[redacted]

[redacted]

[redacted]

[redacted]

176 P.2d 680

HERON v. GARCIA et al.

No. 4988.

Supreme Court of New Mexico.
Jan. 30, 1947.

Rehearing Denied Feb. 24, 1947.

[redacted]

[redacted]

[redacted]

Kenneth A. Heron, of Chama, per se.

Reed Holloman, of Santa Fe, for appellees.

McGHEE, Justice.

Requested findings of fact were made by plaintiff and defendants and the case was decided by the trial judge, Hon. William J. Barker, only four days prior to the effective date of his resignation. He acted on the requested findings and conclusions of the defendants but in the stress of closing pending cases before the effective date of his resignation overlooked acting on plaintiff's requested findings and conclu-

sions, many of which are material to a decision in this case.

As the judge who tried the case is out of office, we realize that the remanding of this case for findings and conclusions will necessitate a new trial, but we feel the questions of fact can be better decided by one who hears the witnesses and who personally inspects the records than if we were to make our own findings of fact as was done in Merrick v. Deering et al., 30 N.M. 431, 236 P. 735.

The judgment of the District Court will be reversed, and the case remanded for a new trial, and it is so ordered.

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

177 P.2d 167

BARDIN v. BARDIN.

No. 4969.

Supreme Court of New Mexico.

Jan. 29, 1947.

Rehearing Denied Feb. 24, 1947.

Wm. J. Eaton, of Socorro, for appellant.

Claron E. Waggoner, of Socorro, for appellee.

McGHEE, Justice.

This is an appeal from a decree entered in a suit for divorce in the district court, in which it was held that certain property hereinafter described was community property of the parties and in which one-half of the appellant's share thereof was awarded to appellee as alimony.

The property consisted of 622 acres of land, household goods, cattle, chickens and an old automobile, all of the value of $3,200. Entry was made on the land and patent obtained during the marriage relation. The filing fee and the cost of the improvements came out of appellant's pension received as a Spanish American War veteran. The attorneys for the parties agreed at the close of the trial that the personalty was community property and the evidence supports such agreement.

The case was heard and decided in the trial court September 19, 1945, and on October 5 following appellant filed a motion asking that the case be reopened for the taking of further testimony showing appellee had been in possession of more money than she testified. The motion was heard November 7, 1945, and denied, and decree was thereupon entered the same day. On November 14, 1945, new counsel appeared for appellant and filed a motion for a new trial asking that the same witness named in the previous motion be heard, and also claiming the court had erred in finding all of the property to be community property and in awarding the alimony.

In the pleadings each of the parties claimed all of the property to be their separate estate and appellee, who initiated the action, did not ask for alimony.

The appellant claims the trial court committed the following errors:

1. In refusing to grant his motion filed October 5 to produce additional testimony, and in refusing to grant that part of his motion filed November 14 to introduce substantially the same testimony.

2. In holding the property of the parties to be community property.

3. In awarding alimony when it had not been asked in the complaint.

4. That the awarding of alimony is a violation of the due process clause of the state and federal constitution. Const. Art. 2, § 18; U.S.Const. Amend. 14.

The reopening of the case was a matter resting in the sound discretion of the trial judge, and we do not believe that he abused such discretion.

The homestead having been entered and patented during the existence of the marriage relationship was community property. Citizens' Nat. Bank of Albuquerque v. Ruley, 29 N.M. 662, 226 P. 416; McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250.

The appellant did not state amount expended by him out of his claimed separate funds for filing fees and improvements, so we cannot give him credit therefor.

The appellant allowed appellee to testify without objection that she was old, sick, unable to work, and destitute. This was admissible only on the question of alimony and appellant thereby waived the failure to plead it, and the trial court, following the well-established rule of this court, treated the pleadings as amended. The testimony shows the parties were married in the Philippines in 1909 where appellant was a soldier in the United States Army; he lost or spent her inheritance of 10,000 pesos ($5,000 in our money) before bringing her, a Filipino, to this country in 1932, and then in 1945, when she was old, sick and unable to work, drove her from his home. He has a pension of $75 per month, is entitled to medical and hospital care from the government, and we feel he has no cause for complaint for this award of $800 in alimony.

Appellant's claim that the allowance of alimony violates the due process clause of the state and federal constitutions does not meet with favor. It is provided for by statute, Sec. 25-706, 1941 Comp., and has been directly approved by this court. See Cassan v. Cassan, 27 N.M. 256, 199 P. 1010; Golden v. Golden, 41 N.M. 356, 68 P.2d 928.

The judgment of the trial court will be affirmed and the cause remanded to the District Court with instructions to render judgment against the sureties on the supersedeas bond and to enforce its decree, and it is so ordered.

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

177 P.2d 168

BUNTON v. HULL.

No. 4968.

Supreme Court of New Mexico.

Feb. 6, 1947.

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

James T. Jennings, of Roswell, for appellee.

LUJAN, Justice.

The appellant, as plaintiff below, brought this action to recover damages from defendant-appellee, for the death of his daughter, which resulted from an automobile collision occurring at the intersection of Highway No. 285 and the Country Club road, just beyond the limits of the town of Roswell. The appellant, prior to suit, qualified as administrator of the estate of his deceased daughter, Victoria Bunton, and sued in that capacity.

The case was tried to a jury, after being charged in a manner agreeable to both parties as evidenced by the absence of exceptions to the trial court's affirmative instructions, which returned a verdict in favor of the defendant. A motion to set aside the verdict and grant appellant a new trial was overruled, and it is from this order and the final judgment on the verdict that appellant appeals.

The first point relied upon by appellant for reversal is that the trial court erred in overruling his motion to grant him a new trial. The grounds upon which it was based were that the verdict was contrary to the law and the evidence, and the court's refusal to give his requested instructions Nos. 6 and 9.

The collision occurred at approximately 11:00 o'clock on the night of March 22, 1945, at the intersection of the two streets mentioned above. Donald Maurer, with whom the deceased was riding in the front seat, was driving a medium weight car, a 1936 Dodge sedan, while the appellee's truck was a very large and heavy vehicle. Highway No. 285 is a paved through highway which has a considerable number of residences built on each side of it as it approaches the city limits of Roswell. It carries a considerable volume of traffic and is intersected by the Country Club road at a point north and just beyond the city limits. The former extends north and south and the latter east and west. West of said highway and on the south side of the Country Club road was a "stop" sign to warn drivers of motor vehicles that they were approaching a through highway. At the point in dispute in this intersection, the appellee's truck struck the rear left door and fender of the passenger car considerably damaging the same and causing injuries to Victoria Bunton from which she died within a few minutes after the accident.

Section 68-521, Compilation 1941, reads as follows:

"Vehicles must stop at certain through highway.—The state highway commission with reference to all highways and local authorities with reference to highways under their jurisdictions are hereby authorized to designate main traveled or through highways by erecting at the entrances thereto from intersecting highways signs

notifying drivers of vehicles to come to a full stop before entering or crossing such designated highway, and whenever any such signs have been so erected it shall be unlawful for the driver of any vehicle to fail to stop in obedience thereto. All such signs shall be illuminated at night or so placed as to be illuminated by the headlights of any approaching vehicle or by street lights."

These precise and definite regulations were enacted for the protection of the traveling public; their purpose was to avoid collisions at through highway intersections by requiring all operators of motor vehicles, in obedience to a "stop" sign, to bring their automobiles to a full stop before entering or crossing such designated through highways, and to yield the right of way to other vehicles not so obliged to stop. Relative to this matter, Earl Othel Niceley, the driver of the truck, testified as follows:

"Q. How far was this car from you or from the side of the road when you first saw it? A. It was just almost on the pavement when I first saw it; it just came out from behind that building.

"Q. Did that car stop before entering the intersection? A. No, sir, it did not stop."

Eddie Reeves, who was riding on the right hand side in the front seat with the driver of the passenger car, also testified in regard to this matter as follows:

"Q. Did the driver of the car in which you were riding stop before entering the intersection? A. Not that I know of; I just remember him hitting the brake just as I saw the lights and just instantly before the truck hit us.

"Q. Did the car stop any place from the time you left Mr. McDaniels' house to the time of the impact? A. No sir, it did not."

In American Jur., Vol. 5, on collisions at intersections page 750, it is said:

"* * * The driver of an automobile on a main or primary road has a right to rely on stop signs at the junction of a street and such highway; he is not guilty of contributory negligence in assuming that a vehicle on the street will regard the stop sign and stop before entering the primary highway, and he cannot be charged with negligence in acting upon such assumption. * * *"

Upon the occasion in question, Earl Othel Niceley, driving alone in appellee's truck was proceeding in a southerly direction on Highway 285, while one Donald Maurer, driving and accompanied by Victoria Bunton, deceased, and Eddie Reeves, seated in the front seat, and Curley Lacy, Miss Tumbleson and L. D. Crocker, occupying the back seat, was proceeding in an easterly direction on the Country Club road. The appellee's truck, driven on a through highway, had the right to proceed

uninterruptedly in a lawful manner across the intersection, and it was the duty of the driver of the passenger car to come to a full stop in order to permit the truck to proceed across this intersection. In other words, it was the duty of the driver of the passenger car to yield the right of way to the truck and not to drive into the intersection so as to deprive him of his right to proceed uninterruptedly in a lawful manner in the direction in which he was moving.

The drivers of these two vehicles were presumed to know the law and their rights and obligations thereunder. The driver of the truck, driving on the through highway, had a right to assume that the driver of the passenger car, as he approached the through highway from an intersecting street, would obey the law by coming to a full stop thereby yielding the right of way. Lord v. Austin, Mo.App., 39 S.W.2d 575, 577; Shuck v. Keefe, 205 Iowa 365, 218 N.W. 31; Morris v. Bloomgren, 127 Ohio St. 147, 187 N.E. 2, 89 A.L. R. 831.

There was sufficient evidence to justify the jury in finding that the driver of the passenger car was negligent in failing to stop and to yield the right of way to the appellee's truck at this intersection, and that his negligence was the proximate cause of the collision.

Appellant contends that appellee's truck violated the law of the road by failing to yield the right of way to the driver of the passenger car, as it was on the truck driver's right when it approached and entered this intersection. The pertinent part of the statute which appellant refers to reads as follows:

"(a) When two [2] vehicles approach or enter an intersection at approximately the same time, the driver of the vehicle on the left shall yield the right of way to the vehicle on the right except as otherwise provided in section 19 [§ 68-519]. The driver of any vehicle traveling at an unlawful speed shall forfeit any right of way which he might otherwise have hereunder." 1941 Comp. Sec. 68-518.

This section applies only where a collision occurs at an intersection where neither road is a through highway, but does not so apply where the collision occurs at the intersection of a through highway and an intersecting "stop" street or highway.

It is further contended by appellant that the driver of the truck was also guilty of negligence in that he operated his vehicle at an unlawful and excessive rate of speed, and that by reason of such unlawful and excessive rate of speed the appellee forfeited his preferential right to proceed at said intersection. The right of the appellee to use the through highway un-

interruptedly is an absolute right qualified only by his duty to use it in a lawful manner. See Seekatz v. Sparks, 56 Ohio App. 397, 10 N.E.2d 1007; Keir v. Trager, 134 Kan. 505, 7 P.2d 49, 81 A.L.R. 181, 185.

Section 68-504 Compilation 1941 reads as follows:

"(b) Maximum Speed. The state highway commission may, by resolution, establish the maximum speed at which motor vehicles shall be permitted to operate upon the public highways, or upon any public highway or section thereof, and may from time to time change such maximum speed limits.

"Upon the establishment of such maximum speed limits, in the manner herein provided, such resolution shall take effect and be in force from and after the placing upon or along the highways, or any highway or section thereof, of such suitable signs as shall be provided by such resolution, designating such maximum speed limit for such highway or section thereof so posted.

"No truck shall be operated at a speed greater than the posted speed limit for any highway or section thereof, and no truck shall in any event be operated at a speed in excess of fifty [50] miles per hour."

The force of the collision was such that it either hurled the passenger car some thirty feet from the point of impact unto and against an electric light pole to the east of the highway or the driver of the passenger car lost control of his car after being hit by the truck which caused him to crash into the said pole.

Earl Othel Niceley testified as follows:

"Q. Were you near this intersection; just describe this whole thing, what happened as you came down there and everything you did? A. As I come into Roswell I usually slow up out at the 'Y' and check my speed there a lot. I was coming along in at approximately between thirty-five and forty miles an hour, and at the time I got to this intersection there was nothing in front of me at the time I got there, and all at once a car came out from behind the building there, and it looked as if it was going to East from West, and it shot out in front of me and I could not stop quick enough, and this car threw my tractor to the left into the tank, *and they went into the telephone post*, and when my tractor stopped it was almost straight." (Emphasis ours.)

Did the driver of appellee's truck proceed in a lawful manner? The driver of the truck who was the only eye witness, other than Eddie Reeves, an occupant in the passenger car, testified that he was traveling between 35 and 40 miles per hour at the time of the collision, and that he applied his brakes just as he hit the passenger car. In addition to this testimony other witnesses who arrived at the scene of the

accident shortly after it happened, testified from observations made as to signs and marks on the pavement, the location of the vehicles, the distance the truck stopped from the point of impact, and the condition of the vehicles. Likewise, pictures were taken of each vehicle and of the locus in quo, which were admitted in evidence. The jury resolved the question of speed in favor of the appellee. It was required to weigh all of the evidence in order to determine whether the appellee's truck was proceeding unlawfully at an excessive rate of speed and whether he was guilty of any negligence which was a proximate cause of the collision. On this issue, the jury by its verdict, found in favor of the appellee.

In view of the evidence in this case and the facts and circumstances surrounding the collision, we believe the jury was justified in absolving the appellee of any negligence in connection with the collision.

We have carefully examined the record, and while it may be that a conclusion might be reached from the physical facts in evidence differing from that reached by the jury, if it were within our province to draw such inference, but there being substantial evidence to support the verdict, it should not be disturbed. Snodgrass v. Turner Tourist Hotels, Inc., 45 N.M. 50, 109 P.2d 775; Chesher et al. v. Shafter Lake Clay Co., 45 N.M. 419, 115 P.2d 636; Roth v. Yara, 22 N.M. 361, 161 P. 1183; James v. Hood, 19 N.M. 234, 142 P. 162; Jenkins v. Maxwell Land Grant Co., 15 N.M. 281, 107 P. 739; Candelaria v. Miera, 13 N.M. 362, 84 P. 1021.

Although appellant in his motion for a new trial claims that the court erred in refusing to give his requested instructions Nos. 6 and 9, still, there is nothing in the record to show that he tendered them, and since no exception was taken to the giving of or the refusal to give any instruction, nor is any error assigned thereon, we must assume that the instructions given correctly stated the applicable law and all of it. Territory v. Gallegos et al., 17 N.M. 409, 130 P. 245; Territory v. Lobato, 17 N.M. 666, 134 P. 222, L.R.A. 1917A, 1226; Territory v. Leslie, 15 N.M. 240, 106 P. 378; Padilla v. Territory, 8 N. M. 562, 45 P. 1120.

Appellant's next contention is that the court erred in excluding the testimony of C. M. Hester as to the speed the truck was making at the time of the collision.

Whether an expert witness is qualified to give an opinion is a matter which is peculiarly within the discretion of the trial court, and unless that discretion has been abused this court will not disturb the ruling in refusing such testimony.

Appellant at the trial produced the above named witness who testified that he was

70 years old; that he was a farmer and the operator of a trailer and tourist camp in the outskirts of Roswell; that he had driven automobiles for 37 years; that he was not present at the scene of the accident nor did he hear the crash, but that he went there approximately seven hours after it happened; that upon his arrival at the scene of the accident he observed signs and marks on the pavement; that the passenger car was badly damaged and resting against an electric light pole about 25 feet from the point of impact; that prior to the accident he had had the opportunity of seeing an automobile hit a telephone pole and break it in half, also saw a truck hit another telephone post with the same result and that he judged both the car and truck must have been traveling about sixty miles an hour when they crashed into the respective poles. With this background it was sought by appellant to qualify the witness as an expert to testfy as to his opinion concerning the rate of speed the truck in question was traveling at or immediately preceding the collision at this intersection with the Dodge sedan.

The fact that the witness had driven an automobile as stated by him in no way qualified him as an expert. The jury having before it all of the evidence, including photographic exhibits showing the condition of the car and truck as well as the scene of the locus in quo, it would seem anomalous to have the jury's province to find the facts determined by the opinion of some individual, who did not see the accident, and whose sole qualification appears to be that he had driven automobiles for some 37 years. The ultimate object of the inquiry on that point was the speed of the truck at and immediately preceding the collision. The foundation for expert testimony did not exist.

It is laid down in a good many cases that, where a person has an opportunity to observe the movement of a vehicle, he may give an opinion as to its speed at the time; it not being a matter of expert testimony. The general rule is that a witness must testify as to matters within his own personal knowledge. Warren v. Hynes, 4 Wash.2d 128, 102 P.2d 691; Oyster v. Dye, 7 Wash.2d 674, 110 P.2d 863, 133 A. L.R. 720; State v. Carlsten, 17 Wash.2d 573, 136 P.2d 183; Allen v. Porter, 19 Wash.2d 503, 143 P.2d 328; Roscoe v. Metropolitan St. R. Co., 202 Mo. 576, 101 S.W. 32.

In State v. Barrett, 33 Or. 194, 54 P. 807, 808, the court used this language:

"As a general rule, a witness must testify to facts, and not conclusions or opinions. It is the duty of the jury, and not the witness, to draw inferences from the evidence, and form opinions from the facts presented. The cases in which the opinions of witnesses are allowed constitute exceptions to this rule, founded on the ground of necessity,

because the facts cannot be presented or depicted to the jury precisely as they appeared to the witness, and it is impracticable, from the nature of the subject, for him to relate the facts without supplementing their description with his conclusions. First National Bank of Portland v. Fire Ass'n of Philadelphia, 33 Or. 172, 50 P. 568, 53 P. 8. Such are questions as to the identity of persons or things; the age, health, physical condition, and appearance of a person; the lapse of time; the dimensions and quantities of things; and many other instances in which it is impossible to detail the facts without the use of language which necessarily implies the conclusion or opinion of the witness [citing authorities]. But the books all agree that such opinion evidence is never admissible if all the pertinent facts can be sufficiently described and detailed to the jury so as to enable it to draw its own inferences and conclusions."

Also see State v. Jennings, 48 Or. 483, 87 P. 524, 89 P. 421; Mott v. Detroit, etc., Ry. Co., 120 Mich. 127, 79 N.W. 3; Wright v. Crane, 142 Mich. 508, 106 N.W. 71; Williams v. Kansas City, etc., R. Co., 96 Mo. 275, 9 S.W. 573; and Campbell v. St. Louis & Suburban R. Co., 175 Mo. 161, 75 S. W. 86.

