as set forth by plaintiff, a reasonably prudent person would have foreseen *the possibility of live stock* getting to the feed and so suffering injury therefrom, defendant is answerable for his negligence to plaintiff, even had he (defendant) no actual notice of plaintiff's use of the land as pasturage." (My emphasis.)

Another case cited by the defendants on the question of anticipation of injury is Gilbert v. New Mexico Const. Co., supra. The defendant in making excavations for

city improvements had broken a water main in the city of Roswell. The break could have been repaired in two hours, but it remained unrepaired eight hours, during which time the plaintiff's house caught fire and was partially destroyed. The break in the main lowered the water pressure so that the fire could not be extinguished until after serious damage had been done. The claim there was that the defendant could not have anticipated that the city would wait eight hours to repair the main or that Gilbert's house would catch fire at this particular time. This court in holding that the defendant was liable to the damages incurred, stated:

"However, the question is one of fact; becoming one of law only when undisputed evidence discloses a case as to which reasonable minds could not differ * * * And *the question is not whether this particular loss, but whether loss of this kind,* was, or should have been anticipated. * * *

"The other aspect of appellant's contention on proximate cause is that, even if its act could proximately have caused the injury, it did not in this case, because the chain of causation was broken by the intervening negligent delay of the city in making the repairs or in restoring pressure after completion of the repairs.

"It is no doubt true that the injury to appellee might have been avoided by greater diligence or better directed effort on the part of the city. That does not in our opinion interrupt the natural and continued sequence of the original force. The city's negligence was passive merely. * * * It was not independent. The necessity for it to act at all arose wholly from appellant's act. In reason, he who sets a harmful force in motion should not be heard to defend against liability by the claim that another than the injured party might have prevented the injurious result by an active and timely intervention." (My emphasis.)

"The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not disregard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal response to a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." Sec. 477, Restatement of Law of Torts.

The question of proximate cause and foreseeability was present in the case of

Pease v. Sinclair Refining Co., 2 Cir., 104 F.2d 183, 185, 123 A.L.R. 933. The defendant labeled the word "Kerosene" on a bottle containing water, which it sent as a part of a "process oil display" to a school teacher, to be used by him in conducting experiments before his pupils. During the experiment the teacher poured some of the water from the mislabeled bottle on sodium metal which is highly explosive when combined with water, with the result that he received severe burns and the loss of an eye. The defense was that the injury could not have been foreseen. Regarding this the Circuit Court of Appeals said: "This, therefore, is one of those cases where not unusual human conduct produces results so unexpected and tragic as to startle and amaze. Yet legal precedents and human experience combine to show that bizarre accidents are far from unlikely, and recovery cannot be denied because of the uniqueness of the happenings. Usually judicial rationalization is couched largely in terms of "foreseeability," but it is obvious that, if it is the exact accident which must be foreseen, then recovery must regularly be denied (as it is not). Perhaps in this class of cases, it is easier to reach decision than to explain it, for explanations tend towards abstract generalities, under which are lumped all sorts of accidents, from railroad and automobile collisions to chemical explosions. At any rate, given some culpability on the part of a defendant, i. e., some conduct involving a departure from the natural, and hence the reasonable, then the courts look more *for the possibility of hazard of some form to some person than for an expectation of the particular chance that happened.*" (My emphasis.)

The defendants and the trial court were apparently of the opinion that unless the plaintiff could have foreseen that the acts of the officials would result in the exact injury complained of here that no liability could ensue, notwithstanding negligence. This is the clear meaning of the third ground for dismissal. So far as we are informed it is not the rule in any jurisdiction, certainly not here. No rule has been stated that will apply to all cases of negligence. But, as stated in Gilbert v. New Mexico Const. Co., supra [39 N.M. 216, 44 P.2d 494], "The question is not whether this particular loss, but whether loss of this kind, was or should have been anticipated."

To say that it was not "foreseeable" that some precinct election officials would follow the instructions printed on the envelope is denying exactly what the defendant officials expected and intended should happen. They would not have sent the envelopes to the election officials if they had not anticipated that the poll books would be placed therein and forwarded to the county clerk by mail.

Whether the judges of election were negligent is beside the question. They followed the instructions sent them by defend-

ant officers, whose duty it was to prepare and distribute instructions. The act of the election officers in mailing the poll books was not an independent intervening force. It was an expected sequence, direct and continuous from the original wrongful act started by a superior and controlling agency. The defendant officers cannot disclaim responsibility for a situation which was the expected and intentional result of their own unlawful acts. "The proximate cause is the efficient cause, the one that sets the other causes in operation. The causes that are merely incidental or instruments of a *superior* or controlling agency, are not the proximate causes and the responsible ones though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is to be charged with the disaster." Aetna Ins. Co. v. Boon, 95 U.S. 117, 24 L.Ed. 395; Rix v. Alamogordo, supra; 38 A. J. "Negligence" Sec. 56.

When the Secretary of State sent to the various county clerks in the state more than 1,000 poll books and, we assume, envelopes for their return by mail to the several county clerks of the state, she might well have anticipated that some would be lost or delayed in the mail. The county clerk of Rio Arriba county should have known, whether she did or not, that the mail in that county from some country precincts more than 25 miles from the county seat, could not reach her in due course within the 24 hours in which the poll books were required by law to be delivered.

When the poll books were mailed from the four election districts, "mischief was afoot." * * * The mail was not delivered, and could not have been delivered, to the county clerk within 24 hours after the polls were closed on election day, with the result that the canvassing board did not, and could not legally, canvass and count the ballots so returned. As the loss of the votes not counted would deprive the plaintiff of his office, he resorted to court action. I do not attach any importance to the intervening judicial proceedings, as without them the damage to plaintiff would have been much greater. Nor does the fact that Herrera was financially irresponsible enter into the question, or relieve defendant officers of liability for their negligence. He may have been, and probably was, insolvent from the beginning. This was not an intervening independent force that caused the injury.

We cannot say as a matter of law that the unlawful acts of the defendant officers was not the proximate cause of plaintiff's damage.

The fourth ground upon which the motion to dismiss was sustained is as follows: "Fourth: The complaint fails to allege any statutory duty resting upon the said Gaby B. Madrid or Jessie M. Gonzales affording plaintiff a right of action against said de-

fendants, or either of them, in the absence of any allegation of malice, dishonesty, or wilfulness on the part of said public officials."

The duties of the Secretary of State and county clerk with reference to preparing and distributing election supplies are strictly ministerial. The statute enumerates specifically of what these supplies shall consist, their contents and the manner of their preparation and distribution to the election officers. There is no factor upon which discretion could act. It was the duty of the Secretary of State and county clerk to Not send out for use by the election officers unauthorized instructions, contradicting those which the law required them to prepare and send to election precinct officers.

It is immaterial whether the acts of those officers in sending out the unauthorized instructions were by virtue of office or under color thereof (State v. Llewellyn et al., 23 N. M. 43, 167 P. 414); they were official acts if they intended the acts to be official and would not have so acted if they had not been officers. State ex rel. Penrod v. French, Sheriff, 222 Ind. 145, 51 N.E.2d 858, 149 A.L.R. 1084, Cooper v. O'Conner, 69 App. D. C. 100, 99 F.2d 135, 118 A.L.R. 1440.

The plaintiff asserts that the defendant officers not only owed a duty to the public not to send out to the election officers the misleading instructions, but he was under a like duty to the plaintiff as a candidate for office. The rule which is not in dispute is well stated in Antin v. Union High School Dist. No. 2 of Clatsop County, 130 Or. 461, 280 P. 664, 669, 66 A.L.R. 1271, as follows: "A public officer, however, is responsible to a private party for his own negligence or wrongful acts when acting beyond the scope of his authority, or when acting within the scope of his authority, if the wrong done is not a violation of a duty which he owes solely to the public. If the duty is solely a duty which the officer owes to the public, then the officer is not subject to the suit of a private party, even though it has resulted in injury to such party. But if the duty is one which the officer owes both to the public and to a private individual, and the private individual is injuriously affected specially, and not as a member of the public, then for such violation the injured party may sue for the wrong done." Also see II Cooley on Torts (4th Ed.) Sec. 300; 43 A. J. "Negligence" Sec. 279.

It is true that the defendant election officers owed a duty to the public not to send out the misleading instructions. It is also true that the plaintiff was injured specially, not as a member of the public. The only question, therefore, under this assignment, is whether the defendant offi-

cers owed a duty to candidates for office not to send out such instructions.

The state Constitution provides that "Every citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state except as otherwise provided in this constitution." N.M.Const. Art. 7, Sec. 2.

Also, that "All elections shall be by ballot, and the person who receives the highest number of votes for any office shall be declared elected thereto. N.M.Const. Art. 7, Sec. 5.

The legislature of this state has enacted a comprehensive election code providing for the selection of public officers by a vote of the qualified electors. To guarantee the constitutional right to office if elected by a majority of the qualified electors, elaborate proceedings are provided therein. The public is necessarily interested in these elections, as by this means officers are secured to carry on the business of government. But a qualified citizen is entitled to an office if voted for by a majority of the electors entitled to vote for him. The procedure for the selection of officers is provided, not only for the purpose of electing officers to carry on the business of government, but to guarantee to one who is elected his constitutional right to the office. It follows that every officer whose prescribed duties may affect this constitutional right owes a duty to candidates, as well as to the public, to do nothing unlawful that may deprive them of that right. Duties to be performed by the several public officials are duties owed not only to the public but to candidates for office, though not specifically provided by statute.

No case exactly in point has been discovered by me, nor has one been cited. There is a collection of cases in an annotation entitled "Liability of Election Officers" in 153 A.L.R. beginning at page 109. Under a sub-head "Liability for impairing candidate's chance of election" at page 148, a number of cases are cited.

In Judd v. Polk, 267 Ky. 408, 102 S.W.2d 325, a county clerk and his surety were held liable to a candidate deprived of his office by the clerk's failure to place his name on the ballot.

In Larson v. Marsh, 144 Neb. 644, 14 N.W.2d 189, 153 A.L.R. 101, it was held that the secretary of state was liable to damages for an injury resulting proximately from the failure of such officer to comply with the candidate's request to designate his post office address after his name on an election ballot, his name being the same as that of another candidate for the same office. It appears in that case that the statute required the designation of the post office address in such cases if requested by the candidate. The argument

is that this statute made it a duty of the secretary of state to obey the request of the candidate and therefore there is a difference here. It is true that there is no such statutory duty here in favor of a candidate, but it seems that none is required in a case where the duty is plainly to be inferred.

It was held in Sterling v. Turner, 1672, 1 Vent. 206, 86 Eng.Reprint 139, that a candidate for the office of Bridge Master of London Bridge was entitled to a voice vote in the choice to fill that office, and the Lord Mayor's failure to put it was a ground for an action for damages.

In Frank v. Eaton, 225 App.Div. 149, 231 N.Y.S. 477, it was held that defendant officials were liable to damages for having placed the plaintiff's name in such an erroneous position that his election was invalidated.

The question depends upon whether the defendant officers owed a duty to candidates to send correct, and only correct, instructions to the election officers, and I hold that they owed that duty to the plaintiff. Accordingly it should be held that the trial court erred in sustaining the motion upon the fourth ground stated in his order.

In considering the first assignment of error, I said that an action may be brought in the name and in behalf of any individual for whose benefit an official bond was executed, whether the state or an official is named as obligee. Another question was posed by plaintiff under this assignment of error, to wit: Whether the bond in question was in fact made for the benefit of any third person, and particularly for plaintiff's benefit.

Defendants assert that this question was not ruled upon by the district court. But I am of the opinion that the trial court ruled upon it in holding generally that the state only (the obligee names therein) could sue on these particular bonds.

The plaintiff is not a party to the contracts and may maintain an action thereon only if they were executed for his benefit. There is no statute specifically authorizing such suit. The form of official bonds in this state is prescribed by statute. The surety is liable on such bond for injury to any one *for whose benefit* it may be executed, if the principal does not "well and faithfully perform *all his duties* as such officer * * * etc." The plaintiff asserts that as the principal's obligation is to well and faithfully perform all his duties as such officer, that it includes duties owing not only to the state but third persons.

In most states there is statutory authority for suits on official bonds by persons injured by a wrongful official act or default of the principal, but we have no such statute in New Mexico.

The principal authority upon the question is Howard v. U. S., 184 U.S. 676, 22 S.Ct. 543, 546, 46 L.Ed. 754. The question there was whether the bond of a clerk of a United States court was liable to third persons for money deposited with him without an order of court, which he embezzled. There was no federal statute authorizing such suit. The bond was conditioned that the clerk faithfully discharge the duties of his office and seasonably record the decrees, judgments and determinations of the court. There were statutes authorizing the deposit of money with the clerk, and this had been the custom for 100 years. The court said:

"But it is suggested that, in the absence of a statute distinctly so providing, the clerk was not entitled to receive the money deposited in payment and satisfaction of Stewart's claim. It is true that no statute declares in words that a clerk may receive money brought into court for the purposes of a pending suit. But it is clear that Henry county was entitled to bring into court and tender to its adversary the amount it was willing to pay in satisfaction of his claim. It cannot be that it was the duty of the judge of the court himself to have received the money and personally deposited it as required by law. No one has ever supposed that a judge was under obligation to perform such services. Who, then, was to receive the money? Plainly it was the duty of the clerk, who was the arm of the court, kept its records showing money paid in by suitors or officers, and was under bond conditioned that he would faithfully perform all the duties of his office. He was allowed by statute a commission 'for *receiving*, keeping, and paying out money in pursuance of any statute or order of court.'

* * * * *

"In our opinion, Congress intended that the required bond should protect private suitors as well as the United States, and therefore, no statute forbidding it, a private suitor may bring an action thereon for his benefit in the name of the obligee, the United States. Such must be held to be the legal intendment of existing statutory provisions. The United States, or rather the court which had custody of the bond, is to be regarded as a trustee for any party injured by a breach of its conditions.

"Murfree in his Treatise on Official Bonds says: '§ 323. It is usually provided in statutes authorizing official bonds to be required of state, county, or municipal officers, that suits may be brought upon them in the name of the official obligee "upon the relation" or "to the use" of the party injured by the breach of the bond or interested in its enforcement. Whenever, however, this express provision is omitted in the statute itself the deficiency is supplied by the construction given to such statutes by the courts whenever a proper case for such a ruling is presented. In

a Maryland case (1858), State, to use of Mayor, etc., of Baltimore v. Norwood, 12 Md. 177, 194, the court held that it was not necessary for a plaintiff before instituting a suit upon an official bond payable to the state, to obtain the state's permission to do so; and this although there was in the statute which prescribed the bond no specific provision for making the bond payable to the state, or for giving the party interested the right to sue upon it. The court adds, however, that "there is no doubt that it is incumbent on the party suing on the bond to show that he has an interest in it, before he could recover in a regular trial prosecuted to verdict." The rationale of official bonds is well expressed by the court in this case.' "

The court in effect held that if from all the circumstances touching the question it clearly appears that the bond was made for the benefit of third persons; then such persons could sue thereon, notwithstanding the absence of specific statutory authority. That was a much stronger case than the one here being considered, but the question in each case was whether the bond was made for the benefit of third persons. It is usual for the United States, State, Governor, or other public official to be named as obligee in bonds of public officials, though made for the benefit of persons not parties to the contract.

The condition of the bonds in suit was that the respective defendant official should each well and faithfully perform *all her duties* as such public officer; not just those owing by her to the state.

I am of the opinion that under the facts alleged the sureties on the defendant officers' official bonds are liable for the injury to plaintiff.

I am aware that the authorities are not harmonious on this question, but it appears to me to be reasonable that if a public official under his obligation owes duties to individuals as well as to the state which he undertakes to perform and his sureties agree to be responsible for the faithful performance of *all his duties*, the sureties' liability extends to injuries to third persons.

The following cases lend some support to my conclusion on this question: Erickson v. Anderson, 77 Mont. 517, 252 P. 299; Richards v. Tynes, 149 Okl. 235, 300 P. 297; Hollister v. Hubbard, 11 S.D. 461, 78 N.W. 949; City of Cairo for Use of Robinson v. Sheehan, 173 Ill.App. 464; American Guaranty Co. v. McNiece, 111 Ohio St. 532, 146 N.E. 77, 39 A.L.R. 1289; Lee v. Charmley, 20 N.D. 570, 129 N.W. 448, 33 L.R.A.,N.S., 275; Town of Lester, for Use of Richardson v. Trail, 85 W.Va. 386, 101 S.E. 732; Scott v. Feilschmidt, 191 Iowa 347, 182 N.W. 382; Judd v. Polk, 267 Ky. 408, 102 S.W.2d 325.

The judgment of the district court should be reversed and the cause remanded for a new trial, for the reasons stated.

176 P.2d 187

WITHERSPOON v. BRUMMETT et al.

No. 5000.

Supreme Court of New Mexico.

Dec. 31, 1946.

James A. Hall, of Clovis, for appellants.

Gore & Babbitt, of Clovis, for appellee.

BRICE, Justice.

The question is whether appellee's testate, R. M. Witherspoon, was at his death in 1946 the owner of the South Half of Section 14, Township 7, North of Range 26 East, N. M. P. M., situated in Curry County, New Mexico.

The following is the decision of the trial court:

"1. That the estate of Joe T. Brummett, deceased was probated before the Probate Court of Curry County, New Mexico, in cause No. 389, and P. B. Hartley was appointed and qualified as administrator therein on the 5th day of July, 1922.

"2. That the wife of Joe T. Brummett predeceased him and that at his death he was the owner in fee of the South Half of Section 14, and the North half of Section 23 in Township 7 North of Range 36 East, N. M. P. M.

"3. That the defendant Barney Brummett, also known as J. B. Brummett, was born June 27, 1910; that Henry Brummett was born June 15, 1913; and Thelma Brummett, now Thelma O'Neal, was born March 22, 1915; that the said Henry Brummett and Thelma Brummett each inherited from the deceased Joe T. Brummett a one-sixteenth interest in the estate of the said Joe T. Brummett, deceased, and the said Barney Brummett inherited from the said Joe T. Brummett a one-eighth interest in his estate.

"4. That thereafter the said administrator, P. B. Hartley, instituted a suit in District Court, cause No. 2264 in the District Court of Curry County, New Mexico, for the purpose of selling all of the real estate belonging to the estate of the said Joe T. Brummett, deceased, for the purpose of paying the indebtedness of the said Joe T. Brummett, deceased.

"5. That it was the intention of the said P. B. Hartley, administrator of the estate of the said Joe T. Brummett, deceased, to sell and convey the South half of Section 14, Township 7 North of Range 36 East, N. M. P. M., together with other lands of the said deceased in Township 7 North, Range 36 East, for the purpose of obtaining funds to pay the indebtedness against said estate, and that in the proceedings for the sale of said lands of said estate, the said administrator inadvertently listed the South half of Section 26 in said township and range, instead of the South half of Section 14 in said township and range.

"6. That the South half of Section 26, Township 7 North of Range 36 East, N. M. P. M., at no time was the property of the estate of the said Joe T. Brummett, deceased.

"7. That the said administrator, P. B. Hartley, in his endeavor to sell the real estate of the said deceased, to pay the debts against said estate, erroneously described the South half of Section 14, Township 7 North of Range 36 East, as the South half of Section 26, Township 7 North, Range 36 East, N. M. P. M.

"8. That the order of the court confirming the sale in said cause No. 2264 by the said administrator to the plaintiff herein, R. M. Witherspoon, correctly described said property belonging to the estate of the said Joe T. Brummett, deceased, as the South Half of Section 14, Township 7 North, Range 36 East, N. M. P. M. the property now claimed by the plaintiff.

"9. That the said plaintiff, R. M. Witherspoon, paid to the said P. B. Hartley, administrator aforesaid, a valuable consideration for the said South half of Section 14, Township 7 North of Range 36 East, N. M. P. M., whereupon the said administrator made and executed a deed to the said R. M. Witherspoon, same being filed of record July 25th, 1923, in the office of the County Clerk of Curry County, New Mexico.

"10. That the plaintiff herein, R. M. Witherspoon, has been, since the 25th day of July 1923, in actual, visible, open, notorious, exclusive and hostile possession of the land involved herein; and that the said plaintiff, R. M. Witherspoon, has paid all taxes against the lands involved herein since the 25th day of July 1923.

"11. That the plaintiff, R. M. Witherspoon, has had actual, visible appropriation of the South half of Section 14, Township 7 North, Range 36 East, Curry County, New Mexico under color of title since the 25th day of July, 1923.

"12. That the defendants Barney Brummett, Henry Brummett, and Thelma O'Neal, formerly Thelma Brummett, were represented in cause No. 2264 by a Guardian ad Litem, appointed by the District Court, to protect the interest of said defendants, then minors, in said sale.

"13. The Court finds the issues generally in favor of the plaintiff and against the defendants.

"Based upon the foregoing findings of fact, the Court concludes:

Conclusions of Law

"1. That the plaintiff, R. M. Witherspoon, is entitled to a decree quieting title in the plaintiff, in and to the South half of Section 14, Township 7 North of Range 36 East, Curry County, New Mexico, adverse to any and all claims of the defendants, or either of them, their heirs or assigns.

"2. That the defendants Barney Brummett, also known as J. B. Brummett, Henry Brummett and Thelma Brummett, now Thelma O'Neal, have no right, title or in-

terest in and to said land, or any part thereof, adverse to the interest of the plaintiff therein.

"3. That the title of the plaintiff, R. M. Witherspoon, in and to the South half of Section 14, Township 7 North, Range 36 East, N. M. P. M., Curry County, New Mexico, should be quieted and set at rest against all claims of the defendants herein.

"4. That the answer and cross-complaint of the defendants should be dismissed."

The appellants filed exceptions to these findings and conclusions in the trial court, but the assignment of errors is not based thereon. The facts found by the trial court, if not attacked here are, ordinarily, the facts upon which the case must rest in this court. In re White's Estate, 41 N. M. 631, 73 P.2d 316; Wells v. Gulf Refining Co., 42 N.M. 378, 79 P.2d 921; Lopez v. Townsend, 42 N.M. 601, 82 P.2d 921; Ritter-Walker Co. v. Bell, 46 N.M. 125, 123 P.2d 381.

Sec. 6 of Rule 15 of the Supreme Court is as follows:

"Assertion of fact must be accompanied by references to the transcript showing a finding or proof of it. Otherwise the court may disregard the fact.

"A contention that a verdict, judgment or finding of fact is not supported by substantial evidence will not ordinarily be entertained, unless the party so contending shall have stated in his brief the substance of all evidence bearing upon the proposition, with proper references to the transcript. Such a statement will be taken as complete unless the opposite party shall call attention in like manner to other evidence bearing upon the proposition."

This rule has been construed a number of times by this court. It contemplates a direct attack upon questioned findings; and in the absence of such attack, the facts found by the trial court will ordinarily not be disturbed. Arias v. Springer, 42 N.M. 350, 78 P.2d 153; Hobbs Water Co. v. Madera, 42 N.M. 373, 78 P.2d 1118. There has been no direct attack made in this court upon the trial court's findings of fact; and therefore only questions of law presented, going to the sufficiency of the facts to support the judgment, will be considered.

The appellants assign errors as follows:

"I. That the deed conveying to R. M. Witherspoon was not color of title because:

(a) It was void upon its face;

(b) The property was not sold for cash as provided in the order or decree of sale, but was traded between Witherspoon and the Administrator and with the consent of the adult heirs.

"II. That the possession of R. M. Witherspoon was not actual, visible, open, notorious, exclusive and hostile, and in good faith, as to the appellants herein."

It is asserted by appellants that the deed conveying the property to R. M. Witherspoon was not color of title because: (a) it was void upon its face; and (b) because certain provisions of the statute providing for the sale of property by administrators were not followed. It is unnecessary to recite these defects, if any, because it matters not whether the deed was void on its face or void at all, it was color of title. Hitt v. Carr, 62 Ind.App. 80, 109 N.E. 456; McFarland v. Cornwall, 151 N.C. 428, 66 S.E. 454; Wright v. Mattison, 18 How. 50, 15 L.Ed. 280; Deprutron v. Young, 134 U.S. 241, 10 S.Ct. 539, 33 L. Ed. 923 (construing Nebraska law); Sutton v. Jenkins, 147 N.C. 11, 60 S.E. 643; Work v. United Globe Mines, 12 Ariz. 339, 100 P. 813; Gatling v. Lane, 17 Neb. 77, 22 N.W. 227; Colvin v. McCune, 39 Iowa 502; Miesen v. Canfield, 64 Minn. 513, 67 N.W. 632; Pharis v. Bayless, 122 Mo. 116, 26 S.W. 1030; Stovall v. Fowler, 72 Ala. 77; Brown v. Hartford, 173 Mo. 183, 189, 73 S.W. 140. The appellee cites the following authorities which support our conclusion: Brian v. Melton, 125 Ill. 647, 18 N.E. 318 (void Admr's. deed); Steinberg v. Salzman, 139 Wis. 118, 120 N.W. 1005 (void Admr's. sale); Hall v. Law, 102 U.S. 461, 26 L.Ed. 217 (Guardian's sale); Satariano v. Galletto, 66 Cal.App.2d 813, 153 P.2d 201; 4 Tiffany on Real Property, Sec. 1155; 1 A. J. "Adverse Possession" Sec. 199; 2 C.J.S., Adverse Possession, § 72. There are authorities to the contrary (Hardy Oil Co. v. Burnham, 58 Tex.Civ.App. 285, 124 S.W. 221; Bernal v. Gleim, 33 Cal. 668; Sanders v. Word, 50 Tex.Civ. App. 294, 110 S.W. 205); but the great weight of authority is opposed to these cases.

Appellants' second assignment of error raises the question of whether R. M. Witherspoon was in good faith, in actual, visible, open, notorious, exclusive, and hostile possession of the property in question. But this is a question of fact. The trial court determined that Witherspoon was, "since the 25th day of July 1923, in actual, visible, open, notorious, exclusive and hostile possession of the land involved herein" and that he had paid taxes thereon since the 25th day of July, 1923; also, that he "has had actual, visible, appropriation of the land in question" under color of title since the 25th day of July 1923. (Findings Nos. 10 and 11). These findings are not directly attacked, and are binding on this court.

It is said that the appellants were tenants in common with the deceased Witherspoon, by reason of which, it is claimed, his possession was not adverse. But Witherspoon claimed under a deed which purported to convey the entire tract to him, and under which he took actual, open and exclusive possession. This operated as a disseizin of all others, and was sufficient

notice to all claimants, including tenants in common, that the property was claimed adversely to them. Baker v. Trujillo De Armijo, 17 N.M. 383, 128 P. 73; Armijo v. Neher, 11 N.M. 645, 72 P. 12.

Witherspoon's good faith is challenged. We said in Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325, 331:

"As we have seen from the authorities quoted, 'good faith' in acquiring title by adverse possession does not require ignorance of adverse claims or defects in title. There is nothing in this affidavit or its recording which indicates a disavowal by Thurmond of his claim of right or a recognition of the claim of anyone else.