Our examination of the testimony satisfies us that the evidence as to the qualifications of the witness in question justified the trial court in its determination, and was not an abuse of discretion nor erroneous as a matter of law. So, therefore, we see no merit in this point.

Finding substantial evidence to sustain the verdict rendered by the jury, and finding no reversible error in the record, the judgment appealed from will be affirmed.

It is so ordered.

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

McGHEE, J., did not participate.

177 P.2d 174

FLASKA, County Assessor, v. STATE et al.
No. 4959.

Supreme Court of New Mexico.
Dec. 5, 1946.

Rehearing Denied Dec. 31, 1946.
Second Rehearing Denied Feb. 19, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. C. McCulloh, Atty. Gen., Robert W. Ward and William R. Federici, Asst. Attys.

Gen., and E. P. Ripley, Special Tax Attorney for State Tax Commission, of Santa Fe, for appellants.

M. A. Threet, of Albuquerque, for appellee.

CHARLES H. FOWLER, District Judge.

Flaska, the Bernalillo County Assessor, sued for a declaratory judgment to advise whether the New Mexico statute commonly called the "Soldier's Tax Exemption Law" (Chapter 130, Laws of 1923, as amended, now Sections 76-111 to 76-117, NMSA 1941) authorizes allowance of the tax exemption to soldiers whose period of service was during World War II. (For brevity the term "soldier" is used to designate any person who is or may be eligible to have the exemption under the statute.)

The issues were made up by the pleadings to call for determination of the question.

The trial court held that the Soldier's Tax Exemption Law as written is not applicable to soldiers of World War II. This holding followed upon the court's conclusion that the New Mexico Constitution does not authorize the legislature to grant the tax exemption to a soldier whose period of military service was during any war occurring subsequent to the adoption of the Amendment which is now Article 8, Section 5, of the Constitution. Since that section contains the only grant of power to the legislature to provide for the exemption, it follows that if its provisions relate only to soldiers whose pertinent period of service was in some war prior to the adoption of the Amendment, all statutes passed in the exercise of such power must also be limited to relate to such soldiers of prior wars.

Judgment was rendered in accordance with the court's decision and this appeal was taken by the defendants.

The primary question for decision is: Does the New Mexico Constitution, Article 8, Section 5, authorize the legislature to grant the tax exemption to soldiers of World War II?

If that question be answered here in the negative, the matter is concluded. If that question be answered here in the affirmative, then answer will be required to the further question: Does the Soldier's Tax Exemption Law as written grant the exemption to soldiers of World War II?

Article 8, Section 5, of the Constitution reads:

"The legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars, and the property of every honorably discharged soldier, sailor, marine and army nurse, and the widow of every such soldier, sailor, or marine, who served in the armed forces

of the United States at any time during the period in which the United States was regularly and officially engaged in any war, in the sum of two thousand dollars. Provided, that in every case where exemption is claimed on the ground of the claimants having served with the military or naval forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property, upon which exemption is claimed, shall be upon the claimant."

The section was proposed as a constitutional amendment by joint resolution of the legislature, approved March 11, 1921, and was adopted by the people at a special election held September 20, 1921. World War I was ended officially by Congressional resolution and Presidential proclamation on July 2, 1921. World War II is the only war in which the United States has been regularly and officially engaged since the Amendment was adopted and became part of the Constitution.

The trial court noted that the Amendment, as it relates to soldiers, uses only the past tense. The court held that the provision authorizes the legislature to grant the tax exemption to soldiers of World War I and prior wars, but does not authorize such a grant to soldiers of any war subsequent to the time of the adoption of the Amendment. In other words, the holding was that Section 5 related and relates only to those soldiers whose eligibility for the exemption was established, or made possible, already through having served in the armed forces of the United States during a period in which the nation had been regularly and officially engaged in some war which was fought before the adoption of the Constitutional Amendment. It may be noted that in the statute, as in the constitutional provision, only the past tense and the same verb forms are used.

The appellee presses the argument here. In addition to his claim that the language used is plain and shows the certain intent, he declares that the history of the Amendment shows that in adopting it the people had in mind the first World War, then just concluded, and that they limited the authority conferred upon the legislature to permission to grant the exemption to soldiers of that and prior wars. Of this he says:

"The first World War was over. People all over the world, the United States, and New Mexico were rejoicing that the War to end wars was ended. The people of New Mexico, out of a grateful heart, in order to show their appreciation for the sacrifices made by their sons and daughters, expressed their wants, intention and designs in adopting the Amendment to the Constitution granting tax exemptions to those who had participated in that great

conflict, and to the dependents of those who did not return. The intention, want and design of the people of the State of New Mexico, in adopting the Amendment to the Constitution, was to reward, in a measure, those who had fought the last of all wars. This was what they had in mind. They could not foresee that another great conflict was imminent. They were thinking of the present and the past, with no thought of the future. * * * They, the people, desired to reward the soldiers who had rendered services in the defense of their country in past wars, as all pertinent language of the amendment restricted its application to wars fought prior to its adoption. The intent of the people was to leave to the future the adjustment of other situations when they should arise. No one contemplated another war, and no provision was made for the soldiers of that war."

Thus is the contention of the appellee, Flaska, plainly set out. Is his conclusion correct concerning the will of the people in adopting the Amendment? If indeed the will of the people was as stated by the appellee, then the constitutional provision does restrict the legislature and the judgment of the trial court was correct.

It is the duty of this court to search out and declare the true meaning and intent of the Amendment as adopted by the people.

"Terms used in a Constitution must be taken to mean what they meant to the minds of the voters of the state when the provision was adopted." Tintic Standard Mining Co. v. Utah County, 80 Utah 491, 15 P.2d 633, 637.

"Constitutions do not change with the varying tides of public opinion and desire. The will of the people therein recorded is the same inflexible law until changed by their own deliberative action, and therefore the courts should never allow a change in public sentiment to influence them in giving a construction to a written Constitution not warranted by the intention of its founders." 11 Am.Jur. 659, Sec. 50, Constitutional Law.

If the language used in the provision in question is plain and definite and free from ambiguity, when taken in its plain and ordinary sense, there is no occasion for construction of it. If the meaning of the language is not clear and precise, that is if more than one fair and reasonable interpretation can be put upon the language employed, then the history of the Amendment and the conditions which prompted its framing and adoption may be considered to shed light on the terms used and to ascertain truly "the will of the people therein recorded."

By the Amendment the legislature ever since 1921 has been, and today is, authorized to exempt from taxation, to the

amount of $2000, the property of "*every honorably discharged* soldier * * * who *served* * * * at any time during the period in which the United States *was* regularly and officially *engaged* in *any* war."

By a statute passed in 1923 the legislature undertook to allow such tax exemption to "*every honorably discharged* soldier * * * resident of New Mexico and who *served* * * * for thirty [30] days or more at any time in which the United States was officially *engaged* in *any* war." § 76-111. By amendment in 1933 it was provided that the claimant's residence must be acquired prior to January 1, 1934.

Prompting the bringing of this suit, this situation faces the County Assessor: Two men stand before him, each demanding allowance of the tax exemption. Each of them is an honorably discharged soldier, a resident of New Mexico since a time prior to January 1, 1934, who served in the armed forces of the United States for more than thirty days at a time in which the United States was regularly and officially engaged in war. One of these claimants is a "soldier" who served with the United States Army in France during World War I; the other of them is a "soldier" who served with the United States Army in France during World War II. Does the language of the Amendment, now Article 8, Section 5, of the Constitution, permit the allowance of the tax exemption to the first of these men, and *require* it to be withheld from the second of them? The service of both men is in the past, and must be spoken of in the past tense. No words can describe more fitly the status of these men in regard to their army service than the language of the Amendment, with its past tense; each honorably *discharged*, his army term *served* during a time in which the United States *was engaged* in war. Should the misfortune of war again involve us, this same language of the Amendment will fitly describe the veteran of that third World War at the hour when, with honorable discharge in hand, he shall ask that the exemption be allowed to him, for he will be then a soldier, honorably *discharged*, who *served* at a time when the United States *was engaged* in a war.

Allowing then that the terms used conceivably might bear more than one construction, let us consider the history of the provision and the conditions under which it was adopted together with the words used to express "the will of the people."

None may doubt that it was the immediacy of the first World War and the surge of emotions it evoked which moved the people to frame and adopt the Amendment. In this way, in some measure of reward, did the people express their gratitude to war veterans for heroic services rendered. The soldiers, sailors and marines of World War I, the youth of that generation, who were

the sons and brothers and husbands of those who adopted the Amendment, were the ones whose service and sacrifice stirred the feelings of the people to set in motion the machinery which resulted in the resolution and exemption. But when the provision was drawn up it was not restricted to the soldiers, sailors and marines of that war. It was made to apply to those of "any" war. Deliberately the people extended the bounty to veterans of the Spanish-American, Civil and Mexican, and "any" wars in which the United States "was engaged."

Had it been the desire and intent of the people to restrict the application of the provision to soldiers of wars then in the past, that meaning could have been made clear by use of language incapable of any other interpretation. Instead, the people chose language which now perfectly describes the soldier of World War II. A moment's reflection on the part of any legislator who framed or supported the resolution, or of any voter who voted to adopt it as part of the Constitution, in 1921, would have made him fully aware that an interpretation rendering the exemption allowable to soldiers of wars then in the future *not only* reasonably *could be, but* indeed *would have to be,* placed upon the language used in the Amendment, *unless* the very argument made here by appellee should prevail against it—namely, that the people of that day looked only to the past and were indifferent to and regardless of and unconcerned for making the provision for any soldiers of wars thereafter to come, and that they did not intend to do so. With such meaning implicit in the language used, unless such argument were brought forward and sustained, can we say that the people who adopted the Amendment as part of the State's fundamental law did not intend that meaning? Can we say that on the contrary the people willed and intended that the provision should not govern the future but should be and was confined to meet existing conditions of that day and limited in application to a class whose membership was then already fully made up?

"It is presumed that the people expressed themselves in careful and measured terms in framing the constitution and that they left as little as possible to implication." 16 C.J.S., Constitutional Law, § 14, page 50; Vaughn & Ragsdale Co. v. State Board of Equalization, 109 Mont. 52, 96 P.2d 420.

In careful and measured terms the people and framers of the Amendment extended the privilege of the exemption to every honorably discharged soldier of any war. This gave it to soldiers of wars fought long before the first World War. If the provision does not extend to later wars, it must be because the people by their implied intention excluded them, for we now see that the "careful and measured terms" used do perfectly describe and picture the honor-

ably discharged soldier of the present great World War.

Nothing has been presented to show what debates or arguments or explanations, if any, were offered among the framers of the resolution or among and to the people who adopted the Amendment, as to its meaning and intent with reference to being limited to soldiers of then past wars. If such matters could be considered, we are left without information concerning them.

Considering the fitness of the language used to describe today the soldiers of our most recent war, it seems plain that if the people who adopted the Amendment actually did intend to restrict its application to wars fought prior to its adoption, it was indeed because "they were thinking of the present and the past, with no thought of the future" and they meant "to leave to the future the adjustment of other situations when they should arise," as the appellee contends. Therefore, we may look to the conditions existing in that day.

We must assume that the people, in 1921, were enlightened and in general informed of world events. Among the world events then of common knowledge and arresting the attention of men were these: "That China was in a state of declared war; there was revolution and siege in Bolivia; our neighbor republic, Mexico, was virtually in civil war; in Morocco its tribesmen and Spanish soldiers were at war, and in a single battle in July ten thousand soldiers died; South Arabia was in war; Italy was in revolt and its government was in process of change by violence; Ireland was in turmoil and "a guerrilla war of the bitterest intensity was (being) fought in all counties;" Russia was still in revolution; Greece and Turkey were again at each other's throats in war, and in early September, only days before the amendment election, the city of Smyrna died by battle and war-set fire, with loss of thousands of lives and millions of dollars in property; that the Senate of the United States after bitter debate had rejected the proposed adherence of this nation to the League of Nations (which many people then regarded as the World's last hope for lasting peace) and Senators had declared that the provisions of its Covenant, if accepted, would "make America the policeman of the world," and would "embroil us in foreign wars," and that its voting plan would enable a small group of foreign powers, Japan among them, against our will and consent to "vote us into war;" that the naval armament race between the Great Powers was in full swing and had reached to proportions so alarming that the nations had arranged the Washington Conference to discuss means to curb that race —but that Conference was still in the future when the Amendment was adopted. The people saw in the world about them

that the War to end wars had not brought World Peace. They knew that this Nation had never experienced peace, free from "regular and official" war, for as long as thirty-four consecutive years.

Another condition, which may have prompted the people's action, was the fact that while other states had paid bonuses, or had granted tax exemptions, or had given other material assistance to soldiers of the first World War, New Mexico had not done so. With choice of method by which to remedy this condition open to them the legislature, by framing the Constitutional Amendment, and the people, by adopting it, turned away from the bonus plan or similar measures and chose the tax exemption plan instead as a means of rewarding New Mexico's soldier sons. The bonus plan would have been applicable only to soldiers of the first World War or prior wars. The tax exemption plan could be made applicable to the veterans of *any* wars, whether past or in progress or of the future.

It must be presumed that the people know the meaning of the words they use in constitutional provisions, and that they use them according to their plain, natural and usual signification and import, and with due regard to the fact that they are framing a part of the permanent and fundamental law of the state, and with understanding of the general rules of construction as to provisions of Constitutions.

"A Constitution, unlike a statute, is intended not merely to meet existing conditions, but to govern the future. It has been said that the term 'constitution' implies an instrument of a permanent nature. * * * As a rule a Constitution does not deal in details, but enunciates the general principles and general directions which are intended to apply to all new facts that may come into being, and which may be brought within these general principles or directions." 6 R.C.L. 16, Sec. 3, Constitutional Law; 11 Am.Jur. 604.

"The language of a Constitution is not to be limited to the precise things considered therein, but it embraces other things as they come into being of the same general nature or class." Sturtevant Co. v. O'Brien, 186 Wis. 10, 202 N.W. 324, 327.

"Although the meaning or principles of a constitution remain fixed and unchanged from the time of its adoption, a constitution must be construed as if intended to stand for a great length of time, and it is progressive and not static. Accordingly, it should not receive too narrow or literal an interpretation, but rather the meaning given it should be applied in such a manner as to meet new or changed conditions as they arise." 16 C.J.S., Constitutional Law, § 14, at page 49. See 11 Am.Jur. 660.

"A Constitution is an instrument of a practical nature, made and adopted by the people themselves, adapted to common

wants and designed for common use. When words are used therein which have both a restricted and general meaning, the general must prevail over the restricted unless the nature of the subject-matter of the context clearly indicates that the limited sense was intended. (Citing authorities.) External aids and arbitrary rules applied to instruments of this popular character are of uncertain value and should be made use of with hesitation and circumspection. (Citing authority.) * * *. The language of a Constitution (or statute) is generally extended to include new things and new conditions of the same class as those specified which were not known or contemplated when it was adopted. (Citing authorities.)" Gaiser v. Buck, 203 Ind. 9, 179 N.E. 1, 3, 82 A.L.R. 1348.

With knowledge of these principles and of world events, the legislature and the people deliberately adopted, in 1921, a plan of reward to our soldiers: (a) Which could be made to apply to soldiers of any war, past or future; although they might have adopted a plan which could have been applicable to soldiers of past wars only; (b) by a provision framed in language which the people knew *could* apply to soldiers of future wars, although by using apt terms therein the people could have made the provision impossible of application to soldiers of any war subsequent to the adoption date; (c) by a provision framed in language which the people well knew *would* describe and apply to the soldiers of later wars, in case any should occur, *unless,* by a construction founded entirely upon consideration of the circumstances surrounding its adoption, the provision should be held to refer only to soldiers of wars previously fought; although by using apt terms therein, one word added would have been enough, the provision could have been restricted and made impossible of misinterpretation or application to soldiers of any later war, if indeed it were the people's intention, meaning and design to exclude them from the Amendment's benefits; (d) by a provision which, on its face, grants a continuing and permanent authority to the legislature, at its discretion and without limitation of time in which to exercise the same, to enact a statute, or statutes from time to time, allowing tax exemption to every honorably discharged soldier of any war in which the United States was engaged when his service was being performed.

The legislature might have delayed indefinitely to exercise the authority. Let us suppose that up to this time the legislature has never taken any action to pass a soldier's exemption law, and that such condition continues until the next legislature meets in January, 1947. And let us suppose that that legislature takes note of this constitutional grant of power, and proceeds to enact a soldier's exemption statute in the identical words of Chapter

130, Laws of 1923. Such legislation would be within and a proper exercise of the authority conferred by the Amendment. No one may doubt that such law on its face would seem to provide the exemption to the soldier of World War II. No one can point out wherein that soldier fails to fit the description and fulfill the definition of "soldier" entitled to the exemption, as expressed in the statute, as completely as does the soldier of any previous war. Yet, if the Amendment has the meaning that appellee contends for here, the statute so passed (as we have assumed) would have to be held to refer only to soldiers of wars fought before September, 1921, and to allow no benefits to soldiers of the second World War.

It is not questioned that taxation is the rule and exemption is the exception; that exemptions are never presumed and the burden is on the claimant to establish clearly his right to the exemption; that the intention to make an exemption must be expressed in clear and unambiguous terms, and that these principles of interpretation apply to statutes and to constitutional provisions. Cooley on Taxation, II, 4th Ed., 1403 et seq. But here we are concerned with an express power granted by the people to the legislature to allow tax exemptions to soldiers of a class defined. Although it relates to exemption, we are not privileged to restrict that power by reading into the provision granting it words that are not there; nor, without proof, may we confine the language used to one narrow channel of meaning, granting a limited power, when a broader meaning, granting a broader power, is implicit in the terms used unless proofs show that the narrower sense was intended. 11 Am.Jur. 668.

The language of the Amendment, Article 8, Section 5, is plain, clear and unambiguous. The ambiguity, if it may be so called, does not arise out of the language used, but out of attempt to construe it in the light of the influences and desires which some say brought about the provision's adoption and so to confine its meaning to a part of its whole scope—to restrict it to refer to a group out of a class, although the full sweep of meaning of the language may carry over to and include other groups of the same class. The class is all honorably discharged soldiers who served while the United States was engaged in war. That class may increase in membership as time flows on and wars occur. The group of that class, to which appellee would restrict the meaning of the provision's language, is made up of those soldiers who served while the United States was engaged in war prior to September 20, 1921. The attempt so to confine and interpret the meaning and to restrict the authority for the exemption can succeed only upon a finding that such

meaning and restriction was intended and understood by the people who adopted the provision. Cf. Sanchez v. Contract Trucking Co., 45 N.M. 506, 117 P.2d 815.

Can any one without conjecture say that the voters at the amendment election, in 1921, did not intend the Amendment to apply to future cases and soldiers, if, unhappily, later wars should come? Can any one without conjecture say that those voters overlooked the stern fact of possible future war and actually intended to make no provision for its soldiers in and by the Amendment they adopted? Manifestly, no one can. In framing the provision the people chose expressions that were flexible enough to include veterans of wars then in the future, as well as of wars then in the past, in the class of persons to whom the exemption might be allowed. We must assume that this was intentionally done.

Under the authority conferred by the Amendment the legislature "may exempt" from taxation property of soldiers, etc. But may exempt this when? There is no limit on the time within which that may be done. The soldier to whom the exemption runs must be one who "served" in some war in which the United States "was * * * engaged." But was engaged in such war when? Plainly that period of engagement in war has reference to the time when the soldier's qualifying service was performed. To be eligible for the exemption he must have served during a war; peacetime military service will not suffice. The qualifying service may be in "any" war.

Under the express grant of authority by the Constitution, Article 8, Section 5, the legislature may exempt from taxation, to the amount of $2000, the property of every soldier veteran of any war in which the United States was regularly and officially engaged at the time the soldier served, when from such service, fully performed and as to him necessarily in the past, the soldier stands honorably discharged at the time when he asks that the exemption be allowed to him.

The primary question for decision herein, as above stated, is answered in the affirmative.

Acting under its constitutional authority, the legislature which met next after the adoption of the Amendment passed the Soldier's Tax Exemption Law, Chapter 130, Laws of 1923. In the case of Asplund v. Alarid, 29 N.M. 129, 219 P. 786, the Supreme Court of New Mexico held that act to be constitutional. By Chapter 44, Laws of 1933, the statute was amended by adding a provision that the exemption shall not be allowed to any soldier not a resident of the state prior to January 1, 1934. Another minor change, in deference to draftsmanship, was by changing the year mentioned in the amended section from 1923 to 1933. The statute now appears as Sections

76-111 to 76-117, NMSA1941, but only two sections are of present interest here. They read:

76-111. " 'Soldier' shall mean every honorably discharged soldier, sailor, marine and army nurse resident of New Mexico and who served in the armed forces of the United States for thirty [30] days or more at any time in which the United States was officially engaged in any war, including resident unmarried widows of such soldiers, sailors and marines."

76-113. "Real and personal property of every soldier shall be exempt from taxation in the sum of two thousand dollars [$2,000]. Said exemption shall apply to all taxes levied in the year 1933 and all which may thereafter be levied, but the said exemption shall not apply to any property held in trust by any soldier, except to the extent of the legal beneficial interest of such soldier therein. In addition to said exemption said soldiers are hereby exempted from the payment of road taxes heretofore or hereafter levied. Provided, however, that such exemption from taxation shall not be permitted to be claimed by nor allowed to any soldier who has not, prior to January 1, 1934, acquired residence in the state of New Mexico."

In this case the validity of the 1933 amendment, or the statute as amended, has not been attacked, and its validity is assumed. The only question now raised is whether the statute, as written, allows the tax exemption to the soldier of World War II. This is the second question for decision in this case, as above stated. It also must be answered in the affirmative, but with qualification as herein explained due to the residence requirement of the statute.

Upon consideration of the statute, in the light of what has been determined as to the Constitutional Amendment, it is evident that the Soldier's Tax Exemption Law as written allows the tax exemption to every honorably discharged soldier of World War II, and to every honorably discharged soldier of any prior war, who served for thirty days or more in the armed forces of the United States at any time in which the Nation was engaged in such war, and who is a resident of New Mexico and had acquired his residence in this state prior to January 1, 1934.

Perhaps some soldiers who live in and entered military service from New Mexico and served during the present war will be denied benefit of the exemption because of the requirement that residence in the state must have been acquired before 1934 to be eligible for the bounty, unless a change is made in respect of such requirement. If it sees fit to do so, the legislature has authority to act again under, and within the terms of, the constitutional provision herein discussed to meet and provide for conditions which may have grown up since the exemption statute in question was passed.

The District Court erred in rendering its judgment holding that the Soldier's Tax Exemption Law, as written, is not applicable to honorably discharged soldiers of World War II, and that the County Assessor is not authorized to extend the tax exemption to any such soldier, resident of New Mexico and whose residence in this state was acquired prior to January 1, 1934, and who served in the armed forces of the United States for thirty days or more during said war.

The judgment is reversed and the cause is remanded to the District Court with instructions to set aside that judgment and to render new judgment in conformity with the conclusions of this opinion. It is so ordered.

HUDSPETH, J., and A. W. MARSHALL, District Judge, concur.

SADLER, C. J., and BICKLEY, J., having recused themselves, did not participate in this decision.

BRICE, Justice (dissenting).

The constitutional provision in question authorized the state to give annually to a veteran who has taxable property, an indefinite sum of money during his life, though he may never have risked his life in battle; but provides nothing for a poor soldier though he may have earned the Congressional Medal of Honor, or suffered wounds in the defense of his country. We have given to those that have, and have forgotten the needy and poor of our soldiers who "have not." The Federal Government has never discriminated against any of its soldiers by the selection of a favored and least needy class, for its largess. That the State has been defrauded of its taxes by relatives deeding their property to veterans is well known in this state. In a recent argument of a case in this court, it was admitted that a woman living in another state has had the benefit of this tax exemption for years, through holding the title to a valuable lot in Albuquerque in her son's name.

I hasten to say that the fact the law in question is unjust, discriminatory and has been, and is, a source of fraud against the state, does not authorize this court to limit its application upon constitutional grounds beyond the legislative intent. But it does not encourage me to strain the Constitution to the breaking point to include beneficiaries who least need the state's assistance, and who will eventually own a large part of the taxable property of a poor state.

This action was brought by the tax assessor of Bernalillo County against the State of New Mexico and its tax commission, praying for a declaratory judgment on the question of whether the soldiers, sailors, marines and army nurses of the Second World War are entitled to the tax

exemption provided for in the statutes quoted in the majority opinion.

These statutes were enacted in pursuance of Sec. 5 of Art. 8 of the State Constitution as amended in 1921, which is as follows:

"The Legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars, and the property of every honorably discharged soldier, sailor, marine and army nurse, and the widow of every such soldier, sailor, or marine, who served in the armed forces of the United States at any time during the period in which the United States was regularly and officially engaged in any war, in the sum of two thousand dollars. Provided, that in every case where exemption is claimed on the ground of the claimants having served with the military or naval forces of the United States as aforesaid, the burden of proving actual and bona fide ownership of such property, upon which exemption is claimed, shall be upon the claimant."

Section 5 originally read:

"The Legislature may exempt from taxation property of each head of a family to the amount of two hundred dollars."

Regarding liability to taxes and exemptions therefrom, the State Constitution provides:

"Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class." Art. 8, Sec. 1.

"The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the state of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation." Art. 8, Sec. 3.

Regarding these constitutional provisions, we stated in State ex rel. Attorney General v. State Tax Commission, 40 N.M. 299, 58 P.2d 1204, 1206:

"Section 1 of article 8 of the Constitution of New Mexico is as follows: 'Taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class.'

"By the terms of section 3 of article 8, certain specific property is exempt from taxation, and by section 5 thereof the Legislature is authorized to exempt from taxation certain other specific property; and no other property is or can be exempted. The Constitution, in effect, classes tangible property into that exempt from taxa-

tion, that which may be exempted, and that which must be taxed."

And in Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434, 435:

"All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution or by its authority. Secs. 1, 3, and 5 of Article VIII, N.M.Constitution; Albuquerque Alumnae Ass'n v. Tierney, 37 N.M. 156, 20 P.2d 267; State v. State Tax Commission, 40 N.M. 299, 58 P.2d 1204."

I call attention to Sec. 32 of Art. 4 of the State Constitution, which is as follows:

"No obligation or liability of any person, association or corporation, held or owned by or owing to the state, or any municipal corporation therein, shall ever be exchanged, transferred, remitted, released, postponed, or in any way diminished by the legislature, nor shall any such obligation or liability be extinguished except by the payment thereof into the proper treasury, or by proper proceeding in court." Art. 4, Sec. 32.

This court has held that taxes duly assessed and levied are debts owing to the state within the meaning of the last quoted provision of the state's Constitution. State v. Montoya, 32 N.M. 314, 255 P. 634. They have been held by this court to be constitutional insofar as they apply to soldiers, sailors, marines and army nurses of World War One. Asplund v. Alarid, Assessor, etc., 29 N.M. 129, 219 P. 786.

But for the amendment of 1921 (Sec. 5 of Art. 8 N.M.Const. supra) the exemption statutes would have been unconstitutional and therefore void. As stated in the Asplund Case, supra [29 N.M. 129, 219 P. 788]:

"The courts have had frequent occasion to construe the effect of a constitutional amendment which is inconsistent with some *remaining provision of the original Constitution*, and have uniformly, so far as our investigation discloses, given effect to the later provision as the latest expression of the sovereign will of the people, and as an implied modification pro tanto of the original provision of the Constitution in conflict therewith."

Stripped of verbiage unnecessary to construction, the words of the constitutional provision to be construed may be thus stated: "The Legislature may exempt from taxation * * * the property of every honorably discharged soldier, etc. * * * *who served* in the armed forces of the United States *at any time* during the period in which the United States *was* * * * *engaged in any war* * * * in the sum of two thousand dollars. * * *". (My emphasis.)

Do the words "every * * * soldier, sailor, marine and army nurse" as used in the amended Sec. of Art. 8, adopted in

1921, include "each soldier, etc.," of World War Two; and if those of World War Two, obviously it includes those of World War Three, believed by many thinking people to be imminent, as well as all future wars. If this is answered in the negative I need not go further, as any legislative act is void that purports to grant an exemption from the payment of taxes not specifically authorized by some provision of the state constitution. State ex rel. Attorney General v. State Tax Commission, supra.

It is said that ordinarily that which is implied in the Constitution is as effectual as that which is expressed. Pine Grove Township v. Talcott, 19 Wall. 666, 86 U.S. 666, 22 L.Ed. 227, but there is an exception to this which we recognized in Church of Holy Faith v. State Tax Commission, 39 N.M. 403, 48 P.2d 777. The question involved was the construction of Art. 8, Sec. 3, supra, as to the meaning of "All church property." We quoted with approval from the Supreme Court of the United States, in Chicago Theological Seminary v. People of State of Illinois, 188 U.S. 662, 23 S.Ct. 386, 387, 47 L.Ed. 641, affirming a decision of the Supreme Court of Illinois, in which the Supreme Court stated:

"The rule of construction followed by the supreme court of Illinois in construing this act exempting property from taxation is so well established by this and other courts as scarcely to need the citation of authorities. One or two, however, from this court may be given. Tucker v. Ferguson, 22 Wall. 527, 22 L.Ed. 805; New Orleans City & L. R. Co. v. New Orleans, 143 U.S. 192, 195, 26 L.Ed. 121, 122, 12 S.Ct. Rep. 406; Bank of Commerce v. Tennessee [to] Use of [City of] Memphis, 161 U.S. 134, 40 L.Ed. 645, 649, 16 S.Ct.Rep. 456.

"The rule is that, in claims for exemption from taxation under legislative authority, the exemption must be plainly and unmistakably granted; it cannot exist by implication only; a doubt is fatal to the claim."

It is the claim of appellee that the plain language of the constitutional provision limits the class which the legislature by its terms is authorized to exempt from taxation, to those of that class who had belonged to the armed forces of the United States prior to the adoption of the constitutional provision; that the language "who serve at any time during the period in which the United States was * * * engaged in any war," could only have reference to those who had so served at the time of the adoption of the amendment by the people.

The appellant counters with the contention that the words "any war," includes past, present and future wars; that if the people had intended such limitation the words to express the intent would have been "any past wars."

It is apparent that only a limited number of soldiers, sailors, marines and army nurs-

es (hereafter collectively referred to as soldiers) are entitled to this bounty from the state. Besides being a soldier of the United States armed forces, he must have, (1) received an honorable discharge; (2) he must have served while the nation was regularly and officially engaged in war; (3) he must be the owner of property subject to taxation; and failing these, though he had been decorated with the Congressional Medal of Honor, he has no legal claim against the state.

We come now to the question of whether the phrase "soldiers, etc.," as contemplated by the amended constitutional provision here considered, is further limited by the exclusion of all soldiers of World War Two, owning property subject to taxation, for all others are excluded by its terms.

The intent of the framers of the amendment to the Constitution in question, and the people who adopted it, of course must control. If the language used is plain and unambiguous there is no room for construction. It was written to be understood by the people whose approval was required to constitute it the state's fundamental law; and its words, phrases and sentences should be assumed to have been used in their normal and usual meaning, in the absence of strong reasons that compel a different construction. A. Magnano Co. v. Hamilton, 292 U.S. 40, 46, 54 S.Ct. 599, 78 L.Ed. 1109; Pocket Veto Case, 279 U.S. 655, 49 S.Ct. 463, 73 L.Ed. 894, 64 A.L.R. 1434.

"The first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. * * * The simplest and most obvious interpretation of a constitution, if in itself sensible, is the most likely to be that meant by the people in its adoption." Lake County v. Rollins, 130 U.S. 662, 9 S.Ct. 651, 652, 32 L.Ed. 1060.

See Wright v. United States, 302 U.S. 583, 58 S.Ct. 395, 82 L.Ed. 439.

If we are unable to arrive at a satisfactory meaning by the assumption that the words of the amendment were used in their ordinary and usual meaning, as grammatically arranged, or if there is a doubt, tax exemption being its object, then resort should next be had to its historical setting at the time of its adoption. Maxwell v. Dow, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597; United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368.

At the time the amended provision was adopted (1921) there were persons living who served as soldiers in one or more of a number of wars in which the United States had been engaged. The use of the past tense indicates a reference to soldiers who, previously to the adoption of the amendment, had served in the armed forces. The language used indicates that persons who might serve in the future were not included unless the phrase "in any war" necessarily

includes wars past and future. *Keeping in mind the rule that a claim for exemption from taxation must be plainly and unmistakably granted,* I conclude that the soldiers "who served" did not include those who might serve in the armed forces at some future time. The phrase "During the period in which the United States was * * * engaged in any war," has no reference to wars in which the United States might be engaged after the adoption of the amendment; but to any wars in which the United States was engaged before the amendment was adopted; or if it could be so construed, it was not clearly and unmistakably so phrased as that it is free from doubt.

One claiming an exemption from taxation is required to establish clearly and unmistakably that he comes within the favored class. Doubts are resolved in favor of the sovereign. There is more than a reasonable doubt that stands as a bar to appellants' claim that soldiers of World War Two are included among those entitled to this tax exemption, and this doubt I resolve in favor of the state. Church of Holy Faith v. State Tax Commission, supra; Theological Seminary v. Illinois, supra.

The appellee aptly states in his brief:

"What was obviously the common understanding of the people when they adopted the amendment? The question answers itself. They, the people, desired to reward the soldiers who had rendered services in the defense of their country in past wars, as all pertinent language of the amendment restricted its application to wars fought prior to its adoption. The intent of the people was to leave to the future the adjustment of other situations when they should arise. No one contemplated another war, and no provision was made for the soldiers of that war.

"No doubt public sentiment is on the side most favorable to extending the exemption to soldiers of World War II. But, in order to do that, the court must read into the amendment an intent on the part of the people not to be found in the language used, viz.: an intent to extend the tax exemption to all soldiers of all future wars, regardless of time and condition."

The historical setting, as well as the language used, if strictly construed in favor of the state, leads me to the conclusion that Sec. 5 of Art. 8 of the State Constitution, as amended, has no application to soldiers of World War Two, and the district court did not err in so holding. But by a three to three decision (including the learned trial judge) the opposite conclusion has been reached.

The conclusion of the district court was correct and its judgment should be affirmed.

LUJAN, J., concurs.

On Second Motion for Rehearing.

FOWLER, District Judge.

A second motion for rehearing has been presented in this case. It poses no question or proposition which has not been already submitted and disposed of in the decision or in the denial of the first motion for rehearing.

Decision in the case was filed in this court on December 5, 1946, with three members of the court concurring in and two members dissenting from the majority opinion. A motion for rehearing was duly filed. It was denied December 31, 1946, with the same three judges agreeing on and the same two judges dissenting from such denial.

At the time of the decision and the denial of the motion for rehearing, Mr. Justice HUDSPETH was a member of the court and one of the majority who joined in the opinion and in the denial of such motion. On January 1, 1947, he retired from the court and Mr. Justice McGHEE succeeded him. Thereafter the second motion for rehearing was filed. Question has been raised before the court as to the propriety of participation by Justice McGHEE in the determining of the fate of such second application for rehearing.

It will be seen that if each of the four judges who participated in the decision and the action on the first motion for rehearing, and who are yet members of the court as constituted for this case, holds to his former opinion (as each still does), and if the new member participates in the decision as to whether the second motion for rehearing shall be granted or denied, then the actual decision on the motion will be made by one who did not take part in the consideration and decision of the case upon the merits. Should a granting of rehearing result, and if thereafter the new member should join with the dissenting judges in their views, it would follow that the original decision would be withdrawn and another perhaps of opposite effect would be handed down. Such results would flow directly and merely from a change in the make up of the court and the newly acquired voting power of the erstwhile minority, and not from any change of views of the court to whom decision of the case was originally entrusted and by whom it was originally made.

The question is one of first impression in New Mexico so far as a decision is concerned. But until 1936, that is through the territorial years and about two-thirds of the period of our statehood, such question was made practically impossible because of the then existing positive rule of this court that a rehearing "will not be granted or permitted to be argued orally, unless a justice who concurred in the judgment, desires it and a majority of the court so determines." It would seem that a rule so long adhered to might be considered part of

the settled policy of the court in absence of something positive by rule or decision indicating an intention to change it. The above quoted portion of the rule was left out of the rules adopted and made effective January 1, 1936, and the rule makers revised and expanded the paragraph in which it had occurred (Sec. 1, Rule 18, Rules of Appellate Procedure, 1928) with attention evidently centered on defining the content, form and scope of the motion itself (See Sec. 1, Rule 18, Supreme Court Rules, 1936), which subject was quite tersely handled in the paragraph before its revision. The omission of said quoted statement from the rule in 1936 may be accounted for without assuming that it was thereby intended to work a radical change in a policy so long adhered to, and which was and is the rule and policy of the Supreme Court of the United States and apparently of the highest courts of most of our sister states. The fact that those present members of this court who were members of it then recall no discussion or mention of the matter or suggestion of change of policy made at that time, leaves it fair to assume that the omission of the words above quoted was not purposely designed to effect such change.