"Since the trial court by its findings and conclusions necessarily concluded that the evidence did not show an absence of good faith and it being our duty on review to entertain all reasonable presumptions in favor of the correctness of the trial court's findings, conclusions and decree, we do not find ground for reversal."

There is nothing in the record to indicate that Witherspoon, who paid a large sum of money for the land in question, was not acting in good faith. In fact the whole record indicates that he was.

Accordingly the judgment of the district court should be, and is, affirmed.

It is so ordered.

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

176 P.2d 190

M. R. PRESTRIDGE LUMBER CO. v. EMPLOYMENT SECURITY COMMISSION.

No. 4890.

Supreme Court of New Mexico.

Sept. 30, 1946.

Rehearing Denied Jan. 30, 1947.

Wilson, Brophy & Whitehouse, of Albuquerque, for appellant.

W. A. Keleher and Theo. E. Jones, both of Albuquerque, for appellees.

SADLER, Chief Justice.

The petitioner before the District Court of Bernalillo County, the appellant here, complains of a judgment rendered against it, or them (if we think separately of the partners composing the firm), by said court in certiorari proceedings instituted by petitioner to review the action of the respondent, the appellee, in fixing the rate

of contribution to be paid by the petitioner for the years 1942 and 1943 to Employment Security Commission of New Mexico under the Unemployment Compensation Law. Article 8, 1941 Comp. (L.1936, Sp. Sess., c. 1, as amended). Certiorari was applied for under 1941 Comp. § 57-806(i), and Supreme Court Rule, § 19-101(81) (c), adopted pursuant thereto. Hereinafter, the respondent, in the interest of brevity, will be referred to as simply "the Commission."

As the matter proceeded before the Commission, both the 1942 and the 1943 rates of contribution, as fixed by it, were reviewed and redetermined in an agreed consolidation for all purposes of the two applications for such redetermination filed by the petitioner before the Commission. Following a somewhat lengthy hearing, the Commission made findings of fact as follows:

"1. In 1932 M. R. Prestridge and Carl Seligman formed a partnership composed of themselves as partners, with the firm name and style of 'B. M. C. Logging Company', the principal business of which was contract logging in the vicinity of Grants, New Mexico. In 1933, by oral agreement subsequently embodied in written articles of partnership dated November 1, 1937, the firm name and style of the partnership was changed to 'Prestridge and Seligman', under which name M. R. Prestridge and Carl Seligman continued to conduct a business substantially of the same character in the same vicinity until about June 1941. The partnership of M. R. Prestridge and Carl Seligman, operating under the name of Prestridge and Seligman, was with respect to the year 1936 and each calendar year thereafter an employer subject to the contributions imposed by the Unemployment Compensation Law of New Mexico and filed reports and paid contributions.

"2. In the year 1939, while operations continued at Grants, 'Prestridge and Seligman' under contract with the George E. Breece Lumber Company went to Otero County, New Mexico, and started logging and sawmill operations by which they cut timber and sawed the same into rough lumber and hauled the rough lumber to the Breece Mill at Alamogordo. This operation continued under the name of 'Prestridge and Seligman' until about June of 1941. During the last three months of this operation, the lumber was delivered to the mill of the Southwest Lumber Company at Alamogordo.

"3. On March 15, 1940, in order to expand their lumber manufacturing operations, M. R. Prestridge and Carl Seligman executed articles of partnership under which they became the partners under the firm name of 'M. R. Prestridge Lumber Company.' This firm purchased the lumber mill and acquired timber rights of the

George E. Breece Lumber Company at Alamogordo and on or about February 1, 1941, commenced repairing and renovating the mill for active operation, completing this repair and renovation about June 1, 1941.

"4. On or about June 1, 1941 operations under the name of 'Prestridge and Seligman' were discontinued in Otero County, all subsequent operations down to the present being conducted as the 'M. R. Prestridge Lumber Company.'

"5. On or about June 1, 1941, M. R. Prestridge and Carl Seligman, as a partnership of Prestridge and Seligman, wound up the business at Grants, New Mexico, and also under the contract with the Breece Lumber Company in Otero County as stated above, and at that time the equipment owned by 'Prestridge and Seligman' was taken over for the operations of the partnership known as M. R. Prestridge Lumber Company and the employees of the former were transferred to the new operations. The business of 'M. R. Prestridge Lumber Company' continued to be the same as that formerly conducted by 'Prestridge and Seligman' in Otero County except that rough lumber was now processed into finished lumber in the mill at Alamogordo.

"6. The two enterprises, one conducted at Alamogordo as 'M. R. Prestridge Lumber Company' and the other conducted at Grants and Alamogordo as 'Prestridge and Seligman,' had the same partners, and for a period of two or three months in the year 1941 both conducted business at the same time, and in the main 'M. R. Prestridge Lumber Company' thereafter carried on the business formerly conducted by 'Prestridge and Seligman' in Otero County with the exception that they also finished lumber in the mill at Alamogordo as aforesaid.

"7. The enterprise known as the M. R. Prestridge Lumber Company is still being conducted in Otero County, New Mexico, which includes the cutting and felling of timber and the operation of a modern sawmill at Alamogordo, New Mexico.

"8. A contribution account for 'Prestridge and Seligman' for liability commencing in 1936 was registered and maintained in that name by the Commission, and reports and contributions were made into that account for their operations at Grants and also, for the last two calendar quarters of 1940, for their operations at Alamogordo in Otero County. As of January 1, 1941, as a result of inquiry by the Commission as to the change of location and at the request of the employer, a separate contribution account was established in the name of 'Prestridge and Seligman,' and reports and contributions for their operations at Alamogordo were made into this account beginning January 1, 1941. Reports and contributions continued to be made during

most of 1941 into the earlier account also. At no time during 1941, or before or afterward until this controversy had arisen, was any application made for registration of an account in the name of the 'M. R. Prestridge Lumber Company,' nor was any notice filed of any change in ownership or organization or legal identity of the employing unit carrying on any of the operations at either place. Shortly after the new operations under the firm name and style of the M. R. Prestridge Lumber Company had commenced, wages for some employment on behalf of 'Prestridge and Seligman' were reported together and on the same report and into the same account as wages for employment on behalf of the new enterprise conducted as the M. R. Prestridge Lumber Company. Thereafter all of the wages for employment in the latter enterprise were reported on report forms of the Commission addressed to and in the name of 'Prestridge and Seligman,' at Alamogordo, the reports being filed and the contributions being paid into this account, the second of the two which the Commission had established for 'Prestridge and Seligman.' This continued until after the beginning of this controversy with respect to the fixing of rates. Arrangements were made with the Commission by Carl Seligman, at one and the same time in 1942, for the payment or the allowance of additional time, in the case of certain contributions due and delinquent with respect to operations of both 'Prestridge and Seligman' and operations at Alamogordo conducted as the M. R. Prestridge Lumber Company. The contributions due on the last report for the 'Grants job' were paid by check of the 'M. R. Prestridge Lumber Company,' the check also including contributions for the 'Alamogordo job.'

"9. For the purpose of rate determination, there never was at any time but one employing unit, the various partnership articles merely evidencing the agreement of the parties at various times.

"10. If the two partnership agreements, the first creating the firm Prestridge and Seligman and the second the firm of M. R. Prestridge Lumber Company, are to be construed as creating separate and distinct legal entities, then when the first was closed out, a merger or consolidation or other form of reorganization was effected and the second partnership was, for the purposes of rate determination, at least the successor to the first, in view of the fact that: Immediately after the merger or consolidation or other form of reorganization, the successor was controlled by the same interests as the predecessor; immediately after such change the successor assumed liability for the contributions due by the predecessor under the Unemployment Compensation Law; and after the reorganization was completed, none of the

'Prestridge and Seligman' enterprises were continued except such as were carried on by the 'M. R. Prestridge Lumber Company' as successor. The consideration of such two partnerships as a single employing unit for the purpose of determining the contribution rate under the Unemployment Compensation Law would not be inequitable.

"11. The contribution rate for 1942 was determined by the fact that the total benefits chargeable against the two accounts maintained for the operation of 'Prestridge and Seligman' and those of 'M. R. Prestridge Lumber Company,' for all periods occurring on or before the computation date of December 31, 1941, (including benefits paid on or before the last day of the month immediately succeeding such computation date, with respect to weeks of unemployment beginning on or before such computation date), exceeded the total contributions paid by the two partnerships for the same period (including contributions paid on or before the last day of the month immediately succeeding such computation date with respect to wages for employment paid by them on or before such computation date).

"12. The contribution rate for the year 1943 was determined by the fact that the total benefits chargeable against the two accounts maintained for the operations of 'Prestridge and Seligman' and those of 'M. R. Prestridge Lumber Company,' for all periods occurring on or before the computation date of June 30, 1942, (including benefits paid on or before the last day of the month immediately succeeding such computation date, with respect to weeks of unemployment beginning on or before such computation date), exceeded the total contributions paid by the two partnerships for the same period (including contributions paid on or before the last day of the month immediately succeeding such computation date with respect to wages for employment paid by them on or before such computation date)."

The findings of the Commission were followed by an opinion and an order, incorporated in the same document, reading as follows:

"While M. R. Prestridge and Carl Seligman might and did form a partnership which became an employing unit, we believe that the three firms identified by the names 'B. M. C. Logging Company', 'Prestridge and Seligman', and 'The M. R. Prestridge Lumber Company', in each of which M. R. Prestridge and Carl Seligman were associated together, were not three separate and distinct partnerships in the sense of separate legal entities. They were rather a single partnership operating under different names. The Commission is of the view that a partnership is not a separate and distinct legal entity recognized by the law. A partnership is no more than the in-

dividuals composing it and therefore when the same individuals enter into different articles of partnership and use different partnership names, they are in reality the same individuals conducting business. We believe this to be true as a general principle of law, but even more that it is borne out as the principle applicable to this case by reason of the facts in evidence. As between the 'B. M. C. Logging Company' and 'Prestridge and Seligman', testimony on behalf of the employer admitted their single identity and that the articles of partnership establishing 'Prestridge and Seligman' merely amended the previous articles to effect a change in the name of the partnership. Further, in view of all the evidence, including the terms of the various articles of partnership, the conduct and attitude of the partners and their agents and employees throughout the periods in which changes were made in the articles of partnership, and the operation of enterprises of similar or related characters by the partnership throughout, with some of the same equipment and employees, it seems impossible to say that the 'M. R. Prestridge Lumber Company' was a new entity, separate and distinct from 'Prestridge and Seligman' or that it was a new and distinct employing unit. The principles of law and the facts in the case irrefutably establish the proposition that the association together of M. R. Prestridge and Carl Seligman as partners, under whatever name or agreement, was at all times a single employing unit, whose entire experience in the payment of contributions and the benefits to be charged to its account must determine its rate of contribution.

"But if the Commission is wrong in this conclusion, and the true principle be that the articles of partnership creating 'The M. R. Prestridge Lumber Company' effected a change in legal identity and form, then the same result with respect to determining its rate of contribution follows by reason of the provisions of paragraph (6) of Section 57-807(c) of the Unemployment Compensation Law. There was a reorganization by which 'The M. R. Prestridge Lumber Company' became the successor to 'Prestridge and Seligman', as the instrument by which M. R. Prestridge and Carl Seligman continued to pursue a livelihood in their chosen field of logging and lumbering. The facts are present meeting conditions (a), (b), (c) and (d) of paragraph (6). With respect to condition (d), as to the equity or inequity of treating the predecessor and successor as a single employing unit, counsel for the employer argued that the employment experience of 'The M. R. Prestridge Lumber Company' would be better than was that of 'Prestridge and Seligman'. This proposition is hardly susceptible of proof. In any case, other principles throw more light on whether there would be inequity here. These principles

are (1) that control and management of employment policies is the prime factor in the employment experience, rather than the nature of the business conducted, weather conditions, state of the market for the product, etc., and (2) that the determination and fixing of a contribution rate cannot be made in anticipation of the employer's future experience, but can only be the result of his past experience, or why otherwise would the statute require that, to be eligible for rate adjustment, an employer must have had three years' of contribution and benefit experience. Upon these principles, there is nothing inequitable in treating 'Prestridge and Seligman' and 'The M. R. Prestridge Lumber Company' as a single unit for rate determination.

"Order

"Based upon the foregoing findings of fact and opinion, it is therefore ordered and determined: That the employer's rate of contribution for the years 1942 and 1943 be and it hereby is fixed at three and six-tenths percentum; and that the applications for redetermination of the rate for each of said years be and they hereby are denied."

An important decision to be made at the very outset is the scope of review to be given an employer upon the removal by certiorari into the district court of a proceeding questioning the Commission's action fixing the rate of contribution. Does a duty rest on the district court to make findings of its own after a review of the evidence? Or, if the evidence is substantial in support of findings made by the Commission, is the district court bound by them? These and questions incidental to them must be answered before we are in a position to determine the disposition of this appeal.

The controlling provisions of the act are to be found in 1941 Comp. §§ 57-806 and 57-807. The former section is concerned with the prosecution of claims for unemployment compensation by an unemployed workman, whereas the latter concerns itself with opposition by an employer to the rate of contribution fixed for him by the Commission and a review thereof by the district court on certiorari.