A distinction must be noted between the instance where a new judge takes part in the ordinary business, and participates in decisions in c pending but not decided before his coming on to the court, and the instance where he would assume the role of "swing man" to determine as to rehearing in a case already decided by the court, as formerly constituted, before he became a member of it. The two instances are not parallel.

We think the weight of authority, and the better reasoning, supports the conclusion that a judge who takes his place upon a court by succeeding a former judge thereof after said court, as so previously constituted, has rendered judgment and has denied rehearing in a case, cannot with propriety participate in the consideration and determination of a further motion for rehearing in such decided case.

A number of authorities to this effect are collected and cited in the cases of Cordner v. Cordner, 91 Utah 474, 64 P.2d 828, and Gas Products Co. v. Rankin, 63 Mont. 372, 207 P. 993, 24 A.L.R. 294, wherein the Supreme Courts of Utah and Montana each arrive at the same conclusions on the proposition. If it may be said that the case of *Metropolitan Water District, etc., v. Adams,* 19 Cal.2d 463, 122 P.2d 257 (a case decided upon complicated facts and impressed by practice rules of California), announces another conclusion, we are not in accord with it. (Emphasis ours)

The Cordner case, supra, on its facts is on all fours with the case before this court, except that there the first petition for rehearing was involved, and quotation from

it, including quotations therein given, is appropriate:

"After full consideration of the matter, the court as now constituted is unanimously of the opinion that the new member of the court should not participate in the consideration of the petition for a rehearing. For the new member of the court to participate would require that he consider the case on its merits and if, after considering the case, he should be compelled to disagree with the conclusion reached by a majority of the court as constituted at the time the decision was rendered, the ultimate effect would be to reverse the decision made. This question has not heretofore been squarely presented to this court. The effect of the participation of a new member of the court, where the court is evenly divided on the question after the retirement of the former member, would establish a precedent fraught with dangerous implications. * * * if we once make a precedent of this kind, it will in time lead to great abuse; and that parties who have had judgments given against them as this case was, by a divided vote, or by small majorities, will upon a change of a part of the members of the court be induced to try experiments here, for the purpose of producing a different decision of their causes by the votes of new members." People v. Mayor, etc., of City of New York, 25 Wend. (N. Y.) 252, 35 Am.Dec. 669.

"It would be mischievous in a high degree to permit the re-opening of controversies every time a new judge takes his place in the court, thereby encouraging speculation as to the probable effect of such changes upon principles previously declared and enforced in decided cases." McCutcheon, Admr. v. Homer, 43 Mich. 483, 5 N.W. 668, 38 Am.Rep. 212.

"If a re-argument were now allowed, and the former decision reversed, this result would follow, not from a conviction upon the part of the members of the court by which the case was originally heard and determined that the decision was erroneous, nor from the consideration of reasons and arguments not before advanced and considered, but solely from the change in the composition of the court. Under such circumstances, a relaxation of the ordinary rules governing applications for re-argument, would seem to be peculiarly ill-timed. It would, in our opinion, be a violation of proprieties in the administration of justice, which it is the duty of a court to maintain, and would tend to destroy that respect for, and confidence in judicial tribunals, the loss of which every good citizen would deplore." Woodbury v. Dorman, 15 Minn. 341, Gil. 274.

With the principles thus announced we agree.

[redacted] This question is one of first impression in this court and we are free

to adopt either of the views stated for such situations. The case has been decided by a majority of this court. No one of those who are now members and who participated in the decision has changed his views thereon. We are of the opinion that we should follow the rule of the courts of Utah, Montana, Michigan, New York and Minnesota for guidance of this court in such cases. The reasoning in Cordner v. Cordner, supra, satisfies us that the rule therein followed is correct. Justice McGHEE who heard the argument on the motion being not eligible to take part in a decision thereon for the reasons above stated; and as the four remaining members of this court are equally divided on the question of whether a rehearing should be granted, it follows that failing a majority in favor thereof the motion for rehearing must be overruled. Motion overruled, and it is so ordered.

BRICE and LUJAN, JJ., and A. W. MARSHALL, District Judge, concur.

177 P.2d 532

MARES v. KOOL et al.

No. 4986.

Supreme Court of New Mexico.

Nov. 22, 1946.

William T. O'Sullivan, of Albuquerque, for petitioner.

Donald B. Moses and Jethro S. Vaught, Jr., both of Albuquerque, for respondents.

HUDSPETH, Justice.

This is an original proceeding in which an alternative writ of prohibition has been issued commanding the Honorable Albert R. Kool as Judge of the Second Division of the District Court of the Second Judicial District of the State of New Mexico sitting in and for the County of Bernalillo to desist and refrain from taking any further proceeding in a certain cause appealed from the Police Judge of the City of Albuquerque and now pending in said court. It appears that petitioner was arrested by police of the City of Albuquerque on a warrant issued by E. C. Gober, Police Judge of the City of Albuquerque, on a complaint which was not signed, although the signature of "E. C. Gober" appears beneath the jurat attesting that the same was "subscribed and sworn to" before the police judge; that the petitioner deposited with the Police Department of the City of Albuquerque the sum of $105 in cash as bond for the appearance of the petitioner in police court to answer the "complaint" on the 26th of March, 1945. Petitioner alleges:

"That on said 26th day of March, 1945, upon the advice of counsel, your petitioner disregarded said 'complaint,' so-called, and said warrant of arrest, and did not appear in said Police Court for the scheduled hearing or trial of the charges contained in said 'complaint'; that by reason of such failure to appear as aforesaid, said Police Judge thereupon declared the bond aforesaid to be forfeited by your petitioner and, pursuant to the mandatory provisions of N. M. S. A., 1941 Comp., Sec. 68-317, subd. 6-c, directed that the appropriate motor vehicle authorities of the State of New Mexico be notified of the alleged 'conviction' of your petitioner of the crime of operating a motor vehicle while allegedly under the influence of liquor, as required by said statute, so that your peti-

tioner's license might be cancelled or revoked."

Petitioner immediately appealed to the district court. The appeal was brought on for hearing on the first day of June, 1946. After witnesses were sworn, counsel for petitioner moved for the quashing of the warrant and the dismissal of all the proceedings below; and the City Attorney moved for leave to amend the complaint below by inserting therein, among other things, the signatures of complaining witnesses, to which petitioner's counsel objected. The district court denied the motion of petitioner and granted the motion of the City of Albuquerque for leave to amend the complaint, and the case was set down for trial on the merits. Whereupon the petition was filed in this court, and the alternative writ of prohibition was issued. Respondent has filed a motion to dismiss.

The municipal ordinance under which the prosecution was brought was adopted by the City Commission of Albuquerque on the 14th day of September, 1937, and reads as follows:

"Section 28. Operation of Vehicles by Persons Under the Influence of Liquor.

"(a) It shall be unlawful for any person while in an intoxicated condition caused by the use of alcohol, drugs, narcotics, and any other cause whatever, to operate, or attempt to operate, a vehicle upon any street or any public way in the City of Albuquerque.

"(b) It shall be unlawful for any person to knowingly and wilfully accompany an intoxicated person who is operating a vehicle."

The penalties are a fine not to exceed $200 or by imprisonment in the city jail for a period of not less than one day nor more than ninety days, or both such fine and imprisonment in the discretion of the court.

Petitioner challenges the authority of the City of Albuquerque to adopt the above ordinance, and cites Clayton v. State, 38 Ariz. 135, 297 P. 1037, in support of his theory that where the Legislature has enacted laws fully covering the field of motor traffic, and penalized the offense of operating a vehicle while under the influence of intoxicating liquor, the city is precluded from enacting a valid ordinance punishing the identical offense, without specific legislative authority.

The Uniform Motor Vehicle Act, chapter 75 of the Session Laws of 1929, Section 2, N. M. S. A., 1941 Comp., Sec. 68-502, is as follows:

"It shall be unlawful and punishable as provided in section 60 ([N. M. S. A., 1941 Comp.,] § 68-902) of this act for any person whether licensed or not who is an habitual user of narcotic drugs or any person who is under the influence of in-

toxicating liquor or narcotic drugs to drive any vehicle upon a highway within this state."

The penalties are: Jail sentence of not less than 30 days and not more than one year, or fine of not less than $100 nor more than $1,000, or by both such fine and imprisonment, for the first offense, and a revocation of the driver's license.

The courts are divided on the question of the validity of such ordinances. See Annotations 21 A.L.R. 1186, 64 A.L.R. 993, 147 A.L.R. 522, 566, and 2 McQuillin (Revised) Sec. 683.1, p. 707.

The Supreme Court of Arizona in Clayton v. State, supra, quotes from Sec. 408 of Arizona Revised Code of 1928, language which appears in N. M. S. A., 1941 Comp. Sec. 14-1805, enacted in the year 1884, and says [38 Ariz. 135, 297 P. 1042]:

"We think the power therein conferred 'to regulate the use' of streets, alleys, etc., must be construed in connection with the limitations expressed and implied in the Highway Code. The latter has declared who may drive motor vehicles upon the highways of the state; has provided for their licensing (section 1655 et seq.), and the grounds upon which their licenses may be revoked (section 1664 et seq.), naming as one of such grounds the driving of a motor vehicle while under the influence of intoxicating liquor, and under section 1688 has made it an offense to drive while in such condition. In other words, the Legislature in the Highway Code has made all of these things, as to the qualification or fitness of motor vehicle drivers and their punishment for infractions of the regulations therein prescribed, 'state affairs,' taking from municipalities the power to legislate thereon as effectively as if directly prohibited to them.

We have additional statutes bearing upon the subject. Section 68-533, N. M. S. A., 1941 Comp., L.1929, Ch. 75, Sec. 32, reads:

"* * * Local authorities may also adopt and enforce ordinances, not in conflict with the provisions of this act, relative to the operation of vehicles upon the highways within their respective jurisdictions."

And a later act, N. M. S. A., 1941 Comp., Sec. 68-317, Chapter 110, § 17, Laws 1937, Uniform Operators' and Chauffeurs' Licenses Act, provides:

"68-317. Mandatory revocation of license by the department.—(a) The department shall forthwith revoke the license of any person upon receiving a record of the conviction of such person of any of the following crimes, whether such conviction be had under any state law or local ordinance:

"1. Manslaughter resulting from the operation of a motor vehicle.

"2. Driving a motor vehicle while under the influence of an intoxicating liquor or narcotic drug: Provided, that for the purpose of this act marijuana (Cannabis Indica) shall be classified as a narcotic drug. * * *"

In addition we have N. M. S. A., 1941 Comp., 14-2201, commonly termed the General Welfare Clause quoted in City of Clovis v. Dendy, 35 N.M. 347, 297 P. 141, 142, where we said:

"We think section 90—901, 1929 Comp., commonly termed the 'General Welfare Clause,' which gives municipal corporations power to make and publish ordinances, 'as shall seem necessary and proper to provide for the safety, preserve the health, promote the prosperity, improve the morals, order, comfort and convenience of such corporation and the inhabitants thereof,' is sufficient source of power to enact the ordinance in question. See Daniel v. City of Clovis, 34 N.M. 239, 280 P. 260; City of Roswell v. Jacoby, 21 N.M. 702, 158 P. 419. The purpose of the ordinance, being in accord with the state constitutional prohibition amendment and prohibitory statutes, would seem to leave no doubt that the ordinance was properly intended for the general welfare.

"But appellant contends that a municipality cannot by ordinance provide for the punishment of an act which constitutes a criminal offense under the general law of the state, in the absence of express legislative authority. Counsel agree that there is a conflict of judicial authority on this proposition. * * *

"Whether subsection 18 of section 90—402, 1929 Comp. (enacted in 1915), is obsolete or not by virtue of prohibition amendments to the federal and state Constitution is not necessary to decide, but at least it reflects the policy of the state as being in accord with the weight of judicial opinion. The same is true of section 12, c. 89, Laws of 1927, which was a state prohibition act, and which declared:

" 'Nothing in this Act shall be construed as limiting the power of any city, town, or village, to prohibit the manufacture, sale, transportation, or possession of intoxicating liquors for beverage purposes.'

"If this section was not a grant of power, it at least seemed to *recognize* the power of municipalities to legislate on the subject."

We adhere to the rule announced in City of Clovis v. Dendy, supra, that an ordinance may duplicate or complement statutory regulations, when authorized by the Legislature, and we conclude that the statutes quoted above authorized the City of Albuquerque to enact the ordinance in question.

Petitioner maintains that the trial court is without jurisdiction of the subject-

matter because of defects in the complaint, upon which warrant was issued, and criticizes the definition of "Jurisdiction of the Subject-Matter," appearing in 21 C.J.S., Courts, § 23, p. 36, as follows:

"Jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the proceedings in question belong; * * *."

There are many cases cited which support the text, and it is quoted in Carlson v. Bartels, 143 Neb. 680, 10 N.W.2d 671, 148 A.L.R. 658.

In Cooper v. Reynolds, 1870, 10 Wall. 308, 316, 19 L.Ed. 931, Mr. Justice Miller defined jurisdiction over the subject matter as follows:

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and it is to be sought for in the general nature of its powers, or in authority specially conferred."

In Belden v. Wilkinson et al., 44 App. Div. 420, 60 N.Y.S. 1083, 1084, the court stated:

"It must be remembered that the question of the jurisdiction of the subject-matter presented by this demurrer has nothing to do with the question whether the allegations of the complaint set out a good cause of action upon a subject of which jurisdiction exists. 'Jurisdiction of the subject-matter of an action is a power to adjudge concerning the general question involved therein, and is not dependent upon the state of facts which may appear in a particular case, or the ultimate existence of a good cause of action in the plaintiff therein.' Hunt v. Hunt, 72 N.Y. 217, [28 Am.Rep. 129]."

The following appears in Montgomery et al. v. Equitable Life Assur. Soc. of United States, 7 Cir., 83 F.2d 758, 761:

"Jurisdiction of the subject matter is the power to inquire and adjudge whether the facts of a particular case make that case a proper one for jurisdictional consideration by the judge before whom it is brought. Lange v. Benedict, 73 N.Y. 12, 29 Am.Rep. 80. Jurisdiction of the subject matter is the power to decide concerning the general question involved. It is not the exercise of that power. If a bill states a cause of action which belongs to a general class over which the court's authority extends, jurisdiction attaches and no error committed by the court in the rendition of the judgment can render the judgment void. Miller v. Rowan, 251 Ill. 344, 96 N.E. 285. It is the power to decide, regardless of whether that decision be right or wrong. Gibbs v. Andrews, 299 Ill. 510, 132 N.E. 544. Jurisdiction does not depend upon the state of facts which may appear in a particular case arising, or which is claimed to have arisen under that

general question. Hunt v. Hunt, 72 N.Y. 217, 28 Am.Rep. 129."

We hold that the district court has jurisdiction of the subject matter, and that prohibition is not available as a remedy for testing the sufficiency of the complaint. The other points relied upon by petitioner are procedural questions, and petitioner's remedy is by appeal or writ of error. State v. District Court of First Judicial District, 46 N.M. 296, 128 P.2d 454.

The motion to dismiss the petition should be sustained and the temporary writ of prohibition recalled. It is so ordered.

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

LUJAN, J., did not participate in this opinion.

177 P.2d 536

STATE ex rel. PRINCE et al. v. COORS, Judge.

No. 4994.

Supreme Court of New Mexico.

Sept. 30, 1946.

Lewis R. Sutin, of Albuquerque, for petitioners.

Dailey & Rogers, of Albuquerque, for respondent.

SADLER, Chief Justice.

The question for decision is whether, one of the two resident judges of the second judicial district having been disqualified by statutory affidavit under 1941 Comp. § 19-508 from presiding in the trial of a pending cause, the other retains jurisdiction to try the same.

The decision of the question stated may determine, incidentally, the ancillary one, whether, notwithstanding our decision in State ex rel. Tittman v. McGhee, 41 N.M. 103, 64 P.2d 825, that the statute mentioned permitted only disqualification of the presiding judge of the district in which a cause is pending, thereby limiting the parties litigant to employment of a single affidavit of disqualification as the law then stood, a second affidavit filed against the other resident judge following the statutory disqualification of his associate resident judge will serve to disqualify him.

The question above mentioned comes before us in a prohibition proceeding invoking our original jurisdiction. The petitioner, who sought and obtained an order authorizing issuance of the alternative writ of prohibition, is one of the defendants below in a forcible entry and detainer action now pending in Division No. 1 of the District Court of Bernalillo County, presided over by the respondent, Henry G. Coors, as senior judge of the second judicial district sitting for Bernalillo County. The plaintiff in said action is Mrs. E. J. Marchant and its number on the civil docket of said court is 35,610. The cause originally was pending before the Honorable Albert R. Kool, one of the resident judges of the second judicial district for Bernalillo County, who presides over Division No. 2 of said court. A statutory affidavit of disqualification was filed against him, whereupon the clerk placed the case on respondent's civil docket for trial under a standing order from respondent as senior judge of the district that upon the disqualification of either of the two resident judges of the district in a pending action or proceeding, civil or criminal, such action or proceeding should automatically be placed upon the appropriate docket of the other for trial.

Following the disqualification of Judge Kool, as aforesaid, and the placing of the cause on respondent's docket for trial, petitioner's attorney objected to him as trial judge, and was informed by respondent that he would honor a statutory affidavit of disqualification and retire from the case, if one were filed against him but that until disqualified, he would proceed to act in the case. Whereupon, having declined to invoke statutory or constitutional disqualification of the respondent below, the petitioner moved before us for an alternative writ of prohibition. This was granted and her attorneys now seek to make said writ

absolute. The foregoing facts are not in dispute.

We think the alternative writ has been improvidently issued. Ever since the addition of another resident judge to the second judicial district by 1941 Comp. § 16-302, L.1941, c. 66, uncertainty and confusion have prevailed as to the operation of statutory disqualifications under L. 1933, c. 184, 1931 Comp. § 19-508, in the light of our decision construing same in State ex rel. Tittman v. McGhee, supra, as permitting only the disqualification of the presiding judge. The effect of this holding at the time of that decision and also at the time of the later one in State ex rel. Armijo v. Lujan, 45 N.M. 103, 111 P.2d 541, following it, was to confine the parties to any action or proceeding to a single disqualification. The two decisions mentioned must now be analyzed and interpreted in the light of an important event transpiring since they were made—the addition of the second resident judge to the second judicial district by the enactment of L.1941, c. 66.