An employee claiming benefits under Section 57-806 must first present his claim to a deputy who will pass upon its validity, or refer it to an appeal tribunal or to the Commission itself to make its determination. Provision is also made for Appeal Tribunals to hear and decide disputed claims for benefits and for a review by the Commission on the same or additional evidence of any decision by an appeal tribunal. This section (57-806) goes on to provide:

"(h) Appeal to Courts.—Any decision of the commission in the absence of an appeal therefrom as herein provided shall

become final fifteen (15) days after the date of notification or mailing thereof, and judicial review thereof shall be permitted only after any party claiming to be aggrieved thereby has exhausted his remedies before the commission as provided by this act. The commission shall be deemed to be a party to any judicial action involving any such decision, and may be represented in any such judicial action by an attorney employed by the commission, or when requested by the commission, by the attorney-general or any district attorney.

"(i) Court Review.—The decision of the commission upon any disputed matter decided by it may be reviewed both upon the law and the facts by the district court of the county wherein the person seeking the review resides upon certiorari. For the purpose of such review the commission shall return on such certiorari the reports and all of the evidence heard by it on any such parts and all the papers and documents in its files affecting the matters and things involved in such certiorari. The district court shall render its judgment after hearing and either the commission or any other party thereto affected may appeal from such judgment to the Supreme Court of the state in accordance with the rules now or hereafter established by the Supreme Court. Such certiorari shall not be granted unless the same be applied for within fifteen (15) days from the date of the decision of the commission. Such certiorari shall be heard in a summary manner and shall be given precedence over all other civil cases except cases arising under the Workmen's Compensation Law (§§ 57-901—57-931) of this state. It shall not be necessary in any proceedings before the commission to enter exceptions to the rulings of the commission and no bond shall be required in obtaining certiorari from the district court as hereinabove provided but such certiorari shall be granted as a matter of right to the party applying therefor. A petition for a writ of certiorari shall not act as a supersedeas or a stay of the order of the commission unless the court or the commission shall so order. (Laws 1936 (S.S.), ch. 1, § 6, p. 1.)"

Section 57-807 deals with contributions. It provides for them from the employer equal to 2.7 per cent. of wages paid by him during each calendar year thereafter, with respect to employment occurring after June 30, 1941, except as prescribed in the next succeeding subsection (c) which makes future rates conform to benefit experience. Later subparagraphs of this section prescribe the means for determining the rate of contribution to be paid by the employer, while subparagraph 9 of Section 57-807 provides for protests by the employer before the Commission and for a judicial review of its action by the district court. It reads:

"(9) The commission shall promptly notify each employer of his rate of contributions as determined for any calendar year pursuant to this section. Such notification shall include the amount determined as the employer's average annual pay roll, the total of all of his contributions paid on his own behalf and credited to his account for all past years, and the total benefits charged to his account for all such years. Such determination shall become conclusive and binding upon the employer unless, within thirty (30) days after the mailing of notice thereof to his last known address or in the absence of mailing, within thirty (30) days after the delivery of such notice, the employer files an application for review and redetermination, setting forth his reasons therefor. If the commission grants such review, the employer shall be promptly notified thereof and shall be granted an opportunity for a fair hearing, but no employer shall have standing, in any proceeding involving his rate of contributions or contribution liability, to contest the chargeability to his account of any benefits paid in accordance with a determination, redetermination, or decision pursuant to section 6 (§ 57-806) of this act, except upon the ground that the services on the basis of which such benefits were found to be chargeable did not constitute services performed in employment for him and only in the event that he was not a party to such determination, redetermination, or decision or to any other proceedings under this act in which the character of such services was determined. The employer shall be promptly notified of the commission's denial of his application, or of the commission's redetermination, both of which shall become final unless within fifteen (15) days after the mailing of notice thereof to his last known address or in the absence of mailing, within fifteen (15) days after the delivery of such notice, a petition for judicial review is filed in the district court of the county in which he resides."

So far as our examination of the act discloses, the only other reference to a review in the district court will be found in Section 57-815(b), reading:

"Civil actions brought under this section to collect contributions or interest thereon from an employer shall be heard by the court at the earliest possible date and shall be entitled to preference under the calendar of the court over all other civil actions except petitions for *judicial review* under this act and cases arising under the Workmen's Compensation Law of this state." (Emphasis ours.)

It will be noted that by the terms of section 57-806(i) appeals to the Supreme Court were authorized in accordance with rules then or thereafter established by such court. Subsequently, and acting under its rule making power, the Supreme Court

adopted a rule governing proceedings on certiorari in the district court to review any decision of the Commission on claims for benefits under above mentioned Section 57-806, in which an appeal in such matters from the district court to the Supreme Court was authorized in accordance with existing rules for appeals from interlocutory orders or decrees. The whole procedure governing certiorari proceedings to review action of the Commission in the district court was set out (1941 Comp. § 19-101(81) (c), being practically identical with the procedure governing certiorari in the district court to review decisions of the State Corporation Commission fixing the amount of franchise tax to be paid by domestic and foreign corporations, pursuant to L.1935, c. 116, as shown by a reference to same in § 19-101(81) (c). Among other things, the rule provides:

"(4) The district court shall try and determine such cause upon the evidence legally introduced at the hearing before said employment security commission presented by the parties to said court. After hearing said cause the court shall make findings of fact and conclusions of law and enter judgment therein upon the merits."

The question naturally arises whether the specific directions in relation to certiorari in the district court and appeals from its judgments to the Supreme Court of decisions awarding or denying benefits to the *employee,* found in Section 57-806, apply and govern the judicial review of decisions by the Commission fixing the *employer's* rate of contribution as authorized by Section 57-807(c) (9). Unless they do then we find a paucity of instruction or direction in the statute touching the matter that is difficult to explain.

While, as disclosed by a reading of governing provisions in Section 57-806(h, i), much particularity is indulged as to the review of decisions touching benefits—a review "both upon the law and the facts" being directed—except to make final the action of the Commission unless within 15 days after notice thereof "a petition for judicial review is filed in the district court of the county in which he (the employer) resides," the statute is strangely silent as to the nature of the review authorized, its scope, whether a record before the Commission is to be made up and, if so, whether the same is to go up by certiorari, by appeal, or otherwise. Furthermore, if an appeal to the Supreme Court is contemplated in matters relating to the rate of contribution, the statute says nothing about it.

We can only conclude it to have been the legislative intent that the provisions of Section 57-806, more especially sub-paragraphs f to i, both inclusive, dealing with procedure, review on certiorari in the district court and authorization of an appeal from that court to the Supreme

Court, should be just as applicable to decisions fixing the employer's rate of contribution as to the employee's claim for benefits; that when the legislature in section 57-807(c) (9) authorized a "judicial review" in the district court of the Commission's decision fixing the employer's rate of contribution, it contemplated exactly the same kind of "review" as that provided in the immediately preceding section of the decision rendered on an employee's claim for benefits, brought into the district court by certiorari—and with the same right of a review of the district court's judgment on appeal to the Supreme Court as that authorized in the case of the judgment in a claim for benefits. To hold otherwise would be to convict the legislature of a futile act and of a gross sense of injustice.

So viewing the matter, what, then, was the duty of the trial judge under the statute granting a complaining party the right to have the decision of the Commission "reviewed both upon the law and the facts by the district court of the county wherein the person seeking the review resides upon certiorari"? The governing District Court Rule, 1941 Comp., § 19-101(81) (c), in sub-section 4 thereof confines the trial judge upon such review to the "evidence legally introduced at the hearing before said employment security commission presented by the parties to (the) court."

In Chiordi v. Jernigan, 46 N.M. 396, 129 P.2d 640, 643, we dealt with a statute somewhat similar to the one here involved, although having basic differences. In commenting on it we took note that "no provision is made on appeal for a trial de novo." But, see, State v. Romero, 49 N.M. 129, 158 P.2d 851. This statement is singularly true of the statute under consideration in the granting of a "judicial review" of the Commission's decision in the district court on certiorari. This is especially so when we construe the statute in the light of the District Court Rule, supra, prescribed by us to govern such proceedings directing that the district court shall try and determine the cause on the evidence legally introduced before the Commission.

In the Chiordi case, we spoke concerning the nature of the hearing in the district court under the statute construed, as follows:

"The proceedings before the Chief of Division, while quasi judicial, were essentially administrative. The questions before the district court and here, are questions of law. They are, Whether he acted fraudulently, arbitrarily or capriciously in making his order, and, Whether such order was supported by substantial evidence, and generally, Whether the Chief of Division acted within the scope of the authority conferred by the liquor control act."

In answer to the query hereinabove propounded, we conclude it was the duty of the trial court in conducting the certiorari proceeding authorized by the statute to review the evidence presented to it from the hearing before the Commission and to make its own findings of fact and from them draw the proper conclusions of law. In formulating District Court Rule 19-101(81) (c), we so ordered in sub-section 4 thereof and no reasons have been presented which convince us we were in error in so prescribing.

It is earnestly urged upon us by the Commission that the district court is bound by the findings of the Commission if supported by substantial evidence and the language of our opinion in Chiordi v. Jernigan, supra (see also State v. Romero, 49 N.M. 129, 158 P.2d 851, following same), lends itself to this view until we take note of the differences between the two statutes. In that case, while a trial de novo as ordinarily understood was not authorized, the statute itself prescribed by indirection, at least, that the findings of the Chief of Division of the Board of Liquor Control should be binding on appeal to the district court, if sustained by substantial evidence. Section 1705(a) of Chapter 236, New Mexico Session Laws of 1939, provided that on appeal to the district court any finding "which is not sustained by, * * * substantial, competent, relevant and credible evidence," should be set aside and held void. Even under the statute just mentioned the District Judge for good cause shown may receive evidence in such proceedings in addition to that appearing in the record of hearing for the purpose of determining whether the evidence relied upon in support of the findings or order of the Chief of Division has been overcome by such additional evidence. This procedure in itself involves fact finding by the district court.

Not only do we have no such direction as to findings of the Commission on certiorari to the district court but contrarily a statutory declaration that "any disputed matter decided by it (the Commission) *may be reviewed* both upon the law *and the facts* by the district court" (§ 57-806(i) followed by District Court Rule 19-101(81) (c) directing th- district court, after hearing, to make findings of fact. We take this to mean the district court shall make its own findings of fact, after a review of the evidence. It does not mean, necessarily, that the district court must ignore the findings of the Commission. It may give them some weight and should follow the Commission's findings in making its own, save where the evidence clearly preponderates against them. Cf. Tietzel v. Southwestern Construction Co., 43 N.M. 435, 94 P.2d 972, 126 A.L.R. 307, reviewing holding in Early Times Distillery Co. v.

Zieger, 11 N.M. 182, 66 P. 532. In the last analysis, however, the responsibility of making correct findings rests with the district court and it is not to be hampered or embarrassed in the performance of this duty by the findings of the Commission.

In the proceedings before the district court the petitioner requested findings of fact which the court declined to adopt. It then called upon the court to make its own findings of fact and conclusions of law before entering judgment. The court refused this request. The position of the parties will be clearly delineated by the following excerpts from the record, the first by the Commission's attorney, to-wit:

"If the Court please, the respondent takes the position that if this is a judicial review before this Court that such judicial review is limited to the question of whether or not the findings of fact made by the Commission are supported by substantial evidence and whether or not the correct rulings of law were applied by the Commission; that this Court has no power to make findings of fact or conclusions of law in this proceeding because that would be doing the same thing that the legislature has delegated to the Commission."

The foregoing statement by the attorney for the Commission is followed immediately by this declaration of the trial judge, to-wit:

"I will sustain the position of the respondent that it is not proper for the Court to make findings of fact and conclusions of law in this matter and that the Court hereby refuses to make such findings and conclusions, and that the marginal notations on petitioner's requested findings of fact and conclusions of law are not to be taken as the Court having ruled individually upon each finding of fact and conclusion of law, but the Court has refused to consider any of said findings because of the position heretofore stated that it does not believe it is a proper case for findings or conclusions to be made by the Court."

It follows from what has been said that the trial court erred in declining to make findings of fact as required by the statute and by the governing rules. This conclusion renders untimely and unnecessary the decision of several other questions presented and argued in the briefs of the parties.

The judgment will be reversed and the cause remanded to the District Court of Bernalillo County with a direction that said Court find the facts, draw conclusions of law therefrom and render judgment in conformity therewith.

It is so ordered.

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

176 P.2d 670

WATSON et al. v. HIGHTOWER et al.

No. 4989.

Supreme Court of New Mexico.

Jan. 13, 1947.

George L. Reese, Jr., of Carlsbad, for appellants.

James W. Stagner and Caswell S. Neal, both of Carlsbad, for appellees.

BRICE, Justice.

This action was brought as authorized by Title 29, U.S.C.A. § 206 et seq., known as the "Fair Labor Standards Act." From a judgment for the defendants the plaintiffs have prosecuted this appeal.

The appellants and appellees for purposes of convenience will be hereinafter called plaintiffs and defendants respectively.

Plaintiffs joined in a complaint filed July 5, 1945, in the district court of Eddy County, containing separate claims for each plaintiff, for the recovery of various amounts alleged to be due them for overtime work performed for the defendant Earl V. Hightower, plus equal amounts as liquidated damages and for attorneys' fees under the provisions of the Fair Labor Standards Act, Title 29 U.S.C.A. § 206 et seq.

Plaintiff E. A. Watson alleged that he was employed as an oil well driller at an agreed wage of $20 per twelve hour day, and the other plaintiffs alleged that they were employed as tool dressers at an agreed wage of $18 per twelve hour day, by the defendant Hightower who was a drilling contractor in Eddy County, New Mexico, and that they worked upon a certain drilling machine and tools belonging to Hightower and employed by him, during the course of plaintiffs' employment in the drilling of three oil wells upon two leases in Eddy County belonging to the defendant George Turner.

Each plaintiff alleged the filing of a claim or claims of lien under the laws of New Mexico and sought to foreclose the same upon the drilling machine, tools and oil leases and wells, and claimed attorneys' fees for such foreclosure.

Defendant Hightower answered alleging that the compensation paid plaintiffs of $20 per twelve hour day for driller and $18 per day for tool dresser included overtime for each hour worked per week in excess of forty and that such rates were

rates designed by the agreement of the parties to include overtime at the rate of one and one-half times the regular rate paid in the Artesia oil fields for like work with double time for the seventh day, and that such rates were designed to guarantee to the employees that such overtime would be paid regardless of the number of hours actually worked by such employees. The answer denied that said defendant was indebted to either of the plaintiffs in any sum for overtime, penalty or attorney's fees under the Fair Labor Standards Act.

Defendant Turner answered, likewise denying that any sum was owing to the plaintiffs for overtime, penalty or attorney's fees under the Fair Labor Standards Act, and stating that for such reason the lien claims should fail.

Both answers admitted that the Fair Labor Standards Act applied to the employment and both denied that the plaintiffs had worked the number of overtime hours specified in the complaint.

The defendants each filed separate cross complaints, alleging that nothing was due the plaintiffs and praying that claims of lien filed by the several plaintiffs be cancelled.

That part of the Fair Labor Standards Act involved here is the following:

"§ 207. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—* * *

"(3) for a workweek longer than forty hours * * * unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. * * *"

"Sec. 216 * * *

"(b) Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."

The parties agree that under the Fair Labor Standards Act the minimum wage

permitted thereby is 40¢ per hour. (Exceeded here)

The following are the findings of fact made by the trial court, except those we deem unnecessary to a decision:

(1) "Plaintiff, E. A. Watson, during all times material hereto, was an oil-well driller, and plaintiffs, L. J. Watson, James L. Condon and George Corle, were, during said times, tool dressers. All of said parties were employed by the defendant, Earl V. Hightower, to work upon his drilling machine and tools in the drilling of oil and gas wells in Eddy County, New Mexico, upon certain oil and gas leases described in the pleadings owned by the defendant, George Turner, and the dates of the respective employments of the respective plaintiffs, the particular oil and gas lease upon which they worked and the various times during which their respective employments lasted, are all set out further and admitted by the pleadings in this action. * * *

(2) "Defendant Hightower conceived the idea of establishing a 12-hour day or tower, taking the average pay of $1.25 per hour in the Artesia field for drillers for 40 hours per week, 32 hours at 1½ times that rate, and then figuring double time for 12 hours, which would make $140.00 due the driller for 12 hours per day, seven days a week. * * * The same plan was used for tool dressers except he started figuring their time at $1.12½ per hour, making their total wages for 12 hours per day, 7 days per week, $18.00 per day, or $126.00 per week, and to pay for 12 hours for every day they went to the well for work, even though they worked less time.

(3) "That at the time of the employment of the respective plaintiffs, the defendant Hightower did not guarantee to them or any of them that they would be employed for any definite or certain number of days per week, or for any particular period of time; that there were a number of days during their period of employment in which they only worked a short time in a particular day, but for each such day the plaintiffs set down a full 12-hour day in the time book, and at the time of the trial they were unable to testify as to such number of days but stated there were not many.

(3½) "That during the entire course of employment of the respective plaintiffs they worked various numbers of days per week, and regardless of the numbers of days worked per week said plaintiffs were paid the sums of $18.00 and $20.00 per day respectively, and in making the computation for the hours worked as shown in later findings the various plaintiffs are given credit for a full twelve hour day for each day shown by the log or time books, regardless of the number of hours actually worked in a day.

(4) "The plaintiffs E. A. Watson and George Corle, were employed by Earl V. Hightower personally under substantially the following terms:

"That they would be paid $20.00 and $18.00 per day for a 12-hour day, with no deductions and no overtime unless they worked more than 12 hours, in which event for from one to five hours they would be paid an additional half day, and for more than five hours they would get a full day; with no deductions to be made from their checks, and that they would be paid for 12 hours or a full day for doing anything less than a full day at the rig.

(5) "The plaintiffs L. J. Watson and James L. Condon were employed as tool dressers on behalf of the defendant by driller E. A. Watson at the rate of $18.00 per day for tool dressers, with straight time for each day they went out and with no deductions, and two or three days later the defendant Earl V. Hightower talked with L. J. Watson regarding his rate of pay and told him that he would get $18.00 a day every time he signed the log book (a record of operations kept at the well) and nothing more for overtime or double time. No talk was had between Hightower and Condon about the rate of pay.

(6) "The plaintiffs were paid at regular intervals in accordance with the agreements above set out and everything went well until Federal tax collectors descended on the defendant Earl V. Hightower, examined his books and required the payment of social security and income taxes on the plaintiffs as employees. Hightower then made deductions from the next pay checks of the plaintiffs still in his employ who then resigned and brought this action after Hightower refused to himself bear the taxes he had remitted.

(7) "The plaintiffs were each actually employees of the defendant Hightower and not labor contractors, but during the entire course of their respective employments until the final checks, they each received pay from the defendant Hightower on the basis of the agreed wages for the time actually worked by each without any deductions for withholding tax or social security contributions. * * *"

The plaintiff Corle quit work, and received his last pay check without any deductions for Federal Social Security and income taxes. The defendant Hightower deducted from the wages earned by each of the other plaintiffs during their last pay period, the total amount of withholding taxes and Social Security contributions which had accrued against such plaintiff during the entire time of employment, and tendered those plaintiffs the difference between those amounts and the balance due them according to the terms of employment. With these deductions the plaintiff E. A. Watson was given a check

for $38.15, and L. J. Watson a check for $210.44. The amount due to plaintiff Condon was less by $1 than the sum of the deductions made for withholding taxes and Social Security contributions, and he was tendered nothing. The plaintiffs did not cash these checks.

The plaintiffs worked upon oil and gas wells being drilled by the defendant Hightower for defendant Turner upon lands owned by Turner. During this employment plaintiff E. A. Watson worked 304 hours in excess of 40 hours a week, and filed a claim of lien for $340.10 in the office of the County Clerk of Eddy County, against defendant Turner's land and against the machinery and tools of defendant Hightower, used in such work. The plaintiff E. A. Watson worked a total of 301 hours in excess of 40 hours per week and filed a like lien to secure $539.31 representing overtime, and another to secure $38.15 for regular time. The plaintiff L. J. Watson worked 178 hours in excess of 40 hours per week and filed a like lien to secure $478.94 representing a claim for overtime, and another lien to secure $210.-44 for regular time. The plaintiff James L. Condon worked 153 hours in excess of 40 hours per week, and filed a like lien to secure the sum of $231 representing his claim for overtime. The plaintiff James L. Condon worked 264 hours in excess of 40 hours per week upon a second well and filed a like lien to secure the sum of $397.-50 representing his claim for overtime. The plaintiff George Corle worked a total of 204 hours in excess of 40 hours per week and filed a lien to secure $307.50, representing his claim for overtime for work on one well. The plaintiff Corle also worked a total of 110 hours in excess of 40 hours per week on a second well and filed a lien to secure $176.50 representing his second claim for overtime.

"19. That the defendant Hightower has delivered checks to each of the plaintiffs for the amounts due them less lawful deductions for income taxes and social security, but the plaintiffs have not cashed them on account of notations thereon 'payment in full' with a statement of the deductions made, * * *

"20. That the plaintiffs understood that their daily wage included overtime pay and worked with such knowledge and accepted their pay checks without complaint until their withholding tax was deducted by their employer, and if such deduction had not been made their present claims would not have been asserted. Plaintiffs were at all times familiar with the terms of the Fair Labor Standards Act."

The defendant Turner had no contract of employment with any of the plaintiffs, and was not indebted to either of them in any amount.

It is agreed by the parties and found by the trial court that a reasonable attorney's fee, if allowed to plaintiffs, is $1000, and that a lien should be placed on each of the leases for $500 should attorney's fees be allowed plaintiffs.

The court made the following conclusions of law:

"1. That the defendant Hightower, having taken the fair average rate of pay in the Artesia field, made allowance for overtime, and computed such rates in his daily wage; has in fact complied with the Fair Labor Act and its purposes, to-wit, to raise the standard of living and pay the penalty for failure to spread employment, and the plaintiffs should not be permitted to use the Act to exact an exhorbitant wage.

"2. That the causes of action of the plaintiffs should be dismissed and the claim of liens released.

"3. That the plaintiffs L. J. Watson and E. A. Watson are entitled to judgment against Hightower for the amounts found due them in Finding of Fact No. 19, but as they have been given checks in regular course prior to the filing of such and failed to cash them they are not entitled to costs, attorney's fees or a lien on account thereof."

"4. That portion of the contracts of employment whereby the defendant Hightower agreed that he would not make deductions for income taxes and social security payments was void as against public policy."

The terms of the contracts between plaintiffs and defendant Hightower are difficult to determine because the agreements depend upon vague oral statements, deductions from acts of the parties and testimony regarding the value of like services in the Artesia oil field.

The findings of the trial court regarding the terms of the contracts in question are by no means clear. See findings 3½, 4, 5, 19 and 20 supra. The plaintiffs construe these findings as follows:

"The findings of fact made by the court construed most strongly against the plaintiffs are to the effect that they, with the exception of plaintiff James L. Condon, went to work for and worked for Hightower under agreements providing for certain daily wages amounting to more than the minimum wages required by the Act, for 12 hours work; a contemplated work week of seven days except when shut down for cement to set; and an understanding or agreement that the daily wages would include compensation for all overtime, except such as might accrue from working more than 12 hours in any one day when an extra half day's pay would be paid for work over 12 and up to 17 hours and an extra day's pay if the work in any day exceeded 17 hours; and with a further un-

derstanding or agreement that the plaintiffs would receive a full day's pay each time they reported to the rig and began work even though they did not, due to conditions beyond their control, work a full 12 hours. There was no guarantee of any minimum number of days work per week nor any guaranteed weekly salary."

As we understand, this construction of those particular findings accords with that of the defendants.

If all contracts of employment fixed an hourly rate for normal non-overtime work, and at one and one-half that rate for overtime, there would be little or no difficulty in construing them. But, as will be seen from the cases annotated in 89 L.Ed. at pages 35–60, entitled "Determination of Overtime Compensation under Federal Fair Labor Standards Act," contracts of employment are not ordinarily so simple. Many of the cases involve contracts in which employers have attempted to evade the burden of the statute; and others, contracts made in good faith but so complex that much difficulty has been experienced in construing them. While the findings mentioned are not clear statements of ultimate facts, yet aided for clarification only (see Mosley v. Magnolia Petroleum Corp. 45 N.M. 230, 114 P.2d 740) by the trial court's memorandum opinion, filed below, we are of the opinion that the plaintiff's construction accords with that of the trial court, and we will so accept it.

The plaintiffs do not agree that the findings just mentioned are supported by substantial evidence, and whether they are so supported is the first question to be determined.

The evidence amply supports the contention of the defendants that the average pay per hour for well drillers in the Artesia field is $1.25 for a 40 hour week, one and one-half times that rate for overtime and double that rate for the 7th day. Drillers working 12 hours a day for 7 days would thus receive $140 for a 7 day week. The average pay for tool dressers in the Artesia field is $1.125 per hour for a 40 hour week, one and one-half times that rate for overtime and double that rate for the 7th day. Tool dressers working a 7 day week would thus receive $126. It was on this basis that the defendant Hightower fixed the rate of $20 a day of 12 hours for well drillers and $18 a day for a 12 hour day for tool dressers. It thus appears that the plaintiffs were paid the average wages paid by others for like work in the vicinity where they were employed, and that defendant Hightower *intended* that the wages paid should include overtime and double time wages.

To make the contract more attractive to the plaintiffs, the defendant Hightower agreed to pay them for a full 12 hour day

for any day they appeared for work at the place of employment, except when no drilling or tool dressing was possible or necessary. Only a few days were lost from work during the time plaintiffs were employed by Hightower.

Each of the plaintiffs knew the provision of the Fair Labor Standards Act regarding his right to overtime wages for time employed in excess of forty hours per week; and each of them accepted his $20 or $18 per day for 12 hours work, with no intention of claiming more for overtime. There is substantial evidence that supports the foregoing evidentiary facts, the greater part of which it is unnecessary to review.

The defendant Hightower testified that he told E. A. Watson and George Corle that he worked a 12 hour day, and made his pay roll for $18 and $20 per day, "but there was no double time or overtime, no car allowance," and he did not deduct withholding taxes; that they would be paid for a full day of 12 hours if they went out to the rig and set their lunch pails down. He did not explain to them how he arrived at the wages of $18 and $20 a day, but stated to them "I am paying equal to anybody in the field." "Q. Did you explain to them that the wage you paid included overtime and double time? A. There was nothing to be added on top of it, *that included everything.*" He discussed the matter with L. J. Watson after he went to work. He asked him if he knew what he was to receive and Watson said he did, and defendant then said "Well, you understand you get $18 a day every time you sign the log book, and there is *nothing more for overtime or double time?*" "Q. Did he tell you at that time that he understood it? A. Well, evidently he did, he went to work after that. He never raised any objection." He testified that none of these men made objections until he told them that the collector of internal revenue had demanded that he withhold income and social security taxes.

"Q. And you explained to them you had averaged up these wages? A. No, Sir, I did not explain to them how I arrived at the $18 and $20. I said I figured my wages to where they averaged the average of others in the field *and it took into consideration time and a half and double time and by that way they could not lose.* By guaranteeing every day they would not lose any time, and time and a half and double time, because at that time lots of men were quitting their jobs because they said their employers were laying them off on double time days.

"Q. You just explained, did you not, you had figured out your wages to where you could pay $18 and $20 a day straight time? A. Yes, Sir, and that was equal to the pay they would receive in the field.