The disqualification statute employed in this case, L.1933, c. 184, 1941 Comp. § 19-508, so far as material, reads as follows:

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

The material portions of the statute adding another judge to the second judicial district in 1941 appear in the compilation of that year as sections 16-302 and 16-303, L.1941, c. 66, §§ 1 and 3, reading:

"Section 1. The number of the district judges in the Second Judicial District of the state of New Mexico is hereby increased to two [2], and for the purpose of identifying the two [2] separate judicial positions the present presiding judge of the Second Judicial District is hereby designated as the Judge of Division 1 of said district, and the additional judge to be appointed pursuant to the terms of this act is hereby designated as Judge of Division 2 of said district, and in all appointments to fill vacancies in said positions hereafter made, and in all nominations

and elections to said offices, the person appointed to or the candidate for either of said positions shall be designated as Judge of Division 1 or Division 2, of said district, as the case may be; and aside from the identification of the offices held by each of said district judges there shall be no division or separation of the work of the district clerk's office, nor in the process, pleadings, papers, records and documents of the court, all of which shall be kept, made and treated as one court with two [2] judges thereof, *each of whom shall have all of the power, jurisdiction and authority of a district judge of the state of New Mexico,* a judge of the juvenile court and a judge of the Middle Rio Grande Conservancy District Court, except in the matter of naming the employees of said district court and in the appointment of persons to positions hereinafter named." (Emphasis ours.)

"Section 3. The present qualified and acting judge of the Second Judicial District, who is hereby designated as Judge of Division 1 of said district, and his successors in office as District Judge of Division 1 of said district, shall be the senior or presiding judge of the district and shall have the power and duty to assign as between himself and the Judge of Division 2 of said district the judicial work thereof, and shall appoint the clerk of the district court and all employees and servants thereof, the county boards of education, probation officers, officers and employees of the Juvenile Detention Home, members of the board of commissioners of the Middle Rio Grande Conservancy District, and shall fill vacancies in such positions."

It is to be noted from a reading of the foregoing statute that each of the two judges of the second district "shall have all of the power, jurisdiction and authority of a district judge of the state of New Mexico," etc., except in the matter of naming employees of the district court and in the matter of certain appointments. The State Constitution, Art. 6, § 13, provides: "The district court shall have original jurisdiction in all matters and causes not excepted in this constitution, and such jurisdiction of special cases and proceedings as may be conferred by law."

There can be not the slightest doubt but that the respondent, Judge Coors, possesses exactly the same "power, jurisdiction and authority" to try this case, or any case within his district, as Judge Kool who was disqualified by affidavit from proceeding in the case. The constitution expressly so declares and such power and jurisdiction would have been necessarily implied, if the statute had been silent on the subject.

Such being the case, how then can the mere disqualification, statutory or constitutional, of one of the two resident judges within the district, operate to take from

the other a jurisdiction and power residing in him under the constitution? The answer is that it can have no such effect. The respondent was possessed of the power and authority to proceed in the trial of the case unless himself disqualified in some manner open to one or the other of the parties under the law. Since no effort was made to prove a constitutional disqualification or to disqualify the respondent under the statute, even in the face of respondent's expressed willingness to honor the statutory affidavit, we might very well stop at this point, except to direct a discharge of the alternative writ as having been improvidently issued. Nevertheless, to do so would leave undetermined a pressing inquiry, present in almost every statutory disqualification in the second district, namely, whether the statute may again be employed by either of the parties to disqualify the other resident judge; or, to state the question differently, notwithstanding the enactment of L.1941, c. 66, giving the second judicial district two judges, are the parties to an action or proceeding still confined to the single affidavit of disqualification necessarily the limit under the holding in State ex rel. Tittman v. McGhee, supra, when there was but a single presiding or resident judge in each district? To attempt to avoid or postpone a decision would avail but little since in this very case the filing of a second affidavit, following the handing down of this opinion, would put the case right back with us for an answer to this incidental question. All parties have sought that answer now while we are determining the main question already resolved. Hence, we have decided to give it.

A careful study of State ex rel. Tittman v. McGhee convinces that the gist of its holding is that only the "presiding" judge of a district may be disqualified by the statutory affidavit. When the court used the term "presiding" it used it as the equivalent and interchangeable with the word "resident." This is made manifest by the following language from the opinion in that case, to-wit:

"The question presented here is whether this statute authorizes litigants to disqualify more than one judge, or only the resident district judge. * * *

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

The language in the opinion, "the question presented here is whether the statute authorizes litigants to disqualify more than one judge," is to be viewed and appraised in the light of the fact that any second affidavit filed would be a challenge to a judge other than the resident judge. The

denial of force and effect to any such affidavit arises, under the rationale of the decision, not so much from the fact that it is the "second" affidavit, as because necessarily it is directed against another than the "presiding" or "resident" district judge.

The later case of State ex rel. Armijo v. Lujan, 45 N.M. 103, 111 P.2d 541, which follows State ex rel. Tittman v. McGhee, supra, in confining application of the statute to the "resident" judge, also is relied upon by the relator. The only distinction between the two cases lies in the fact that in the McGhee case, the second judge whose disqualification was sought had been named by the Chief Justice after failure of opposing counsel to agree on another judge, whereas in the Lujan case, later, the judge against whom the first affidavit was filed had been called in from another district by the resident judge upon voluntarily recusing himself.

The Lujan case but emphasizes what we already have said, namely, that the court in employing the term "presiding" judge uses it synonymously with the term "resident" judge: Note our appraisal of the McGhee case as holding that "the disqualifying act above referred to could not be exhausted upon any and all of the district judges but was to be limited in its operation to the *resident* or *presiding* judge. * * *. We there (in the McGhee case) definitely and expressly limited the application of the statute to the *resident,* or *presiding* judge of the district." (Emphasis ours.)

Seeking a reason in the Lujan case for the legislative intent read from the statute in the McGhee case confining its operation to the resident judge, we said [45 N.M. 103, 111 P.2d 543]: "A resident judge it is suggested, is much more likely, although the occasions may be rare, to fall under the spell of partiality because of acquaintanceship or close association with persons and incidents and thus be disqualified to hear cases arising in his own district, when the same situation would not likely present itself in the case of an outside judge designated to go into another community than his own. Some such consideration might have moved the legislature in this instance."

Moreover, both in the McGhee case and in the Lujan case as well, the court was aided in coming to the conclusion reached by the circumstance that, if relator's contention should be sustained, by employing affidavits made to order, a party could disqualify, successively, every district judge in the state.

Now, neither of the considerations mentioned argues in favor of a holding that the parties are limited to a single affidavit in districts where there are two resident judges. Indeed, if as suggested in State ex rel. Armijo v. Lujan, supra, the legislature may have been influenced in authoriz-

ing employment of the affidavit against the resident judge only because of his greater susceptibility to local influences and prejudices than the judge from some other district, then this consideration would argue for the right to employ the statute against the second resident judge as well as the first one.

Neither does the fact that all resident judges could be disqualified, successively, by an abuse of the statute invite the special hardship and inconvenience visualized in the McGhee case from a disqualification of every district judge in the state. There is but one district in the state having more than one resident judge and that is the second district which has but two. In the normal development of the commercial and industrial life of the state, it will be many years before the number of resident judges in a given district could make the operation of the statute a hardship or inconvenience through an abuse of its privilege. When, if ever, it reaches that stage, we apprehend the legislature would not be slow to remedy the situation by an appropriate amendment of the statute. We do not feel disposed to supply the amendment in anticipation of the abuse.

It follows as our conclusion from what has been said that the respondent as one of the two resident judges of the second judicial district was not deprived of jurisdiction to try the cause out of which this prohibition proceeding arose by the statutory disqualification of his associate resident judge. We further conclude, however, that as a resident judge respondent is as subject to disqualification under the statute after, as well as before, it has been invoked against his associate.

The alternative writ outstanding against respondent having been improvidently issued will be discharged.

It is so ordered.

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

BICKLEY, Justice (concurring specially).

I concur in the foregoing opinion except I do not subscribe to a concluding statement that "we further conclude, however, that as a resident judge respondent is as subject to disqualification under the statute after, as well as before, it has been invoked against his associate."

First, I think this declaration is obiter merely and should not be indulged, and secondly, I think it is unsound. As construed in the main opinion we will have resident judg*es* subject to disqualification in the second judicial district, whereas under our previous decisions the disqualification statute may be only *once* invoked. The above quoted interpretation of the statute will create such an inequality in its operation over the state as will perhaps subject it to constitutional objections.

178 P.2d 400

GIBBONS v. TOWN OF HOT SPRINGS.

No. 4964.

Supreme Court of New Mexico.
March 8, 1947.

Douglass K. Fitzhugh, of Hot Springs, for appellant.

Nils T. Kjellstrom, of Hot Springs, for appellee.

McGHEE, Justice.

Appellant sought a decree of specific performance of what he claims to be a contract entered into with appellee on August 1, 1938, following the passage of Ordinance No. 60 of Town of Hot Springs, and damages in the sum of $12,000.00 for failure of the town to enforce the ordinance by prosecution and the levy of assessments, resulting in loss of fees and the garbage which he used as hog feed. We will hereafter refer to the parties as they appeared in the District Court.

The ordinance created "Garbage Disposal District No. 1" which included practically all of the town; classified "rubbish" and "garbage"; provided for the kind of rubbish and garbage cans to be used; that the collector should use a closed truck; the fees to be charged; made it unlawful for any person other than the inspector or party holding the contract to haul or dispose of rubbish or garbage; for the appointment of a Town Garbage and Rubbish Collector, and that he should receive the fees fixed, but that he might at his option enter into contracts with persons having garbage at different rates. It also provided for an occupation tax and bond, and provided for a seventeen year term for the collector. It also provided for the levy of assessments against the property of de-

linquents. Provision is also made for a Sanitary Inspector, and his duties are defined.

On the same day the town and plaintiff signed the following instrument:

"This Agreement, made and entered into this the 1st day of August, 1938, by and between the Town of Hot Springs, a municipal corporation, in the County of Sierra, State of New Mexico, as party of the first part, and Walton Gibbons, of the aforesaid County and State, also a resident of Hot Springs, the party of the second part.

"Witnesseth, That the party of the first part has this day appointed Walton Gibbons as Garbage and Rubbish Collector for the Town of Hot Springs, and that his duties are to collect rubbish and garbage from all of District one of the said Town and to haul the same to a dumping ground outside the municipal corporation limits, which has been agreed upon by both parties.

"That the party of the second part has been granted this contract for the purpose of sanitary conditions which are set out in Ordinance No-60 of the Town of Hot Springs. The contract for removing garbage and rubbish from the Town is of the term of 17 (seventeen) years beginning August 1, 1938 and terminating August 1, 1955.

"A good and sufficient bond given by the party of the second part to the party of the first part for the faithful performance of his duties as such collector shall be and is in the amount of seventeen hundred dollars ($1700.00), and that the party of the second part shall be the Official Garbage Collector for District No-1, and as long as he performs his duties as set out by Ordinance No-60 that no other Collector shall be appointed by the Mayor and Board of Trustees to perform the aforesaid duties, in District No-1.

"In Witness Whereof, the party of the first part and the party of the second part do hereunto set their names, and the day and year first being written. Executed in duplicate."

The plaintiff contends that he has a seventeen year contract with the defendant, while the defendant claims that he is only an appointee and may be removed by it. So far as the results of this appeal are concerned it is immaterial which is correct on this point. The trial court made the following findings of fact, among others.

"13. In the latter part of 1940 and during 1941, 1942, 1943 and 1944, many complaints were lodged by citizens with the Town that plaintiff failed and neglected to haul the garbage and rubbish from restaurants and business places and other points of collection daily or regularly; and the court finds that plaintiff did so neglect and fail regularly to collect and haul the accumulated rubbish and garbage, as provided in the ordinance; that in some instances

such neglect and failure of plaintiff to collect and haul away such rubbish and garbage continued for days and even weeks, until the accumulated waste became a nuisance, and that for protection and purposes of safety, health and sanitation, citizens were obliged to haul away such waste or arrange for its hauling by third persons.

"14. During the past three years, and especially 1943 and 1944, because of war conditions and restrictions, the inhabitants have not been able to obtain and provide containers for the keeping of garbage, etc. of the type and kinds specified in the ordinance, and so they have resorted to the use of other kinds of receptacles. The plaintiff has failed and refused to collect, haul and dispose of the garbage when and where the same was not gathered and placed in regulation containers as specified in the ordinance. During the same period, because of war conditions and restriction, plaintiff has not been able to provide and use a conveyance or vehicle, or body therefor, constructed as prescribed by the ordinance for the hauling of the garbage, and he has been obliged to resort to the hauling of garbage in cans etc. in open bodied trucks."

These findings were not challenged by plaintiff in his brief or in the oral argument, and we accept them.

It is a fundamental rule of specific performance that the complainant coming into equity for specific performance must show not only that he has a valid, legally enforceable contract, but also that he has complied with its terms by performing or offering to perform, on his part, the acts which formed the consideration of the undertaking on the part of the defendant. 49 A.J., § 40, Spec.Perf. p. 53.

The above findings effectively dispose of plaintiff's claim for damages, for one so flagrantly in default in the performance of his duties and obligations in handling the garbage of the town may not recover.

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

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

178 P.2d 401

STATE v. BARKER et al.

No. 4996.

Supreme Court of New Mexico.
March 19, 1947.

Charles B. Barker, Henry J. Hughes and M. W. Hamilton, all of Santa Fe, for appellants.

C. C. McCulloh, Atty. Gen., Wm. R. Federici, Asst. Atty. Gen., and David W. Carmody, Dist. Atty., of Santa Fe, for appellee.

LUJAN, Justice.

This is an appeal from a judgment on a bond given to secure a recount of votes in the 1944 general election.

The defendant, Barker, and David W. Carmody were rival candidates for the office of District Attorney of the First Judicial District. Barker filed an application with the State Canvassing Board for a recount of the votes in 20 precincts or election districts in Rio Arriba County under the provisions of 56-614, 1941 Comp., and gave a bond for $1,000 under the provisions of Sec. 56-615, with his codefendants as sureties, and made it payable to the State of New Mexico. Upon his application to the State Canvassing Board it issued summons, as asked, and Barker had service thereof made and recounts were had in all precincts except one where the election officials claimed there were ballots in the box that had not been cast. The recounts showed errors had been made in some boxes and in the remainder there were no changes. The errors were not sufficient to change the result. Barker failed to pay the sheriff or any of the election officials and the Attorney General brought suit on the bond in the name of the

State to recover the mileage and fees claimed due.

The first point urged by the defendants is that the state is not a proper party and has no interest in this action. The statute is silent as to who shall be the obligee and the defendants voluntarily made it to the State of New Mexico.

Section 19-101(rule 17 (a) of our Rules of Civil Procedure reads: "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 use or benefit of another shall be brought in the name of the state."

In Reagan v. Dougherty, 40 N.M. 439, 62 P.2d 810, we stated the test to determine whether one is a real party in interest is: (1) whether he is the owner of the right to be enforced; or (2) whether he is in position to release and discharge the defendant from the liability upon which the action is grounded. In this case we cited Whiteman v. Taber, 205 Ala. 319, 87 So. 353, as our authority on the first proposition, and Broderick v. Puget Sound Traction, Light & Power Co., 86 Wash. 399, 150 P. 616, for the second. The errors of the election officials were not sufficient to change the result of the election, so there is no liability on the part of the State. The bond was given to secure the fees of the election officials and the sheriff in the event the errors were not sufficient to change the result.

Minnesota has a similar statute. There if one desires to file a contest and secure a recount he must give a bond in the sum of $250, conditioned that he will pay the fees and expenses of the election inspectors who are also the custodians of the ballots. The statute, like ours, is silent as to who shall be the obligee. An unsuccessful candidate initiated contest, asked for a recount, and gave a bond payable to the contestee, one Chisholm, and secured a recount.

The contestant was unsuccessful and the inspectors, not parties to the bond, joined in an action thereon, and answering the defense of the obligors that only the party named could maintain the action, the Minnesota Supreme Court in Moede v. Haines et al., 66 Minn. 419, 69 N.W. 216, 217, said: "The statute, it will be seen, fails to provide for an obligee in the bond, and in such a case it might be held that an obligee is unnecessary, or that the state is the proper party to whom the obligation is to be made payable. * * * and the only point made by respondents as to this is that no one but Chisholm can maintain an action

on the bond. We do not agree with counsel on this. The bond provided by the terms of section 193 is wholly statutory, and is given for the protection and benefit of the persons to whom the examination and inspection of the ballots is referred. No one else is interested, and, as the real parties in interest, the inspectors should have the right to maintain the action, precisely as if no obligee had been named, or the obligation had run to the state."

The case was dismissed because of misjoinder of parties plaintiff. Action was then filed by one of the inspectors on the bond and judgment in his favor was affirmed in Nehring v. Haines et al., 70 Minn. 233, 72 N.W. 1061.

Conway v. Carter, 11 N.M. 419, 68 P. 941, 943, was an action by a minor beneficiary on an administrator's bond in which the Territory of New Mexico was the obligee. The court in answer to the contention that it was necessary to join the Territory as a party plaintiff said: "It (the Territory) is at most only a nominal party, to whom the bond is given as a mere matter of convenience, and the party entitled to recover the proceeds of a judgment upon an administrator's bond is the real party in interest."

And it was further said in this case: "There is no statutory provision prescribing the form of an action on an administrator's bond, and specially authorizing the territory to bring the suit; and, in the absence of such a provision of law, we are of the opinion that the beneficiary under such bond is the real party in interest, who under subsection 2 of the Code, is required to bring the suit in his own name. Amason v. Nash, 24 Ala. 279."

The state is not the owner of the right sought to be enforced. Is the state in position to release and discharge the defendant from liability to the sheriff for his mileage, and to the election officials for their per diem and mileage?

The plaintiff in Broderick v. Puget Sound, etc., supra [86 Wash. 399, 150 P. 618] was the owner of an automobile which she stored with a garage. On telephone call from her the garage would deliver the car to her home and later return it to the garage. While on one of these trips it collided with a freight car belonging to the defendant and was damaged. The garage owner repaired the automobile.

The plaintiff brought suit to recover for the damages to her automobile resulting from the collision. The court held she was not the real party in interest, saying: "The question presented is finally reduced to whether a judgment obtained by the appellant in this action would operate as a complete defense to an action prosecuted by another person. The appellant, not being the trustee of an express trust, if she should recover a judgment, would hold the

amount recovered under a trust arising by implication of law. In such a case, the rule supported by the authorities seems to be that if she should recover a judgment, and fail to account therefor to the person entitled thereto, her judgment would not operate as a bar to the right of any other person who had become subrogated to maintain a subsequent action. Hart v. Western R. Corporation, 13 Metc. (Mass.) 99, 46 Am.Dec. 719; Monmouth County Mut. Fire Ins. Co. v. Hutchinson, 21 N.J.Eq. 107; Swarthout v. Chicago & N. W. Ry. Co., 49 Wis. 625, 6 N.W. 314; Pratt v. Radford, supra, [52 Wis. 114, 8 N.W. 606]."