I talked to Mr. Condon and said 'Do you understand what your salary is?' and he said 'Mr. Cribbs said I was to get $18 a day and you would not withhold anything and I will get that for 12 hours and every day I work.'

"Q. Did you have any other understanding with them with regard to working parts of a half-day? A. Yes, sir; every day they put in one hour or two or three up to five hours over their twelve hours I was to pay them one day and one-half, and if they put in more than five hours above their twelve hours, like if they would put in 17½ hours they would get a double day. If they worked 17 hours they would get one and one-half day.

"Q. The rates you mention, eighteen and twenty dollars, do they represent the average rates paid in the Artesia field for drillers and tool dressers?"

The plaintiff Condon testified in regard to his contract with defendant Hightower, as follows:

"I was hired by J. M. Cribbs, a driller acting for Hightower, in the presence of my wife.

"Q. State in the exact language so far as you can, all statements made by Hightower and all statements made by you in the conversation or conversations above referred to relative to your employment and the terms thereof? A. J. M. Cribbs offered me a job as tool dresser on a Wichita Falls Spudder belonging to Earl V. Hightower. He stated that I would receive $18 a day for 12 hours with no deductions held out of pay and pay periods to be 5th and 20th inclusive."

The principal difficulty is to determine the "regular rate at which he (the employee) is employed," as this phrase is used in Sec. 207, supra, of the Fair Labor Standards Act. When this is determined, then time and a half or double time, is a mere matter of calculation. The trial court did not find the "regular rate" of employment, but if this can be determined from the findings made that are supported by substantial evidence, the case should not be returned for a calculation that we can make from the facts found.

The number of overtime hours worked by each plaintiff is not questioned.

The phrase "The regular rate at which he (the employee) is employed," as used in the Federal Fair Labor Standards Act, means the hourly rate actually paid for the normal non-overtime work week of 40 hours. Walling, Adm'r, v. Helmerich & Payne, 323 U.S. 37, 65 S.Ct. 11, 89 L.Ed. 29.

The plaintiffs, after citing authorities, state:

"It seems clear from said authorities that the proper manner to determine the

regular hourly rate of each of the plaintiffs is to take the wages actually received for their first 40 hours of employment and divide by 40. Or since they were paid the same wages each day, take their weekly earnings and divide by the number of hours worked during the week. In either event the result is the same. $20 divided by 12 equals $1.66 per hour. This was the amount paid to E. A. Watson for his 40 hour regular work week. $18 divided by 12 equals $1.50 per hour and this was the amount paid to the other plaintiffs for their 40 hour regular work weeks."

The defendants state their contention as follows:

"We contend here that the basic rate, or the regular rate upon which overtime compensation is to be and was calculated, is the sum of $1.25 per hour for drillers and $1.125 for tool dressers, and that this fact is unchanged through the addition of calculated overtime and double time to such rate for the first forty hours of the week as a guarantee to employees that they will receive the overtime contemplated by the Act. * * *"

This evidence substantially supports the findings of the trial court to the effect that the contract under which the plaintiffs E. A. Watson, L. J. Watson and George Corle were employed, provided for a payment of $20 a day for E. A. Watson and $18 a day each for L. J. Watson and George Corle, and that there was included in these wages the regular wages for 40 hours per week, time and a half for overtime work during six days, and double time for the work done on the 7th day. These plaintiffs could not have been mistaken concerning this contract. The average pay in that community for drillers employed in the same kind of work was $1.25 per hour "regular rate" for a 40 hour week, time and a half for all over time for six days, and double time for the 7th day, and the plaintiffs were well informed regarding the standard of wages paid to laborers of their profession in the community where they worked. They were told in substance that overtime was included in these wages. They understood their right to overtime wages under the Fair Labor Standards Act, and how to figure it. They never claimed overtime for a 12 hour day, other than that included in the wages paid them; and they did not intend to claim it, until they fell out with the defendant Hightower for holding out of their wages sufficient money to pay their withholding income tax and social security tax. The contract provided for all overtime wages not included in the $20 and $18 pay for a 12 hour work day. We are satisfied that the plaintiffs mentioned, with this information and agreement, well understood the terms of the contract to be as found by the trial court.

Does the contract which the trial court found was made between the defendant Hightower and the plaintiffs contravene the Fair Labor Standards Act? is the next question posed.

We are of the opinion that the contract does not contravene the Fair Labor Standards Act, and this conclusion is well supported by decisions of the Federal Courts.

A similar, though not the exact question, was decided by the United States Supreme Court in Walling, Adm'r, v. Youngerman-Reynolds Hardwood Co., 325 U.S. 419, 427, 65 S.Ct. 1242, 1245, 89 L.Ed. 1705. In that case the contract provided for $35 per week regular rate, but the facts were such that the Court concluded that this rate was an artificial one and did not comply with the Fair Labor Standards Act. The Court stated in regard to such contracts:

"As long as the minimum hourly rates established by Section 6 (Sec. 206 U.S. C.A.) are respected, the employer and employee are free to establish this regular rate at any point and in any manner they see fit. They may agree to pay compensation according to any time or work measurement they desire. United States v. Rosenwasser, supra. 'But this freedom of contract does not include the right to compute the regular rate in a wholly unrealistic and artificial manner so as to negate the statutory purposes.' Walling v. Helmerich & Payne, Inc., supra. The regular rate by its very nature must reflect all payments which the parties have agreed shall be received regularly during the work week, exclusive of overtime payments. It is not an arbitrary label chosen by the parties; it is an actual fact. Once the parties have decided upon the amount of wages and the mode of payment the determination of the regular rate becomes a matter of mathematical computation, the result of which is unaffected by any designation of a contrary 'regular rate' in the wage contracts."

It seems to us that any other conclusion than that arrived at by the trial court in this case would be unrealistic and deny the employer and employee the right to freely establish the "regular rate at any point and in any manner they see fit," provided such rate does not negate the statutory purpose, and the contract involved does not.

In Walling, Adm'r, v. Harnischfeger Corp., 325 U.S. 427, 65 S.Ct. 1246, 1248, 89 L.Ed. 1711, in passing upon this question the Supreme Court stated:

"Our attention here is focused upon a determination of the regular rate of compensation at which the incentive workers are employed. To discover that rate, as in the Youngerman-Reynolds Hardwood Co. case, we look not to contract nomenclature but to the actual payments, exclusive

of those paid for overtime, which the parties have agreed shall be paid during each workweek. * * *

"(1) Those who receive hourly rates at least 20% higher than their guaranteed base rates clearly are paid a regular rate identical with the higher rate and the failure of respondent to pay them for overtime labor on the basis of such a rate is a plain violation of the terms and spirit of Section 7(a). No contract designation of the base rate as the 'regular rate' can negative the fact that these employees do in fact regularly receive the higher rate. To compute overtime compensation from the lower and unreceived rate is not only unrealistic but is destructive of the legislative intent. A full 50% increase in labor costs and a full 50% wage premium, which were meant to flow from the operation of Section 7(a), are impossible of achievement under such a computation."

We do not find that there is any violation of the terms or spirit of the statute in the contract involved in this case. The actual payments made as "regular rates" to the three employees named, *exclusive of those paid for overtime,* are $1.25 per hour for drillers and $1.125 per hour for tool dressers, just a matter of mathematical computation.

In Warren-Bradshaw Drilling Co. v. Hall, 317 U.S. 88, 63 S.Ct. 125, 127, 87 L. Ed. 83, it was held that the contract in question in that case violated the terms of the Fair Labor Standards Act, but it was stated:

"One final contention merits but slight consideration. Respondents were employed on the basis of an eight hour day and regularly worked seven days a week, receiving fixed wages ranging from $6.50 to $11 per day. There was no agreement providing for an hourly rate of pay or that the weekly salary included additional compensation for overtime hours. Petitioner urges that it complied with the overtime compensation requirements of the Act because respondents received wages in excess of the statutory minimum wage, including time and one-half of that minimum wage for all overtime hours, which wages respondents impliedly agreed included overtime compensation by accepting them. A similar argument was squarely rejected in Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 86 L.Ed. 1682."

In the present case the defendant Hightower and the three plaintiffs named agreed that the daily wages paid included "additional compensation for overtime hours."

In Fleming, Adm'r, v. Stone, D.C., 41 F.Supp. 1000, that court had before it a similar question. It was found in that case, as in this, that under the agreements the employer and employees intended that the fixed weekly rates of compensation should

cover time and overtime, and the Court concluded that there was no violation of the Act. The contract fixed the weekly wages, ranging upward from $30 a week, *irrespective of the hours worked.* The hours fluctuated weekly, generally above but frequently below the hours specified in the Act. The employees received extra compensation for Sunday only, and for extra work outside the scope of their usual employment. The Circuit Court of Appeals in the same case (Walling, Adm'r, v. Stone, 7 Cir., 131 F.2d 461, 462) stated:

"The question presented is whether payment of a fixed salary regardless of the number of hours worked in a week satisfies the overtime requirements of § 7 of the Act by reason of the fact that the salary equals or exceeds the statutory minimum for regular time, plus time and one-half the minimum for overtime, for the hours actually worked. * * *

"In the Missel case the court held that the 'regular rate' of pay of an employee working under a fixed salary contract is the total compensation received by him for the week's work, divided by the total number of hours worked in that week. In that case, as in the instant case the contract of employment provided for the payment of a fixed salary regardless of the hours worked. There, as here, during the weeks in question the fixed salary was greater than an amount calculated at the statutory minimum hourly rate (with time and one-half for overtime) for the hours actually worked. Missel brought a statutory action to recover alleged unpaid overtime compensation. The Supreme Court held that the contract did not comply with the requirements of § 7 of the Act and pointed out that two elements are essential in a contract of employment in order to comply with the Act: (1) Either a stated hourly rate for regular work, or an upper limit on the total number of hours to be worked for a fixed salary, and (2) an express provision that overtime should be paid for at time and one-half the regular rate. If the first element is absent from a contract, the hours worked might require minimum compensation greater than the fixed wage; if the second is absent, overtime work could be paid for at any rate equal to or greater than the regular rate. Thus, neither of these elements alone is sufficient for compliance with the law—both must be present. In the case at bar both are absent."

In this case both of these elements are present. There is an *upper limit* of 12 hours to be worked for the fixed salary of $20 and $18 per day. Because of the upper limit on the total number of hours to be worked for $18 and $20 per day, the employee cannot be deprived of his statutory compensation for overtime work. Also, there was an express provision that

overtime should be paid for at time and one-half of the regular rate and double the regular rate for Sunday work. We are of the opinion that the contract in question in no way contravenes the statute.

We have a different situation regarding the plaintiff Condon. After Condon was employed the defendant Hightower asked him if he understood what his salary was, and Condon replied, "Mr. Cribbs said I was to get $18 a day and you would not withhold anything and I will get that for 12 hours and every day I work." Condon testified: "J. M. Cribbs offered me a job as tool dresser on a Wichita Falls Spudder belonging to Earl V. Hightower. He stated that I would receive $18 a day for 12 hours with no deductions held out of pay, and pay periods to be 5th and 20th." This is all the testimony regarding the contract with this plaintiff, except the fact that he knew the rate of pay in the Artesia field and he was not paid for overtime, and he did not claim it.

We are of the opinion, however, that in the absence of proof that the agreement specifically provided that the daily wages included overtime up to 12 hours as an upper limit and an express provision that overtime was included in the wages of the plaintiff Condon, the wages received must be reckoned as having been paid for the 12 hour day and that the "regular rate" would be 1/12 of $18 or $1.50 an hour. This is the holding as we understand it, in Walling, Adm'r, v. Stone, supra, and Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 62 S.Ct. 1216, 1221, 86 L.Ed. 1682.

It would seem that it is only the indefiniteness of the contract that entitles plaintiff Condon to pay for overtime, which neither of the parties thought he was entitled to receive. But we are not authorized to amend the express terms of their contract.

"Petitioner invokes the presumption that contracting parties contemplate compliance with law and contends that accordingly there is no warrant for construing the contract as paying the employee only his base pay or 'regular rate,' regardless of hours worked. It is true that the wage paid was sufficiently large to cover both base pay and fifty per cent additional for the hours actually worked over the statutory maximum without violating section six. But there was no contractual limit upon the hours which petitioner could have required respondent to work for the agreed wage, had he seen fit to do so, and no provision for additional pay in the event the hours worked required minimum compensation greater than the fixed wage. Implication cannot mend a contract so deficient in complying with the law." Overnight Motor Transportation Co., Inc. v.

Missel, 316 U.S. 572, 62 S.Ct. 1216, 1221, 86 L.Ed. 1682.

Also see Yellow Truck & Coach Mfg. Co. v. Edmondson, 6 Cir., 155 F.2d 367, and Warren-Bradshaw Drilling Co. v. Hall, supra.

We are of the opinion that the plaintiff Condon should be allowed attorney's fees in the sum of $350 for his representation in this court.

The plaintiffs have assigned and argued numerous alleged errors, a number of which we believe have merit, but a consideration of them, whether sustained or not, would not affect the result. The facts found by the trial court support the judgment as to the plaintiffs E. A. Watson, L. J. Watson and George Corle; but as to the plaintiff Condon the judgment lacks such support.

The judgment of the district court is affirmed as to the plaintiffs E. A. Watson, L. J. Watson and George Corle, and reversed as to the plaintiff Condon. The cause is remanded with instructions to the district court to set aside its judgment as to the plaintiff Condon and proceed with a determination of his cause and enter judgment for him not inconsistent herewith.