So in this case, the state not being the trustee of an express trust and the mere nominal obligee of the bond if it secured a judgment, the amount recovered under a trust arising by implication of law, such judgment would not be a bar to an action by the sheriff or one of the election officials.

The state may not maintain this action. Our determination of the first point makes a decision on the remaining points unnecessary.

The judgment appealed from will be reversed and the cause remanded to the district court with instructions to vacate its judgment and dismiss the cause, and it is so ordered.

BRICE, C. J., and McGHEE, J., concur.

SADLER, J., did not participate.

178 P.2d 578

HARDEN et al. v. ST. PAUL FIRE & MARINE INS. CO.

No. 4973.

Supreme Court of New Mexico.

March 20, 1947.

W. A. Keleher, Theo. E. Jones and E. L. Swope, all of Albuquerque, and Filo Sedillo, of Belen, for appellant.

Iden & Johnson of Albuquerque, for appellees.

McGHEE, Justice.

This is an appeal from a judgment for the loss by fire of a carload of nails claimed to have been covered by an oral contract of insurance. We will refer to the parties as they appeared in the trial court.

The plaintiffs are engaged in growing, marketing and shipping vegetables and other crops from the Bluewater-Toltec Irrigation District near Grants, New Mexico, and as a part of the business own and operate a parking shed and a shook or box factory where lumber is processed for making crates and containers, and where crates are assembled for holding vegetables, fruits, etc. In originating and developing the business they purchased some property from the Geo. E. Breece Lumber Company near Grants on which were located many buildings that were to be repaired and remodeled for use in their business, including materials for making packing crates. They desired complete insurance on their buildings, machinery and supplies, as well as all of their operations, and tendered such business to Mr. Cy Rouse, the sole local insurance agent, newspaper publisher, editor, and as one of plaintiffs' witnesses appraised him, "the general man about town." Not only was he the sole insurance agent of Grants but the defendant was his only insurance company. As he was new in the business, he felt he should not act without advice from the state agent of the defendant, P. H. Ware.

The plaintiff Church, Rouse and Ware met in Grants and inspection was made of the scattered buildings, machinery, and some supplies. Church informed them of the desire of plaintiffs to have comprehensive coverage on all of their property and operations, but was advised the defendant did not issue such policies, but it would be glad to have their fire insurance business. Valuations on certain of the buildings and machinery were agreed upon, and it was agreed by Rouse and Ware that the insurance was immediately effective, with the policy to be later issued. It is agreed that as other buildings were completed "riders" would be issued covering them and their contents and attached to the master policy.

The only loss by fire was the carload of nails. The defendant pleaded the complaint did not state a cause of action, denied

the allegations of the complaint, claimed its agents acted without authority, urged the matters set out in the complaint were within the Statute of Frauds, and in any event, it was only liable for three-fourths of the value of the nails.

In this court it has abandoned all defenses except that the evidence is insufficient to establish a valid oral contract of insurance on the nails, and that if liable then it cannot be held for more than three-fourths value instead of the full value as allowed by the jury.

The parties agree that the necessary elements to effectuate an oral contract of insurance are: (1) the subject-matter; (2) the risk insured against; (3) the duration of the risk; (4) the amount of insurance; (5) the rate of premium paid or agreed to be paid; and (6) the identity of the parties.

The trial judge correctly instructed the jury that each of these matters had to be established by a preponderance of the evidence in order for the plaintiff to recover. The record shows Church told Rouse and Ware that he was going to establish the shook or box factory, that he would be getting machinery, material and supplies from all over the country, wherever it could be found, and that shipments would be coming in from time to time over the Santa Fe Railway lines and that it would be temporarily stored in whatever buildings were available, and that he wanted it completely covered by insurance on arrival and that his representatives would give the values on inquiry; and that Rouse in the presence of Ware fully agreed to this arrangement and promised that he would keep in touch with the local agent of the railway and immediately on arrival each shipment would be covered by insurance for full value, and when permanently stored a rider would be issued to be attached to the master policy. It was further agreed when repairs and construction were finished a new policy on the buildings and their contents would issue in place of the temporary policy. He is fully corroborated by Rouse except Rouse said he thought the supplies or materials for the manufacture of crates would be insured for only three-fourths value.

The testimony of Ware corroborates that of Church and Rouse in part. Rouse says he overlooked, or did not know of the arrival of the carload of nails by rail, which was temporarily stored in a building on which a written rider had not been issued on its contents.

The defendant strongly urges upon us that nails could not have been within the contemplation of the parties even if the other necessary elements were established.

To this we point to the evidence that they were going to make wooden crates in which to pack and ship fruits and vegetables. It has been a long time since the

basket makers left New Mexico, and we dare say nails have been the medium of holding wooden crates together in this state for sufficient time for such usage to become a matter of general knowledge and were included as materials or supplies. The writer used them in an adjoining state for that identical purpose 40 years ago.

The rate or premium to be paid did not appear to raise a serious question in the minds of the agents of the company who were witnesses. On cross-examination by the defendant's attorney, Rouse testified:

"Q. Was anything said about the premium? A. No. He (referring to Church) indicated they were willing to pay any premium charged."

Ware was called as a witness by the defendant and after saying he considered certain of the property insured, testified as follows on direct examination:

"Q. Did you discuss what amount the premium would be? A. We did not compute the premium or discuss that because we discussed the amount of insurance and the rate of insurance would be computed on that.

"Q. You didn't know at that time what the premium amounted to in dollars and cents, did you? A. Not actual dollars and cents, didn't have my rate book.

"Q. And you know that Mr. Church didn't know either, don't you? A. Well, he did know approximately because the rate is the same as other contents he was carrying insurance upon."

Incidentally, the record shows the defendant collected some $2,250 or $2,500 in premiums on the policy and riders actually issued following these conversations —quite a nice line of business for a small town like Grants and an agent just starting in the insurance business, and it is small wonder Rouse was willing to assume the burden of keeping in touch with the railroad agent and was willing to give coverage immediately on delivery by the railway company.

A careful examination of the entire record satisfies us the evidence is sufficient to sustain the verdict.

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

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

178 P.2d 580

NEW MEXICO TRANSP. CO., Inc., et al. v. STATE CORPORATION COMMISSION et al.

No. 4987.

Supreme Court of New Mexico.
Feb. 10, 1947.
Rehearing Denied April 9, 1947.

Atwood & Malone, of Roswell, and R. E. Kidwell, of Dallas, Tex., for appellants.

C. C. McCulloh, Atty. Gen., Robert W. Ward, Asst. Atty. Gen., and G. H. Little, of Amarillo, Tex., for appellees.

McGHEE, Justice.

The State Corporation Commission issued certificates of necessity and convenience to Jim Ferguson to operate two bus lines between Hobbs and Roswell, one via Lovington and Artesia and the other via Tatum. Appellants protested the granting of the permits where Ferguson proposed to operate over the parts of the routes where they operated. None of the protests covered the route between Lovington and Artesia.

The protestants then filed suit to enjoin the issuance of the certificates under the provisions of Sec. 68-1363, 1941 N.M.S.A., on the grounds the action of the Commission was unlawful and unreasonable. The District Court declined to issue the injunction.

The Court may enjoin the issuance of such a certificate only when the record shows the order of the Commission was unlawful or unreasonable. We con-

strued this statute in Harris v. State Corporation Commission, 46 N.M. 352, 129 P. 2d 323, and are satisfied with the statements there made. Following the rules there announced, we are unable to say from an examination of the record that the order of the Commission granting these certificates was either unlawful or unreasonable. It is not sufficient that we might have reached a different conclusion.

The judgment of the District Court will be affirmed, and it is so ordered.

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

178 P.2d 581

FIRST NAT. BANK IN ALBUQUERQUE v. TANNEY.

No. 4971.

Supreme Court of New Mexico.
March 20, 1947.

Murphy & Nohl, of Albuquerque, for appellant.

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

LUJAN, Justice.

The appellant, defendant below, seeks the reversal of a judgment finding him guilty of unlawful detainer, claiming the evidence was insufficient to support the findings of fact made by the trial court. The findings were that the appellee was the owner of an office building in which the appellant was a tenant from month to month, and that he refused to vacate the premises after a statutory notice to do so.

Defendant's assignments of error are:

"1. That the court erred in overruling defendant's and appellant's motion for judgment at the conclusion of plaintiff's case, in that plaintiff failed to allege in his complaint and failed to prove that it was at any time lawfully entitled to possession of the premises.

"2. That the court erred in denying defendant's and appellant's motion for judgment in that plaintiff filed its complaint on one theory of law and fails to involve facts sustaining that theory.

"3. That the court erred in concluding as a matter of law, that the defendant was guilty of unlawful detainer.

"4. The court erred in overruling defendant's motion to dismiss.

"5. The court erred in concluding as a matter of law, that the tenant was a tenant from month to month.

"6. The court erred in failing to find that defendant was holding over after a lease for a term of years.

"7. The court erred in finding that defendant abandoned his lease."

It appears from the record that upon the overruling of his motion he pleaded to the merits, and issue being joined thereon, the cause was tried by the court without a jury. It was his option to have stood upon his motion, but this he declined to do, and by pleading to the merits and allowing evidence to be introduced on the point complained of, the proof offered supplied the want of accuracy of allegation, which was admitted without objection, thus he must be deemed to have abandoned the same. Springer v. Wasson, 25 N.M. 379,

183 P. 398; Thayer v. D. & R. G. R. Co., 21 N.M. 330, 154 P. 691; Pople v. Orekar, 22 N.M. 307, 161 P. 1110.

The defendant next urges that he is holding over under the original lease and therefore he is a tenant from year to year.

It is essential for the formation of lease that all the essentials of a contract must be present. The very first requisite is that there must be a meeting of the minds—an offer, and an acceptance of the terms of that offer. That there was no such agreement here is shown by the testimony of the defendant, who seeks to uphold his tenancy under the original lease. Under the circumstances it is impossible to find the elements of a valid contract under which he claims to be holding over, and it was not error to permit the restitution and damages allowed the plaintiff by the court.

Here all the elements of a valid agreement are lacking, common parties, a subject matter particularly described, a definite term, its beginning and ending fixed and the amount of rent with terms of payment.

It but remains to determine what relation, if any, existed between the parties to this action. The law upon this point is succinctly stated in 35 C.J. beginning on page 1105. By paying a monthly rent defendant, then, became a tenant from month to month. 35 C.J. 1106. This is the only legal construction which the facts will permit. See Hand v. Knaul, 116 Misc. 714, 191 N.Y.S. 667; Schloss v. Huber, 21 Misc. 28, 46 N.Y.S. 921.

Plaintiff invokes the provisions of Section No. 38-919, 1941 Comp., as a basis for the request that we remand the cause to the district court with instructions to enter judgment against defendant, not alone for the original amount of the judgment in its favor but also for double the actual rental value of the premises as found by the court from the date of rendition of judgment in the district court to the time of delivery of possession to plaintiff. Our Supreme Court Rule 1941 Comp., Section 19-201, rule 17, subd. 5, authorizes the remand of the cause with direction to the district court to enter judgment against defendant and the sureties on his supersedeas bond for the amount of the judgment affirmed against him. This Rule is also cited by defendant. We have no record of any supersedeas bond given in connection with this appeal. If one was given in the district court and not shown in the transcript, the appellee will have his remedy on it by suit as the statute relied upon provides.

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

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

178 P.2d 582

STATE v. BREM.

No. 4980.

Supreme Court of New Mexico.
March 20, 1947.

Lee R. York, of Hobbs, and Murray J. Howze, of Monahans, Tex., for appellant.

C. C. McCulloh, Atty. Gen., and Robert V. Wollard, Asst. Atty. Gen., for appellee.

LUJAN, Justice.

Appellant appeals from a judgment pronounced following his conviction of the crime of bigamy.

The facts are not in dispute. The appellant married Yondola Mae Idom at a time when he was already married to one Audrey May Segler. The marriage to Yondola took place on January 24, 1944, at Crane, Texas, by virtue of a marriage license issued by the County Clerk of that County. On July 3, 1944, the first wife, Audrey, was granted an absolute divorce from appellant by the 112th District Court of Upton County, Texas. Thereafter, appellant continued to live with Yondola in the State of Texas, until November, 1945, when he moved to Hobbs, New Mexico, and continued to live with her there until December 25, 1945, when they separated. On January 19, 1946, some 25 days after his separation from Yondola, appellant, under the name of W. C. Brown, procured a

marriage license in Lovington, New Mexico, went to Abilene, Texas, and was there married to one Nancy Eunice Lovett, under said license, by a minister of the Church of Christ. They lived together in Texas as man and wife for a few days, then moved back to New Mexico, where they continued to live together. When the New Mexico marriage license used in the State of Texas was returned to the County Clerk in New Mexico for recordation, she discovered the ceremony had been performed by a minister beyond the State. She thereupon informed appellant it would be necessary for him to secure a new license. This the appellant did, securing another license in Lea County and on the same day participated in another marriage ceremony to Nancy performed by a Methodist minister at Lovington, New Mexico. It is by reason of this last purported marriage that the commission of bigamy is charged in this case.

We take the case as it comes to us. The defendant was charged with committing the crime of bigamy on February 4, 1946, in Lea County, New Mexico, "in that he married Nancy Eunice Lovett, being at such time lawfully married to Yondola Mae Idom Brem."

Everyone at the trial assumed the lawfulness of the marriage of defendant to Yondola (Yolanda) Mae Idom Brem, although a close scrutiny of the record discloses that the lawfulness of this union rests upon a common law marriage valid in Texas where it was consummated.

Upon the same examination of the record it is disclosed that defendant and Nancy (Nancie) Eunice Lovett were married in Abilene, Texas, on January 19, 1946, by a minister of the Church of Christ, the marriage license used on that occasion having been obtained in Lovington, Lea County, New Mexico.

It is the settled law in Texas that the requirement of a marriage license is directory merely, and that a ceremonial marriage otherwise regular is valid. Furthermore common law marriages are recognized in Texas as valid. The record shows that after the ceremonial marriage of defendant to Nancy Eunice Lovett in Abilene, Texas, they lived together as husband and wife in Texas and published the fact that they were married there. So it appears that but for the impediment of such marriage, to-wit, the existing common law wife of the defendant (Yolanda Mae Idom Brem), the marriage of defendant to Nancy Eunice Lovett would have been a valid marriage, where consummated (in Texas) and consequently good in New Mexico. Hence, the subsequent celebration in Lea County, New Mexico, of a second ceremonial marriage of defendant to Nancy Eunice Lovett did not add to or detract from their status of being married to each other. Thus it is that appellant is right in his contention, adequately presented to the trial

court, that if he had committed bigamy it had been committed in Texas, and hence he could not be tried for such offense in Lea County, New Mexico.

In view of the conclusion we reach on the question argued under point 2, it becomes unnecessary to notice other assignments. The trial court should have sustained appellant's motion for an instructed verdict at the conclusion of all of the evidence. For the reasons herein stated, the judgment will be reversed and the cause remanded with instructions to set aside the judgment and discharge appellant.

It is so ordered.

BRICE, C. J., and SADLER, J., concur. McGHEE, J., did not participate.

178 P.2d 584

STATE v. GODWIN.

No. 4961.

Supreme Court of New Mexico.
March 20, 1947.

Claud S. Mann and Harold O. Waggoner, both of Albuquerque, for appellant.

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

SADLER, Justice.

The defendant appeals from a sentence of life imprisonment imposed by the district court of Valencia County following conviction before a jury of having on July 10, 1945, unlawfully and carnally known and abused Nan Bost, a female child three years and one month old in violation of 1941 Comp., § 41-3902.

On the date mentioned, at about 7:30 p. m., Nan Bost, three years and one month

old fled screaming from the rear door of the apartment of Mr. and Mrs. Robert B. Adams in Belen, New Mexico. She crossed a small court yard and went to the rear door of the apartment in which she lived with her father and mother, Mr. and Mrs. George V. Bost of Belen. The child's mother, attracted by her screams, went to the back door to meet and admit her. Immediately after getting inside, the child exclaimed: "That man hurt me" and when questioned by the mother informed her that it was a man over at the Adams' apartment wearing a white hat. Her condition was described by the mother as follows: "She was torn up physically, her hair was mussed, her clothes were off partially, both her legs were through one leg of her sun suit, she was holding the bib of her play suit."

The child was found to be bleeding at the vagina and there was blood on her lower stomach and legs. A medical examination conducted by two physicians within an hour following the injuries suffered disclosed that the child's labia was bruised and bleeding and that the hymen was ruptured.

As soon as Mrs. Bost had examined her daughter she crossed the small court yard and went to the rear door of the Adams' apartment. Receiving no response to a knock, nor to a call, and the rear door being open, she stepped from the outside through the screen door into the kitchen and called again but still got no response. The apartment seemed to be vacant. She then called a woman living nearby to come to her apartment. Together they took the child to the office of the physicians.

Less than an hour and a half prior to the time the child, Nan, ran screaming from the Adams' apartment in the condition described, the defendant had been left there in an apparent drunken stupor in a chair in the living room by Robert B. Adams, tenant of the apartment and Ray Borland. The defendant, Adams and Borland were all fellow employees of the Santa Fe Railroad Company which maintains a division point at Belen. The three had come to the apartment following a meeting on the street after visiting two bars and drinking for a time in each. The defendant already was in a drunken condition when Adams first met him on the street about midafternoon of that day. While in the latter of the two bars visited some woman came in and seated herself by defendant and remained between 40 and 45 minutes during which time he and she sat with their arms around each other, "loving each other, loving", as a witness described their actions. When she left the defendant inquired her address and on being told left his companions and was gone about 30 minutes.

It was while proceeding from the last bar visited by the trio to the Adams' apartment and just before arriving there that the group met George Bost, accompanied by his little daughter, Nan, en route to a grocery store to make a purchase. This was about

6:30 in the afternoon. Following the usual greetings, the defendant inquired of Bost if the child was his daughter and upon being told that she was responded that he didn't know Bost had a daughter.

It was Adams' intention, upon leaving the first bar visited with defendant to take him to the Kuhn hotel where defendant lived but he refused to give them his room number. Accordingly, after the trio visited the second bar they took him to the Adams' apartment. Adams had just quit work when he met defendant, so he conceived the idea of going home to wash up when all three would go up town to eat at some restaurant. However, when they attempted to arouse defendant from a drunken stupor into which he had fallen while seated in the chair in the living room of the apartment, he gave no reaction, even to an application of face towels dipped in ice water. The other two then proceeded up town without him.

They first went to a drug store to get some sandwiches. While still there, George Bost, the father of Nan came to the store looking for defendant. Adams left the store with Bost and one Sid Smith who had been encountered in the meantime and went directly to the Kuhn hotel where they found defendant. They took him with them to the doctors' office. When first contacted at the hotel, the defendant said: "Hello Bob, hello Sid, what is going on", or something to that effect. Adams replied that he, the defendant, was in trouble. The defendant made no response to this statement.

When they reached the doctors' office, they parked their car directly in front of it. They met the child's mother and others, who had accompanied her there coming out of the doctors' office, Frank Mauldin, a neighbor, carrying Nan in his arms. Bost, Nan's father, Godwin, the defendant, and Adams walked toward the party and when only a short distance away the father, without doing anything to indicate the defendant, said to his daughter: "Is this the man?" Nan, pointing directly to defendant, said: "Yes, Daddy, that is the man." The accused made no response but "dropped his head and changed color", as one witness described it. Whereupon, the father of the child struck defendant on the head and in the face with his fist, knocking him down and kicking him two or three times while on the ground. It was about 8:00 p. m. when this happened.

Just as one of the examining physicians, Dr. Parkinson, was about to leave in his car, following his examination of the child, he was called by Mauldin and asked to return to his office to examine the defendant. The latter had been knocked out momentarily but was picked up, taken inside and placed on a table in the doctor's office. Regaining consciousness, he wanted to know what had happened and was told by the doctor to lie down; and that some one else would have to tell him about it. He lapsed

into unconsciousness again after the doctor had forced him back on the table for an examination—either unconsciousness or a stupor from the inebriated condition into which he had gotten himself earlier in the afternoon, it was difficult to say which, both the blows given him by Bost and the liquor probably contributing to his condition.

The doctor understood he was asked to examine defendant for the purpose of determining whether he had venereal disease. Hence, he made no special examination for the discovery of blood on his male organ or underwear. Actually, he observed none. There was fresh bleeding on his forehead and around the mouth from the blows struck by Bost, father of the child. The defendant's trousers were found to be unbuttoned all the way down in front, save for the top button holding them together. The male organ disclosed a slight redness on portions thereof that would have been irritated by sexual intercourse. This condition, however, could have been due to other causes and was in no way conclusive that defendant had engaged in recent sexual intercourse.

Following the visit to the doctors' office with her daughter, Mrs. Bost returned home and in the company of her husband and another visited the Adams' apartment looking for Nan's panties. They were found in one of the bedrooms, hanging on the side of the bed between the bed and the wall. The beds had been freshly made up within the week, Mrs. Adams having placed new bedspreads on them and the room was clean, not having been occupied for over a week with everything in an orderly condition. However, when examined after the child's flight from the apartment, as above related; one of the beds in this bedroom was "mussed up", with the pillow at the foot and the bedspread turned back toward the foot and Nan's panties hanging on the side of the bed toward the wall.

When and under what conditions the defendant left the Adams' apartment, no one knows. He was not seen to leave by any person, so far as known. It is quite possible that he was still in it when Mrs. Bost, Nan's mother, stepped inside the kitchen screen immediately after Nan ran from it, crying out: "That man hurt me." It was a four room plywood apartment. The accused could easily have been secreted in some part of it, but if so, he made no response to Mrs. Bost's effort to arouse some one. All known is that he appeared in the lobby of the Kuhn hotel about 8:00 p. m., where he was given a letter that had been received for him by Mrs. Mary Whittington, the proprietor. He read the letter and engaged in apparently normal conversation with her for a few minutes. The defendant was wearing a light colored straw hat on reaching the hotel. Shortly after his arrival, George Bost came in and they went out together, the defendant leaving his hat on a table in the lobby as well as the letter Mrs. Whit-

tington had given him. She reminded him that he was leaving the letter and asked if he wanted same. He asked her to keep it for him, saying he would return. Before Mr. Bost's arrival, the defendant also carried on a conversation with another guest of the hotel, a Mr. Beamis, discussing expenses met with in railroad work, the high cost of living and income taxes. This conversation was broken up by Mr. Bost's arrival, however, and he and the defendant left together going directly to the doctor's office where the events already related took place.

The defendant testified in his own behalf but did little more than to relate that he was so intoxicated that he remembered nothing that took place from about 5 o'clock in the afternoon on the day in question until he "came to" in the doctor's office later that evening. The verdict and sentence were as already indicated at the outset of this opinion. Hence, this appeal upon which defendant seeks a reversal and new trial.

All of the facts hereinabove related are well within the verdict of the jury returned against the defendant. Seeking a reversal, the defendant assigns two errors, to wit:

"I. The trial court erred in admitting testimony of third persons as to Nan Bost identifying the defendant when asked by her father, 'Is this the man'.

"II. The trial court erred in denying the motion for a directed verdict, at the close of the State's case, and renewed at the end of defendant's case, on the grounds of insufficient evidence of the corpus delicti, or of any penetration whatsoever of the penis of Appellant into the female organs of Nan Bost."

Did the trial court err in permitting witnesses to relate in evidence the statement made by Nan Bost upon having the accused brought into her presence, to wit: "This is the man"? This is the first question presented for decision. After the opening statement by the state and the district attorney's announcement that the state would tender as its first witness the child claimed to have been abused by the defendant, counsel for defendant invoked a ruling by the court on whether the child's tender years and the lapse of time did not deny her the competency to testify. Holding that a child three years and one month old could not be expected to remember events occurring several months earlier nor to understand the nature or obligation of an oath, the court ruled her incompetent as a witness.

Thereupon and in the course of the trial the court permitted witnesses to testify over an objection which we shall hold goes to the hearsay character of the testimony that the accused was the person who hurt her, saying: "This (the defendant) is the man."

The attorney general, while admitting the hearsay character of the testimony objected to, defends its admission on the ground that it comes within the res gestae exception to the hearsay rule. The principle involved is that an utterance made impulsively and under the immediate influence of a terrifying occurrence may be so inherently truthful that the ordinary sanctions and tests applied to assure verity may be dispensed with. A spontaneous exclamation uttered under such circumstances is illustrative. The test, as quoted with approval by the court from Wigmore in State v. Buck, 33 N.M. 334, 266 P. 917, 918, is as follows:

"First. 'There must be some shock, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting.'

"Second. 'The utterance must have been before there has been time to contrive and misrepresent, i. e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance.'

"Third. 'The utterance must relate to the circumstances of the occurrence preceding it.' "

Other cases in which we have dealt with the question of spontaneous exclamations which we believe support the trial court's action in admitting the child's statement here, are State v. Stewart, 34 N.M. 65, 277 P. 22; State v. Raulie, 35 N.M. 135, 290 P. 789; State v. Sanford, 44 N.M. 66, 97 P.2d 915; State v. Beal, 48 N.M. 84, 146 P.2d 175.

These decisions lay down no hard and fast rule of admissibility but determine same by the special circumstances of each case. It is apparent from them that the element of spontaneity is not to be determined by time alone. It is sufficient for the statement to be substantially contemporaneous with the shocked condition, but not necessarily with the startling occurrence. And in line with the weight of authority we held in State v. Fernandez, 37 N.M. 151, 19 P.2d 1048, that although the statement is in answer to a question, it is admissible. See Dallas Railway & Termial Co. v. Burns, 1933, Tex.Civ.App., 60 S.W.2d 801, 802, where the court said: "If it is otherwise within the rule, it is not rendered inadmissible simply because it is made in response to a question."

Counsel for the state urge that as to this sort of evidence much must be left to the discretion of the court in admitting or rejecting such testimony, citing State v. Buck, supra, wherein we quoted Wigmore as saying of the task of reviewing courts in such cases: "They should, if they are able, lift themselves sensibly to the even greater height of leaving the application of the principle absolutely to the determination of the trial court."

It has been asserted in some decisions that the trial court must exercise an unusual amount of discretion due to its better position in determining whether the statement is spontaneous. See Chicago, R. I. & P. R. v. Owens, 1920, 78 Okl. 50, 186 P. 1092, certiorari denied, 1920, 253 U.S. 489, 40 S.Ct. 485, 64 L.Ed. 1027; Smith v. Chicago, R. I. & P. R., 1914, 42 Okl. 577, 142 P. 398; Dorr v. Atlantic Shore Ry., 1911, 76 N.H. 160, 80 A. 336.

The appellant argues from a number of circumstances that the statement of Nan Bost as to the identity of her assailant is unreliable. But we think the admissibility of this sort of evidence is not affected by the court's opinion as to how much weight should be given to it. The credit of the maker of the statement and the weight to be given thereto were naturally proper elements for consideration by the jury.

The trial court proceeded with unusual and highly commendable caution in determining the admissibility of this testimony. We hold there was no error in admitting it. The first claim of error must be denied.

We turn next to the defendant's second claim of error, namely, that the verdict is without substantial support in the evidence. The argument resolves itself very largely into the contention that the state failed to establish the corpus delicti by failing in proof of penetration. That a finding of this fact was essential to conviction of the crime charged goes without saying. But it is not necessary that it be proved by direct evidence. Indeed, in the case of a child of tender years, such as the victim here, this often would prove quite impossible. The fact may be shown by circumstantial as well as direct evidence. 52 C.J. 1091, § 124 under "Rape"; 44 Am. Jur. 965, § 100 under "Rape"; Case note in 80 Am.Dec. 361; State v. Hamilton, 304 Mo. 19, 263 S.W. 127. In Am.Dec., supra, the author of the case note says: "It is not indispensable that the penetration be proved by the testimony of the prosecutrix; it may be established by circumstantial evidence; see Regina v. Lines, 1 Car. & K. 393; State v. Hodges, Phill.L. 331, overruling State v. Gray, 8 Jones 170; State v. Tarr, 28 Iowa 397; Brauer v. State, 25 Wis. 413."

The defendant was alone in the apartment from which the child fled screaming for all or some portion of the hour or more preceding the child's departure. That he was in a passionate mood during this period and for some time prior thereto, a condition contributed to no doubt by the liquor consumed from midafternoon on, is established by his conduct with the woman in a bar shortly before going to the apartment. It would be pure speculation to suppose that another may have entered the apartment after defendant left

it and have committed the offense. It is equally so, we feel, to ponder whether the defendant, contrary to nature, (a suggestion advanced by his counsel) may have penetrated the female organ of the child with his finger, even if there were no circumstances suggesting that he did it otherwise, such as being found 30 minutes after discovery of the crime with the foreskin of his penis irritated and reddened and his trousers unbuttoned, save for the top button holding them up. The opportunity plus physical condition of the victim, in the light of attendant circumstances, may furnish adequate proof of carnal knowledge. See Commonwealth v. Hollis, 170 Mass. 433, 49 N.E. 632, 633, where the court said: "Under ordinary circumstances, such evidence would be sufficient, and it was for the jury to determine how far the inference of guilt was weakened by the other facts relied on." See, also, Wair v. State, 133 Tex.Cr.R. 26, 106 S.W.2d 704. In this case the majority held proof of penetration by the accused's male organ was insufficient. But there was direct evidence of penetration by another object, a kind of testimony that is lacking here. Aside from this, the minority opinion impresses us as giving a sounder appraisal of the facts. Here, as in the Hollis case, supra, it was for the jury to say to what extent the incriminating circumstances relied upon by the state were weakened by contrary characterizations, more or less plausible, or by other facts having an opposite tendency in the evidence.

The jury evidently was not impressed by the defendant's testimony that he remembered nothing from about 5:00 p. m. until he regained consciousness while lying on a table in the doctor's office at 8:00 p. m., especially in view of the fact that he was overheard carrying on a fairly intelligent conversation on the expenses incident to railroad work, the high cost of living and income taxes within the half hour prior to reaching the doctor's office as well as a routine conversation with the lady manager of his hotel.

We are not unmindful of the great caution that must be exercised by the reviewing court in dealing with sex crimes, to guard against danger that the very heinousness of the offense charged may influence a verdict not supported by the evidence. See State v. Paiz, 34 N.M. 108, 277 P. 966. This consideration has caused us to scrutinize the evidence with great care and while here as in many cases where the extreme penalty of death or life imprisonment is imposed, the reviewing court finishes its review of the evidence with regret that clearer and more definite proof could not have been produced; nevertheless, mindful that most of these cases depend for convictions upon circumstantial evidence, our task is done when we find the evidence attains the degree of substantiality. We hold that it has done so here.

Accordingly, the judgment of the district court will be affirmed and it is so ordered.

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

178 P.2d 590

AUGUST v. TILLIAN et al.

No. 5004.

Supreme Court of New Mexico.
March 20, 1947.

John E. Perry, of Gallup, for appellants.

John R. Scanlon, of Gallup, for appellees.

LUJAN, Justice.

This is a suit between Edna August, widow of George August, and Mary Tillian and Charles Iskra, children of Rose August, a deceased former wife of George August, to determine whether real property deeded to George August and Rose August while married and paid for out of community earnings was community property, or whether Rose August became the owner of a half interest as her separate property. We will refer to the parties as they appeared in the trial court.

The plaintiff contends that it was community property while the defendants say Rose August took a one-half interest as her separate property and the other half was their community property. The trial court upheld the contention of the plaintiff.

The case was submitted to the trial court solely on the following stipulation, omitting the exhibits:

"1. That George August and Rose Iskra were married in the year 1912, and lived together as husband and wife until the death of Rose August. That at the time of said marriage, Rose Iskra had two minor children by a former marriage, who are the defendants and cross-complainants, Charles Iskra and Mary Tillian.

"2. Throughout their said marriage and at all times material herein, George August and Rose August worked and contributed their several earnings to the support of the community.

"3. That on March 31, 1928, a contract was entered into by George August and Rose August for purchase from Gallup Townsite Company, for a total price of One Thousand Dollars, payable in installments, of the real estate described in plaintiff's complaint.

"4. On May 15, 1928, a bill of sale was executed by one Joseph F. Brock, transferring to George August and Rosie August, his wife, of Gamerco, New Mexico, "one six-room frame house located on Lots 30 and 31, Block 2, Mapel Addition to the Town of Gallup, New Mexico.

"5. That on April 15, 1930, Gallup Townsite Company, a corporation, executed a warranty deed conveying to George August and Rose August, his wife, the real estate described in Plaintiff's Complaint, which deed was recorded on April 17, 1930, in Book 6 of Miscellaneous Records at Page 120 Thereof, Records of McKinley County, New Mexico. A copy of said deed is attached hereto and by this reference made a part of this stipulation.

"6. That said real estate and dwelling house described in said deed, contract and bill of sale were purchased and paid for from community funds of George and Rose August.

"7. That said Rose August died intestate on June 7, 1934, and there has been no administration of her estate, if she had any estate to probate.

"8. That on April 18, 1935, George August and the plaintiff in this action were lawfully married and lived together continuously until the death of George August.

"9. That on January 20, 1943, George August died intestate and there has been no administration upon his estate, if he had any estate to probate.

"10. On January 26, 1943, there was filed of record in the office of the Clerk Ex-Officio Recorder of McKinley County,

New Mexico, a quitclaim deed, wherein George August, husband of the plaintiff, conveyed to said plaintiff the real estate described in plaintiff's Complaint, which deed was executed under date of December 10, 1940, and acknowledged and delivered to the plaintiff by said George August on December 13, 1940.

"11. The Parties do not stipulate at this time with regard to the net rents and profits which may have accrued from said real estate subsequent to December 13, 1940, but will endeavor to stipulate as to their amount in the event that the court determines that the defendants and cross-complainants are entitled to an accounting therefor."

Section 65-401, 1941 Code, reads:

"All other property acquired after marriage by either husband or wife, or both, is community property; but whenever any property is conveyed to a married woman by an instrument in writing the presumption is that title is thereby vested in her as her separate property. *And if the conveyance be to such married woman and to her husband, or to her and any other person, the presumption is that the married woman takes the part conveyed to her, as tenant in common unless a different intention is expressed in the instrument,* and the presumption in this section mentioned, is conclusive in favor of a purchaser or encumbrancer in good faith and for valuable consideration." (Emphasis ours)

This court has not passed upon this question, so we turn to the California cases from which state we took the statute. It is there held in Hogevoll v. Hogevoll, 59 Cal.App.2d 188, 138 P.2d 693, 694, and in Dunn v. Mullan, 211 Cal. 583, 296 P. 604, 77 A.L.R. 1015, that where a husband purchases real estate with his own or community funds, and has title conveyed to his wife, these facts themselves raise the presumption that he has made a gift to her.

There are many California cases holding that the use of community funds to purchase real estate, title to which is taken in the names of both husband and wife is not sufficient to rebut the statutory presumption that the wife takes title to one-half the real estate as her separate property, for in such case a gift of community funds to the wife is presumed. Alferitz v. Arrivillaga, 1904, 143 Cal. 646, 77 P. 657, 658, decided prior to enactment of the statute in New Mexico in 1907. Also see Fanning v. Green, 156 Cal. 279, 104 P. 308, 310; Killian v. Killian, 10 Cal.App. 312, 101 P. 806, 807, 808; and Dunn v. Mullan, supra.

The plaintiff has cited California cases where the presumption was overcome but such decisions are based on evidence. She also cites Falk v. Falk, 48 Cal.App.2d 762, 120 P.2d 714, that where the marriage relationship has existed over a long period, the presumption that property acquired by either spouse during marriage is entitled to

greater weight, but this was a case where the separate and community funds had been so intermingled that they could not be separated.

It is the status of the property at the time of its acquisition that determines whether it is separate or community property. Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010; McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250.

We find nothing in the stipulation to overcome the presumption established by statute that Rose August as a tenant in common took a one-half interest in the property as her separate estate or to question it, except the fact the property was paid for out of community earnings, and the California cases say this is not sufficient. We therefore, conclude that the decision of the district court was erroneous.

Prior to his death George August had conveyed his interest in the property to the plaintiff by quit claim deed, so the defendants are the owners of only an undivided three-eighths interest.

The judgment of the district court will be reversed and the case remanded to it with directions to require an accounting to the defendants for their share of the rents and profits, and to render judgment in accordance with this opinion, and it is so ordered.

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

178 P.2d 592

STATE v. YOUNG.

No. 4999.

Supreme Court of New Mexico.

March 19, 1947.

Fletcher Catron and Frank Andrews, both of Santa Fe, and Gilberto Espinosa, of Albuquerque, for appellant.

C. C. McCulloh, Atty. Gen., Robert W. Ward, Asst. Atty. Gen., and David W. Carmody, Dist. Atty., of Santa Fe, for appellee.

BRICE, Chief Justice.

The defendant was convicted of having murdered Mrs. Eloise Kennedy. Following his conviction he was sentenced by the trial court to be electrocuted. From this judgment he has appealed to this court.