Plaintiff James L. Condon shall recover his costs, otherwise costs are adjudged against the other plaintiffs (appellants).

It is so ordered.

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

McGHEE, J., did not participate.

176 P.2d 909

VELASQUEZ et ux. v. COX.

No. 4982.

Supreme Court of New Mexico.

Dec. 23, 1946.

Rehearing Denied Feb. 11, 1947.

Charles B. Barker, of Santa Fe, for appellants.

A. T. Hannett, of Albuquerque, for appellee.

HUDSPETH, Justice.

This is an action brought against Dee W. Cox, hereinafter called the defendant, by the plaintiffs to recover a certain described tract of real estate containing about 40 acres in Section 13, Township 30 North, Range 8 West, N.M.P.M., in San Juan County. The issues were made up by

the defendant's amended answer to the complaint, a cross-complaint and plaintiffs' reply. The case was tried by the court, without a jury, and the defendant recovered judgment, from which an appeal had been taken to this court.

The court found that the plaintiffs were the owners of the W½ of the NE¼, and the NW¼ of the SE¼, Sec. 13, Twp. 30 N., R. 8 W., N.M.P.M., and that the defendant was the owner of the N½ of the NW¼, SE¼ of the NW¼, and NE¼ of the SW¼ of the same sections; that the defendant's land was granted by the United States of America by patent under the homestead law to Felipe Santiago Martinez in the year 1884, and that he immediately erected a fence as the true boundary to the easterly side of the said land, and that said land has ever since been occupied by the defendant and his predecessors in interest in open, notorious and undisputed possession, paying taxes thereon and claiming the same under color of title, up to and until the year 1933; that during the year 1933 the plaintiffs made claim that the fence maintained by the defendant and his predecessors in interest on the easterly boundary between the property of the plaintiffs and defendant was not upon the true boundary line between their lands, and enclosed part of the formers' land, approximately the land in controversy.

Plaintiffs' lands were patented to homesteaders in the years 1908 and 1922, and plaintiffs acquired these tracts in the year 1931.

Simon Velasquez, one of the plaintiffs, testified that he was 55 years old, that he was born near the land in controversy, that about 22 acres of it was good farming land under irrigation, and that it had been farmed by defendant and his predecessors in title as long as he could remember, and that he was the first one to question their title. It was stipulated that grazing land was valued for taxation purposes in San Juan County at $1 per acre, and there is uncontradicted testimony to the effect that the 22 acres of irrigated land in controversy, on which there is an old orchard, is about two-thirds of all the irrigated area on the Martinez homestead, now the farm of defendant.

Plaintiffs' engineer, James Harvey, testified that there were two surveys by the United States government of the east line of this Section 13, the original in the year 1880 and re-surveyed in the year 1913; that he used the re-survey notes along the east boundary and the old survey notes for the balance of the section; that the quarter-section corners on the north and south boundary lines of Section 13 were not found; that he found the original SW corner of Section 13 and established a quarter-section corner on the south boun-

dary line of Section 13, approximately one-half the distance from the SW cornerstone to the point indicated by the re-survey of the east boundary as the SE corner of Section 13 in the San Juan River; that he did not find the NW corner of Section 13, nor any corner within a distance of two miles running west from the point where the field notes indicated the NW corner of Section 13 was originally placed; that using the field notes of the original survey he established a quarter-section corner on the north line of Section 13, starting from the NE corner as located by the re-survey (the corner set in 1913) of Section 13; that he then marked the median line dividing Section 13 into east and west halves, as set out in plaintiffs' complaint. He testified further (cross-examination):

"Q. Now, I will ask you to look, Mr. Harvey, at a map. I think perhaps for the Court's convenience we had better get the map on the Court's desk. I am asking you to look at Defendant's Exhibit 2, annexed to the deposition of Thomas McClure, and numbered Defendant's Exhibit 2, in Mr. McClure's testimony, and which is an official record and map made by the State Engineer's Office for the adjudication suit touching the ownership of water rights on the San Juan River, and point out to you the area which appears on Section 13, and which bears the words Rex Smith, that's the same land that is now owned by Mr. Dee Cox, the defendant in this suit, is it not? That is from the red line towards the words Rex Smith, that is the subdivisions of land where Mr. Cox' land is located? A. I believe that's right.

"Q. Point out on this map the center of the Section 13. A. It is indicated as being at that point there.

"Q. Which is the red line purporting to follow the center line of Section 13, or approximately? A. Yes, I believe this is the ditch I located as the center line.

"Q. The ditch which is marked Martinez Ditch, is that correct? A. Yes, that's where I located it. * * *

(Re-Direct Examination)

"Q. Looking at this map identified as Defendant's Exhibit 2, which shows by a red line the Cox fence, as coinciding very nearly with the center line dividing Section 13 into its east and west halves, I will ask you to state whether that correctly shows the location of the fence? A. It certainly does not show it correctly, if you take half mile west from the northeast corner of Section 13. * * *

(Re-Cross-Examination)

"* * * In other words, between the northeast corner of Section 13 and the North quarter corner of Section 14, there is a north-south discrepancy of about 680 feet and an east-west discrepancy of about 640 feet, between the official plat distance and the official ground distance? A. I

have never run across such large discrepancies in my work.

"Q. Do you know whether that exists here? A. I didn't find the corner, if I found that at such location I would assume the corner had been moved.

"Q. Isn't it true, unless and until the original survey stones at the northeast corner and the north quarter corner of 13 are found, there is no way of knowing how or where this error was distributed between the two points, that's true, isn't it? A. That may be. Which error are you referring to?

"Q. The one I just— A. That 600 feet?

"Q. Yes. A. I don't concede there is such an error. I think if there is a stone that far off it has been moved. I found the southwest corner of 13 quite off from what the notes called for.

"Q. As a matter of fact, if you move— if the State Engineer's map which was filed in this adjudication suit is 700 feet off, or the distance you have given, approximately 700 feet off, then it would affect the title to every piece of land in that township and move it 700 feet in some direction, wouldn't it? A. I found that the lines in that township are very poorly located and marked from the fact that the corners are not in place through either not having been set originally or moved, but I believe not having been set originally."

And testified also:

"* * * Q. Isn't it true it was originally surveyed, and original field notes and original plat of Township 30 North, Range 8 West, N.M.P.M. was made and filed in the land office on April 19, 1881? A. I don't remember the dates. I think the exteriors were run separate from the subdivisions."

Mr. Harvey's plat shows that according to the re-survey of the east boundary the northeast corner of Section 13 is several hundred feet (the exact distance is not shown) south of the corner common to Section 7 and Section 18 in the township to the east; while the field notes of the original survey (year 1880) read: "80.00— Set sandstone 18 x 16 x 8⅔ in ground marked 2 notches on N and 4 on S sides and mound of sandstone for cor. to Secs. 7, 12, 13 and 18 * * *."

Defendant's Exhibit 2 is a map on file in the office of the State Engineer of a hydrographic survey made under the direction of the State Engineer in an adjudication suit concerning the waters of the San Juan River and its tributaries filed in the District Court of San Juan County. The survey was made in the year 1938 and covers a large area including the part of the land in Section 13, which was being served with

water at that time, and portrays the amount and shows the boundaries of the lands owned by each of the owners at that time, according to the testimony of the State Engineer. He said it was the general practice of his office in making such surveys to attempt to locate every corner and get a land net located accurately. An assistant to the State Engineer testified regarding the map as follows:

"Court: Which maps are you referring to? A. I am referring to the Hydraulic Survey, Defendant's Exhibit 2, and all corners which are indicated by a diamond, as I say, were found in the field, and the map and the original field sheets indicate that the quarter corners common to Section 10 and 15 and common to 11 and 14 were both found in the field and have been located on the map. * * *

"Q. In other words, between the northeast corner of Section 13 and the north quarter corner of Section 14, there is a north-south discrepancy of about 680 feet, and an east-west discrepancy of about 640 feet, between the plat and ground distances? A. I found that to be so.

"Q. By official plat, you mean United States Government? A. That's right, the official distances, as shown on the 1880 survey.

"Q. Now, as a matter of fact, state whether or not that unless and until the original survey stones at the northwest corner, or the north quarter corner of Section 13 are found that there is no way of knowing where this error was distributed between the two points? A. I would say that is correct. If there is an approximate north-south error of about one-eighth mile, and an east-west error about the same in that mile and a half, I, myself, wouldn't know how to relocate it, and it seems to me if the corner were not found it would be almost impossible to say where the north quarter corner, say of Section 13, would be, because there is one-eighth of a mile error there which has to be distributed equally in that mile and a half, or the error would have to be resolved by finding the corners originally placed.

"Q. Now, this means, that if the entire 690 feet east-west error occurred in measuring the east half of Section 13, the north end of the Cox fence would be very nearly on the section line? A. That's what our survey shows. In other words, if you go just a full mile westerly (easterly) from the north quarter corner, or the quarter corner common to Sections 11 and 14, and then due south, you will arrive directly on the Cox fence. * * *

(Cross-Examination)

"Q. You admit then, that the center line of Section 13 as shown on this map is incorrectly shown? A. I won't say that because neither the north nor the south quarter corner of Section 13 have been

found. They have been re-established by Mr. Harvey according to usual land office procedure, but with the large error, both north and south and east and west which is indicated in that last mile and a half, I wouldn't care to say that his survey was any more accurate than ours. I don't think anyone knows where the original location is."

It appears that the main question in this case is as to the true location on the ground of the line between the quarter-section corner on the north boundary of Section 13 and the quarter-section corner on the south boundary of said section. The first step is to determine, if possible, where the quarter-section corner stones were set by the United States Deputy Surveyor in the year 1880.

The foregoing excerpts from the testimony of the expert witnesses indicate the different theories as to the surveys. Plaintiffs' attorney, while admitting that defendant's Exhibit 2 was admissible as a public record (N.M.S.A. 1941, 19-101(44); 11 C. J.S., Boundaries § 111, p. 707), strenuously maintains that Mr. Harvey, plaintiffs' engineer was the only competent witness to testify as to the location of corners of the public surveys; and that he located the median line dividing Sec. 13 into east and west halves in accordance with Circular 1452 United States Department of the Interior General Land Office, "Restoration of Lost or Obliterated Corners and Subdivision of Sections." Cordell v. Sanders, 331 Mo. 84, 52 S.W.2d 834, 838.

The circular 1452, supra, states general rules about which there is no dispute, which we quote:

"First. That the boundaries of the public lands, when approved and accepted, are unchangeable.

"Second. That the original township, section, and quarter-section corners must stand as the true corners which they were intended to represent, whether in the place shown by the field notes or not.

"Fourth. That the center lines of a section are to be straight, running from the quarter-section corner on one boundary to the corresponding corner on the opposite boundary.

"Sixth. That lost or obliterated corners are to be restored to their original locations whenever it is possible to do so."

On the other hand, defendant insists that the quarter-section corners are to be restored to their original locations regardless of the distance or direction from the re-established corners on the east line of Section 13. Defendant insists that there is substantial evidence to support his theory that the obliterated quarter-section corners on the north and south lines of Section 13 were originally located as indicated by the map of the hydrographic survey made in the year 1938, (Defendant's Exhibit 2),

which plaintiffs' attorney admits corresponds approximately with the east boundary fence of defendant and defendant points out that the quarter-section corner on the north boundary of Section 13 harmonizes with the quarter-section corners on the north boundaries of the two sections to the west of Section 13 in which there are irrigated fields belonging to other parties. He dwells upon the facts that 60 years have elapsed since the patent to the defendant's land was issued by the United States to the homesteader, Martinez, and the fence in question was built by him; that 49 years elapsed before the location of the boundary fence was questioned; that Martinez, the homesteader, was required under the homestead law to reside five years on his homestead, and that was his place of residence in the year 1880 when the township was surveyed; that it is probable that he knew where the quarter-section corners on the north and south boundaries of Section 13 were placed by the U. S. Deputy Surveyor in 1880, the north quarter-section corner being a corner of his land, and that he built his east boundary fence line in conformity therewith; that he planted an orchard and made other valuable improvements on the disputed strip. Plaintiffs' land being public domain at that time, Martinez had the choice of entering those subdivisions on which the plaintiffs now claim two-thirds of the irrigated land on the Martinez homestead—defendant's farm—are located. The non-irrigated lands are of small value —taxed on a valuation of $1 per acre.

Plaintiffs' witness and engineer, Harvey, expressed the belief that corners within the Township 30 N., R. 8 W., were never set. In other words, the land lines were never run, nor stones placed for the corners by the United States Deputy Surveyor, and that the field notes, which were accepted and approved by the government were fictitious, or what is sometimes called an "office survey." He testified that he found one original corner, the southwest corner of Section 13. Defendant claims that quarter-section corners on the north boundaries of Sections 14 and 15 were found, but Mr. Harvey states that he had never run across such large discrepancies as indicated by the hydrographic map. There are such discrepancies in the public surveys. Canavan v. Dugan, etc., 10 N.M. 316, 62 P. 971, 11 C.J.S. Sec. 51, Boundaries, pp. 612-615.

In the case of Byrne v. McKeachie, 34 S.D. 589, 149 N.W. 552, 553, the court said: "No matter how erroneously the work of the government surveyor may have been done, and no matter how far out of its proper location a government corner may have been established, if such location can be fixed it must control. Hoekman v. Iowa Civil Twp., 28 S.D. 206, 132 N.W. 1004."

And in this same case is quoted from the earlier case of Wentzel v. Claussen,

26 S.D. 89, 127 N.W. 621, 622, as follows: "Where people for 20 or more years have recognized lines as the true boundaries throughout a whole township, there must be most satisfactory proof that the government corners have become absolutely 'lost,' as distinguished from 'obliterated,' before it will be allowed the township authorities or private parties to institute a new survey and locate corners throughout a township at points clearly not where the original corners were located."

In the case of Bentley, et al. v. Jenne, 33 Wyo. 1, 236 P. 509, 513, the court made reference to what is termed an independent survey made by the government by which the township was platted into a number of lots. The homesteads that had been patented were given lot numbers, and the court said: "Counsel for appellant have devoted a great deal of their argument to this subject, but we fail to see the importance thereof. We concede that a resurvey cannot disturb the title which parties have acquired up to the time that it is made. We do not, however, understand that respondents claim any rights under any new survey. The only purpose, apparently, of introducing any evidence in regard thereto was to settle all future questions as to the actual location and description of the Hamilton land, and to locate and describe it in accordance with the new survey."

In Circular No. 1452 of the Department of the Interior, supra, it is stated:

"1006. The act of Congress approved September 21, 1918, entitled 'An act authorizing the resurvey or retracement of lands heretofore returned as surveyed public lands of the United States under certain conditions' provides authority for the resurvey by the Government of townships theretofore held to be ineligible for resurvey by reason of the disposals being in excess of fifty per centum of the total area thereof. * * * *

"1011 * * * The independent resurvey is one which makes a new subdivision and new lottings of the vacant public lands, which are designed to supersede the original survey. Provision is made for the segregation of individual tracts of privately-owned lands, entries, or claims that may be based upon the original plat, when necessary for their protection, or for their conformation to the regular subdivisions of the resurvey if that may be feasible, or for an amendment of the entry or patent after an adjudication of the rights that may be involved."

These independent surveys, where they do not conform to original lines and corners, are not binding on owners of patented lands, but often enable men of good will to avoid expensive litigation by accepting the good offices of the federal officials in charge of the resurvey of public lands.

It is stipulated that the lands of plaintiffs were patented in the year 1908 and 1922 to homesteaders. These parties and their successors in interest lived on these homesteads and farmed up to the fence line in question for more than 10 years before they sold to the plaintiffs, and the plaintiffs after they discovered what they thought was the error in the original survey or location of the fence line waited 11 years before filing this suit.

There are arguments in the briefs on acquiescence and adverse possession. We have lately discussed these subjects in the cases of Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325; Lovelace v. Hightower, 50 N.M. 50, 168 P.2d 864; Christmas v. Cowden, 44 N.M. 517, 105 P.2d 484; Rodriguez v. La Cueva Ranch Co., 17 N.M. 246, 134 P. 228; Ward v. Rodriguez, 43 N.M. 191, 88 P.2d 277, 279.

In Ward v. Rodriguez we said: "We recognize the rule to be that the government has the right to re-survey public land, as corrective and as a retracing, but such survey will be construed to have and follow the lines of the original U. S. survey where it would affect bona fide private rights held under such original survey. U.S.C.A. Tit. 43, § 772; Cragin v. Powell, 128 U.S. 691, 9 S.Ct. 203, 32 L.Ed. 566; Lane v. Darlington, 249 U.S. 331, 39 S.Ct. 299, 63 L.Ed. 629."

In other words, what we were attempting to make plain was that no re-survey by the government can change the lines of the original survey to the prejudice of private rights acquired in good faith in reliance on the integrity of the original survey.

But we rest our conclusion herein on the evidence as to the true location on the ground of the dividing line between the lands of the plaintiffs and defendant. Before the trial court could consider the accuracy of the work of plaintiffs' engineer, he was called upon to determine, if possible, where the original quarter-section corners on the north and south boundaries of Section 13 were actually established by the government survey in the year 1880. Twitchell's Leading Facts of New Mexican History says that the irrigation of the lands in San Juan County was commenced about the year 1877. It is probable that there were settlers in Twp. 30 N., R. 8 W., in 1880, and that the Deputy U. S. Surveyor established some corners in the settlements, although the belief of the witness Harvey that it was in the main an "office survey" may be true. The map of the hydrographic survey, defendant's Exhibit 2, is some evidence that the dividing line claimed by defendant as evidenced by his fence harmonizes with the lines recognized by the landowners of irrigated lands in the two sections immediately west of Section 13.

Moreover, the conditions prevailing at the time Martinez entered as a homestead the lands now owned by defendant, and the long recognition of the fence as the east boundary of this homestead, are evidence that the old fence was built on the true line. On this subject, Circuit Judge Sanborn in the case of State of Iowa v. Carr, 191 F. 257, 263, 112 C.C.A. 477, said:

"Moreover, the arguments and the briefs leave no doubt that a very large proportion, if not all, of the land in controversy is outside of the abandoned river channel, and this fact reduces the issue here to a mere question of the correctness of the boundary lines of the complainants' property, according to which they have held undisputed possession, paid taxes and made costly improvements claiming title with the silent acquiescence of the state for more than 20 years, and brings this portion of the case under the reasonable and salutary rule of evidence that such facts constitute strong proof of the accuracy of the boundary lines, a rule which prevails in the state of Iowa and is stated by its Supreme Court in these words:

" 'Without any reference to the doctrine of title by adverse possession, the fact that a party owning a tract of land has for many years occupied and claimed up to a particular line as the true boundary, and the owner of the adjoining tract has silently acquiesced therein, is a circumstance strongly tending to show the correctness of the claim; and in the absence of other controlling circumstances the line so indicated should be taken as the true division between the respective premises.'

"Corey v. City of Fort Dodge, 118 Iowa 743, 747, 92 N.W. 704, 705 and cases there cited. In view of these facts, of this rule of law and of the evidence of title which the long-continued possession in accordance with these boundary lines produced, the burden was thrown upon the state in the court below to show where, in what respect and to what extent, if at all, these boundary lines were incorrect, and where the true lines were between the plaintiffs' land and the state's part of the abandoned channel of the river. The court below considered all the evidence in the case upon this subject, found that the state had not successfully borne this burden, that the boundary lines in accordance with which the plaintiffs and their grantors had occupied and improved were the true boundary lines of their property and confirmed their title in accordance therewith."

In Magoon v. Davis, 84 Me. 178, 24 A. 809, 810, the court said: "The occupation and possession of the owners of lots by dividing fences erected soon after the establishment of the lines, when the location of the line may generally be better ascertained and understood than it can possibly be years afterwards, is entitled to great weight in

determining the question. And, in cases of doubt, we think the fact of the mutual occupation of the parties, the mutual recognition of the line as indicated by their occupation and dividing fences, should prevail over the uncertainty which arises in any attempt, by the running of lines so many years after the original survey, to establish the true line between the parties."

See also Brown v. Derway, 109 Vt. 37, 192 A. 16; Romine v. West, 134 Neb. 274, 278 N.W. 490; Piquet v. Piquet et al., Okl. Sup., 165 P.2d 622; Vowinckel v. N. Clark & Sons, 217 Cal. 258, 18 P.2d 58; Roberts v. Brae et al., 5 Cal.2d 356, 54 P.2d 698; Meson v. Braught, 33 S.D. 559, 146 N.W. 687.

Where a boundary line lies on the ground is a question of fact (Sunmount Co. v. Bynner, 35 N.M. 527, 2 P.2d 311), and it is our duty on review to entertain all reasonable presumptions in favor of the correctness of the trial court's findings, conclusions and judgment. Thurmond v. Espalin et al., supra. The trial court considered all the evidence and found, in effect, that the boundary line in conformity with which defendant and his predecessors in title had occupied and improved the land was the true boundary.

Finding no error in the record, the judgment of the District Court will be affirmed.

It is so ordered.

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

176 P.2d 915

EDINGTON v. EDINGTON.

No. 4965.

Supreme Court of New Mexico.

Jan. 24, 1947.

W. T. Scoggin, Jr., and J. B. Newell, both of Las Cruces, for appellant and cross-appellee.

Joseph W. Hodges and J. R. Wrinkle, both of Silver City, for appellee and cross-appellant.

LUJAN, Justice.

This was an action for divorce, division of property and custody of the infant

daughter of the parties. A divorce was granted and by stipulation the property rights were settled and the child given to the custody of the parties, each being allowed custody for an equal length of time during each year. The decree provided that the custody of the child should be so settled until the further order of the court. Thereafter a number of motions were filed by the respective parties seeking to obtain complete control of their child. An application was made on July 17, 1945, by the plaintiff for the complete custody of the child setting out grounds why he was entitled thereto. The defendant answered and after a hearing the trial court made the following material findings of fact:

"1. That the testimony and proof submitted by the plaintiff in support of paragraph one of his motion are insufficient to warrant or require any change in the order heretofore made and that paragraph one of the motion should be denied.

"2. That in the Court's opinion there is no ambiguity in the order heretofore made; that the intention is clear but that as long as there is some controversy in the matter that the Court feels a new order should be filed in said cause clarifying the order heretofore made."

"5. The Court further finds that while no formal pleading was filed before the Court in behalf of the defendant for exclusive custody of the said Joy Raynette Edington; that when plaintiff's motion was filed it reopened the question of custody and care again and the Court has considered the request of defendant's attorneys for exclusive control and custody of the said Joy Raynette Edington and feels that the situation is such that it does not require any change in the order heretofore made."

From the foregoing findings the court concluded as a matter of law:

"It is, therefore, Ordered, Adjudged and Decreed that the motion of the plaintiff be and the same is hereby denied * * *

"It is further Ordered, Adjudged, and Decreed that the care, custody and control of the said minor child, Joy Raynette Edington, be awarded and divided between the parties as follows: that the defendant shall have said child for one year dating from July 4, 1945, and upon expiration of said year the defendant shall return said child to plaintiff at Lordsburg, New Mexico, and deliver her to the plaintiff who shall have the care and custody of said minor for the ensuing one year; and that thereafter care, custody and control of said child shall be divided alternately between the parties, each having the care, custody and control of her for one year and upon the expiration of said period, the said child shall be re-

turned to Lordsburg and delivered to the party then entitled to her custody.

"It is further Ordered, Adjudged and Decreed by the Court that the party having custody of said child shall notify the other party as to the whereabouts, health, activity and welfare of said child, monthly; and that said monthly reports will be made on or before the 15th day of each month hereafter.

"It is further Ordered, Adjudged, and Decreed in regards to visitation that either party may permit the other party to visit said child at reasonable times when such visit will not interfere with the regular schooling of said child and that the parties may agree between themselves to permit each other to have the child over a week-end.

"It is further Ordered, Adjudged and Decreed that the request of the Defendant for the exclusive care, custody and control of said child be, and the same hereby is, denied."

The statute, 1941 Comp., Sec. 25-706, authorizing this action is as follows:

"In any suit for the dissolution of the bonds of matrimony, division of property, disposition of the children, or for alimony, the court * * *, on final hearing * * * may modify and change any order in respect to the guardianship, care, custody, maintenance or education of said children, *whenever circumstances render such change proper.* Said district court shall have exclusive jurisdiction of all matters pertaining to said guardianship, care, custody, maintenance and education of said children, * * *." (Emphasis ours)

That the district court has a very wide discretion in the matter of awarding the custody of children has been so often held that it will suffice on the point to cite only one recent opinion of this court, Martinez v. Martinez, 49 N.M. 405, 165 P.2d 125. It should be borne in mind that, upon a proceeding to modify a provision for the custody of a minor child, the burden is on the moving party to satisfy the court that circumstances have so changed as to justify the modification. Every presumption is in favor of the reasonableness of the original decree, and, in the absence of a showing that compels the conclusion that the decree should be modified, an appellate court cannot interfere with the trial court's refusal to modify it.

The only question before us is whether there has been any change of circumstances since the original decree was entered, which requires its modification. The record shows no material change bearing upon the necessity or the justice of modifying the provisions for the custody of the child and the court was not in error

in refusing to do so. See 19 C.J. 350, 351; 27 C.J.S., Divorce, § 317; White v. White, 77 N.H. 26, 86 A. 353.

The welfare of the child is the matter of primary concern, paramount to the wishes of parents. Both parties asked for the absolute care, control and custody of the child. The court had the decision to make of giving the custody of this child to either parent, or awarding the custody evenly between them. The mother has remarried since the divorce and is in a position to give the child a good home; the father, likewise, is in a position to give his daughter a good home with his mother and relatives who are good people, and who could assist him in properly caring for her.

The child is now nine years of age. It will soon become manifest whether she is being nurtured, educated, and trained to meet the duties and responsibilities of life under the present arrangement. The order of the court places her with her father for the term of one year, and with the mother another year, thus alternating annually. Each party will thus have the opportunity to observe the growth and development, mental and physical, of their daughter, and the district court is always open, by its order, to meet whatever change of circumstances may arise, and to supervise alike the conduct of father and mother with respect to the child, with an eye single to the promotion of its interests. See Nelson on Divorce and Separation, Sec. 809-975; Cummins v. Cummins, 59 Mont. 225, 195 P. 1031; Blair v. Blair, 40 Utah 306, 121 P. 19, 38 L.R.A., N.S., 269, Ann.Cas.1914D, 989; 19 C.J. 249, 264, 341; Vol. 27 C.J.S., Divorce, §§ 232, 236, 303; Black v. Black, 149 Cal. 224, 86 P. 505; Welch v. Welch, 33 Wis. 534; Pittman v. Pittman, 3 Or. 553; Lyle v. Lyle, 86 Tenn. 372, 6 S.W. 878; 9 R.C.L. 285.

The appellee, plaintiff below, himself sought and was granted a cross-appeal. His failure to prosecute same suggests that he subsequently became satisfied to abide the decree as it stands.

It follows from what has been said that the order of the district court should be affirmed.

It is so ordered.

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

McGHEE, J., did not participate.