On the 19th day of November, 1945, in the City and County of Santa Fe, in this state, the deceased, a young married woman, was brutally murdered in her apartment, one of several in an apartment building. About 2:30 o'clock P.M. on that day, her husband, Leon G. Kennedy, Jr., communicated with her by telephone. Thereafter, at 3:00 o'clock he again telephoned to the apartment but received no answer. From these circumstances it is presumed she was murdered at sometime between the hours named. At 5:30 o'clock on the same afternoon, her husband found her dead body lying face down on the bathroom floor in their apartment. He called a physician who arrived within from five to ten minutes. The doctor testified that at the time he arrived she had been dead from three to three and a half hours. A mortician was called, who covered the body with a sheet and placed it on a stretcher in the position in which it lay on the floor, and removed it to a mortuary. In lifting the body it was found to be lying in a pool of blood, from which it was then thought Mrs. Kennedy had died from a hemorrhage. She had given birth to a baby less than five weeks before. At the mortuary it was discovered that she had been murdered, and the doctor and police officers were called. It was found upon examination that she

had nine knife wounds and two contusions on her body. There were a number of wounds on her left shoulder; one of two ragged gashes on the left side of her neck had severed the jugular vein, and a stab had penetrated the outer covering of the heart. There was a small, fresh wound, made that day, in her vagina, at the location of a childbirth laceration, and a blood stain therefrom was found on her panties. This did not necessarily prove an attempt to rape. It could have been caused by a strain, struggle, or fall. No spermatozia was found in the vagina. Her levis were torn from the right side of the waist to the right knee, which required considerable force.

On the day following the murder a butcher knife, with human blood on it, was found in a pile of leaves at the rear of the Kennedy apartment. This knife belonged to Chief of State Police Frank Young, and was kept in the kitchen of his apartment, only a few feet from the Kennedy home.

The defendant was a convict "trusty," who had been assigned as a laborer to the state police headquarters. He was serving his fourth term in the state penitentiary for the crime of burglary. Chief Young sent him twice each week to his apartment to do yard and other menial work. A day or two before the murder the defendant had used the knife mentioned to quarter a hog in Chief Young's kitchen. On the day Mrs. Kennedy was murdered the defendant was sent to Chief Young's apartment to work. None of the Chief's family were at home.

On the day of the murder, Mrs. Flanigan, who lived in one of the apartments, employed defendant to wax her floors. There is evidence to the effect that he did not wax these floors, although he was paid for it. He was in or around these apartments from the time he arrived in the morning until after four o'clock in the afternoon. There is no evidence that any other man was seen around them, with the exception of Frank Flanigan, who, with his wife occupied another of the apartments, and who was there only during lunch time.

Clothing worn by the defendant and by the deceased, and fingernail scrapings from each, and some knives, were sent to the Federal Bureau of Investigation in Washington, D. C., for examination. T. D. Beach, a special agent of that department, and its principal analytical chemist, testified regarding the condition of the clothing, and other things sent to the Bureau. He stated that he examined the articles for blood stains, the presence of hairs, fibers, etc., and made chemical examination of stains and microscopic examination of materials. This witness testified that he found human blood on Mrs. Kennedy's levis, shirt, shoes, panties, brassiere, and in scrapings from her fingernails. He also found human blood stains on the butcher knife mentioned, and on defendant's trouser leg, and in the inside

of the defendant's right trouser pocket; at two places on the front of his shorts; and on the lower part of the front of his undershirt, and on one of his shoes.

The Kennedys had a black Scottie dog in the apartment and black canine hairs were found on defendant's trousers and shoes, but it could not be determined whether they were from the Kennedy dog; but they were black and appeared to be like those taken from him.

Mrs. Flanagan went through the Kennedy apartment, calling Mrs. Kennedy at about 2:30 P.M. on the day she was murdered, but received no answer. She went back to her own apartment and from there to the Young's back door and called defendant, but he did not answer. She then went to her own apartment and out the front door and saw the defendant, about 2:45 o'clock "at the end of the fence." At that time he had a waxer in his hand, and when she saw him last he was standing at the front gate with his back to her.

The police examined the defendant's clothing and did not find the several blood spots that were on them, which were later found at the laboratory in Washington.

On the night of November 21, following the death of Mrs. Kennedy, the defendant signed a typewritten confession admitting that he killed the deceased. His confession was in answer to questions propounded by police officers, the substance of which is as follows:

On the morning of November 19th he arrived at Chief Young's apartment between 7:30 and 8:00 o'clock. He had access to the Chief's apartment and practically everything in it. He worked there until one P.M. After Mr. and Mrs. Flanagan left, he went to Mrs. Kennedy's apartment. He stated: "I figured I would get some, that she would let me, but I did not figure on hurting her." He took the butcher knife from Chief Young's apartment to cut rags for waxing Mrs. Flanagan's floors. He had it in a pocket of his overalls at the time he went to Mrs. Kennedy's apartment. He knocked at the door and Mrs. Kennedy admitted him. They talked awhile about work. Mrs. Kennedy went into the bathroom and he followed her and "asked her for a date." He said he meant "going to bed." Mrs. Kennedy told him that she would tell on him. He got scared and stabbed her with the butcher knife which he had in his pocket. He first stabbed her in the left shoulder, he didn't know how many times. He then stabbed her several times. He stabbed her once after she fell. He didn't know how many times he stabbed her in all. She talked after he stabbed her, but he did not remember what she said. He tore her levis after she was down on the floor in the bathroom. He "caught her pants and jerked them." It took five or ten minutes to kill the deceased. He heard someone walking (probably Mrs. Flanagan), and went out at the back door. After kill-

ing Mrs. Kennedy he threw the knife in some leaves in a gully back of the Kennedy apartment, and then went to the Flanigan apartment and waxed the floors. He saw blood on the knife, but saw none on his clothing. He did not go to Mrs. Kennedy's apartment to rape her.

The foregoing confession was admitted in evidence.

It is asserted that the trial court erred in refusing to give to the jury the following requested instruction:

"The Court instructs the jury that 'malice aforethought,' as that term is used in the definition of murder which has been given you, is divided into two kinds: express malice and implied malice.

"Express malice is defined as that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof, *such as previous difficulties or threats or lying in wait or like circumstances.* As here used the word 'deliberate' means 'thought of with a calm and reflective mind.' Such malice must be shown by direct proof and may not be inferred, from the absence of provocation.

"Implied malice is defined as that malice which as a matter of law is considered to exist when no considerable provocation appears for the killing with which the accused is charged, or when all the circumstances of the killing show a wicked and malignant heart."

The trial court gave to the jury all of the above requested instruction except that portion in italics. The instruction as given has been used by the courts of this state and of the territory before statehood, in instructions in murder cases, for many years. We are of the opinion that it is sufficient and all that was required to properly inform the jury regarding the law of express and implied malice.

In any event the requested instruction should not have been given because there was no evidence of any "previous difficulties, threats, lying in wait, or like circumstances." The fact that the defendant, before going to Mrs. Kennedy's apartment, had determined to go there for the purpose of making an indecent proposal to her and took with him the butcher knife with which he killed her, was sufficient evidence from which the jury could infer express malice and a deliberate design to take her life if she refused his request for sexual intercourse, a refusal which, under the circumstances he had strong reason to expect.

The proposed illustrative instruction would have served only to mislead the jury. It would in effect have advised the jury that the external circumstances which would evidence deliberation were limited to "previous difficulties, threats, lying in wait, or like circumstances." If one arms him-

self with a deadly weapon, seeks his victim and kills him without provocation, none of the illustrations would apply. State v. Ybarra, 24 N.M. 413, 174 P. 212.

It is argued in this connection that the trial court "did not instruct the jury properly as to the elements of murder in the second degree." If there was such failure on the part of the trial court, it was not called to its attention, except as to the failure to give the requested instruction mentioned. But we are satisfied that the trial court sufficiently instructed the jury on all phases of murder in the second degree; and it did not err in refusing the requested instruction.

It is asserted that the trial court erred in refusing to give defendant's requested instruction No. XIV on voluntary manslaughter and in giving its purported but incomplete instruction No. XIV in lieu thereof.

Defendant's requested instruction No. XIV is as follows:

"The Court instructs the jury that if in the present case you believe from the evidence which has been introduced, beyond a reasonable doubt, that the defendant killed Eloise Kennedy, but you further believe from the evidence introduced that he so killed her without malice, ~~upon a~~ sudden quarrel, upon such emotions or in the ~~heat of passion engendered by fear or terror,~~ then the defendant is guilty of and you should find him guilty of voluntary manslaughter."

(Defendant's counsel state that the portions lined out were deleted without the knowledge or consent of the defense.)

The trial court's instruction No. 14 is as follows:

"The Court instructs the jury that if in the present case you believe from the evidence which has been introduced, beyond a reasonable doubt, that the defendant killed Eloise Kennedy, but you further believe from the evidence introduced that he so killed her without malice, upon such emotion of anger, rage or sudden resentment or terror as may be sufficient to obscure the reason of an ordinary man and to render the defendant incapable of cool reflection."

That the instruction given is incomplete, is obvious; and that the requested instruction including the deleted portions, is incorrect is equally obvious. There is no evidence of a "sudden quarrel," and a homicide committed in the "heat of passion engendered by fear or terror" is not always manslaughter. But the fear or terror must be sufficient to obscure the reason of an ordinary man, so that he is incapable of cool reflection, and of forming a deliberate design to kill, and does not act with malice. State v. Kidd, 24 N.M. 572, 175 P. 772; State v. Wright, 38 N.M. 427, 34 P. 870.

The defendant did not object to the incomplete instruction, or tender a proper one. The appellee invokes Trial Court Rule No. 20—108, as follows:

"For the preservation of any error in the charge, objection must be made or exception taken to any instruction given; or, in case of a failure to instruct on any point of law, a correct instruction must be tendered, before retirement of the jury. Reasonable opportunity shall be afforded counsel so to object, except or tender instructions."

Appellant cites State v. Williams, 39 N.M. 165, 42 P.2d 1111, and State v. Mitchell, 43 N.M. 138, 87 P.2d 432, 434. In the Mitchell case we said:

"The rule is well settled that the court's failure to instruct on some features of the case will be reviewable error only when and if the party has requested proper or correct instructions upon the subject. We have held heretofore (State v. Williams, 39 N.M. 165, 42 P.2d 1111) that the rule requiring the submission of correct and proper instructions before error in refusing to give some instruction upon the question may be reviewable, 'must be consistent with and sometimes give way to the higher consideration of justice,' and appellant here was clearly entitled to have the question of simple assault submitted. The court was advised of this desire by a sufficient though perhaps not altogether technically accurate or complete instruction."

Also see State v. Plummer, 44 N.M. 614, 107 P.2d 319.

But we need not decide this question, as we are of the opinion that there was no evidence which authorized the trial court to submit to the jury the issue of manslaughter. The only evidence on the question was in substance that he went to Mrs. Kennedy's home to solicit intercourse with her; that she threatened to tell of his insult; and he killed her because he was "scared." "Scared" of what? Not of the loss of his life or of bodily injury, or of anything that the deceased might have done at that time and place; but presumably that he would lose the privileges he enjoyed as a convict "Trusty." There is no evidence of fear or terror of anything imminent. Does "heat of passion" as used in the statute include apprehension of the loss of such privileges in the future, if the apprehension is engendered by his own lascivious conduct? We are of the opinion that it does not.

In State v. Nevares, 36 N.M. 41, 7 P.2d 933, 935, this court, in a well considered opinion written by Justice Sadler, stated that:

"Mere sudden anger or heat of passion will not reduce the killing from murder to manslaughter. There must be adequate provocation. The one without the other will not suffice to effect the reduction in the grade of the offense. The two elements must concur."

The defendant in that case killed a young woman because she refused to associate with him after an estrangement that had taken place some time before. Undoubtedly the killing occurred in the heat of passion, but we held as a matter of law that the fact that he was so enraged because of her refusing his advances as a suitor that he killed her, did not reduce the grade of the offense from murder. The English rule is cited in this case and followed, wherein it was held that different degrees of mental ability in defendants who are sane, could not be taken into account for reducing a homicide from murder to manslaughter, that "There must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion."

The English court in Rex v. Lesbini [1914] 3 K. B. 1116, British Ruling Cases, 272, cited by Justice Sadler, stated further:

"This court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his acts."

This court then said:

"The test of whether the provocation was adequate must be determined by considering whether it would have created the passion offered in mitigation in the ordinary man of average disposition. If so, then it is adequate and will reduce the offense to manslaughter. If not, it is inadequate. Here is shown nothing but words apprising appellant of the fact that the deceased had rejected his suit, except testimony tending to show that by reason of his peculiar, even defective, state of mind, not amounting to insanity, such knowledge likely would result in a state of excitation and anger in him, altogether not to be expected in the ordinary man of average disposition. This circumstance does not alter the rule."

The following instruction to a jury, regarding voluntary manslaughter, was approved by the Supreme Court of the United States:

"* * * Speaking of voluntary manslaughter, it (the common law) says it is the willful and unlawful killing of another on sudden quarrel, or in the heat of passion. Let us see what is meant by this definition. The party who is killed, at the time of the killing, must offer some provocation to produce a certain condition of mind. Now, what is the character of that provocation that can be recognized by the law as being sufficient to reduce the grade of the crime from murder to manslaughter? He cannot produce it by mere words, because mere words alone do not excuse even a simple assault. Any words offered at the time do not reduce the grade of the killing from murder to manslaughter. He must

be doing some act—that is, the deceased, Philip Henson in this case, the party killed —which at the time is of a character that would so inflame the mind of the party who does the killing as that the law contemplates he does not act deliberately, but his mind is in a state of passion, in a heat of passion, where he is incapable of deliberating." Allen v. United States, 164 U.S. 492, 494, 17 S.Ct. 154, 155, 41 L.Ed. 528.

It was held by the Supreme Court of Missouri that the "lawful provocation" which will reduce murder to manslaughter at common law consists, with very few exceptions, of personal violence. That court said in State v. Myers, 221 Mo. 598, 121 S.W. 131, 136:

"In State v. Bulling, 105 Mo. [204,] 225, 15 S.W. [367,] 373, 16 S.W. 830, it was expressly ruled by this court that the heat of passion contemplated by the statute, which would reduce a killing from murder in the first or second degree to manslaughter in the fourth degree, 'is that heat of passion which is produced by a "lawful provocation" as that term was understood at common law,' and it was held in that case that the terms 'legal,' 'lawful,' 'adequate,' and 'reasonable,' when used as adjectives qualifying 'provocation,' are synonymous terms, and then announced the general rule that, with very few exceptions, it takes an assault or personal violence to constitute the provocation as contemplated by the use of those terms.

* * * * * *

"In State v. Gordon, 191 Mo. [114,] 125, 89 S.W. 1025, 1028, 109 Am.St.Rep. 790, the rule as applicable to this subject was thus announced: 'At common law words of reproach, how grievous soever, were not provocation sufficient to free the party killing from the guilt of murder; nor were contemptuous or insulting actions or gestures an assault upon the person; nor was any trespassing against lands or goods to have the effect to reduce the guilt of killing to a grade of manslaughter. The provocation must consist of personal violence. East's Pleas of the Crown, 233; 4 Blackstone, Comm. 201; State v. Wieners, 66 Mo. 13. And the common-law rule in this respect is firmly established in this state by a long line of decisions."

"At common law mere language, however aggravating, abusive, opprobrious or indecent, is not regarded as sufficient provocation to arouse ungovernable passion which will reduce a homicide from murder to manslaughter. This effect will not be given to any insult or epithet, when dissociated with actual or threatened assault, or to any indecent or provoking actions or gestures. The character of the words or conduct has no bearing on the question of sufficient provocation. No distinction is drawn between language of the one sort

and the other; threats when unaccompanied by assault do not constitute adequate provocation." 26 A.J., Homicide, Sec. 29.

Also see Territory v. Anderson, 4 N.M. 213, 13 P. 21.

At most the provocation was only a threat; and if a threat is ever a "lawful provocation," it was not so in this instance. No ordinary man of average disposition (the test applied in State v. Nevares, supra) would have been so terrified by such threats that he would kill a defenseless woman. Only one with a wicked and malignant heart could do so.

It has been held by this court that voluntary intoxication which caused the "heat of passion" that resulted in a homicide, does not reduce it to manslaughter. State v. Brigance, 31 N.M. 436, 246 P. 897; State v. Aragon, 35 N.M. 198, 292 P. 225; and we now hold that a threat to inform, brought about by the defendant's own wrongful and lascivious act, is not such lawful provocation as will reduce a murder committed because of it, to manslaughter.

The giving to the jury of the instruction on manslaughter was harmless error.

It is asserted that the trial court erred in admitting in evidence the confession of the defendant, in that this denied to defendant due process of law, as guaranteed to him by the 14th Amendment to the Constitution of the United States. The question is whether the confession was coerced or was otherwise involuntary.

Before the trial court admitted the confession in evidence, testimony was taken in the absence of the jury to determine its admissibility. The manner and means used, and surrounding circumstances regarding the obtaining of the confession as claimed by the respective parties, were detailed by state's witnesses and the defendant. Upon the conclusion of this testimony the trial court admitted the confession in evidence over the objection of the defendant. The written confession, the substance of the material parts of which has been stated, was prefaced by the following statement dictated by Mr. Clancy, in the presence of the defendant, and acquiesced in by him:

"Santa Fe, New Mexico,
"November 21, 1945
"10:30 P.M.

"I, Louis Young in the presence of Chief Frank Young, Assistant Chief A. B. Martinez, both of the State Police of New Mexico, Manuel Montoya, Chief of Police of Santa Fe, New Mexico, Eddie Mack, Special Investigator of the District Attorney, of the first judicial district of New Mexico, and Albert H. Clancy, Assistant District Attorney, for the first judicial district of the State of New Mexico, do hereby make this voluntary statement; I state in the presence of these men that I have been advised of my constitutional rights; I state that I have been advised

by the Assistant District Attorney that under the law I am entitled to the advice of counsel and that I have the privilege of calling in a lawyer; I have been further advised that I have not been made any promises of immunity or help of any kind; and I have been further advised that any statements that I may make may be used against me, and I reiterate that this statement is made voluntarily without being threatened in any way and it is made of my own free will and accord.

"I further state that on Monday night November 19, 1945, I made a statement to Chief Frank Young, Captain A. B. Martinez and Assistant District Attorney Albert H. Clancy, which I now repudiate.

"I further state that on the afternoon of November 20th, 1945, I made a written statement in the office of the District Attorney at Santa Fe, New Mexico, which said statement I now repudiate.

"I further state that at the Coroner's inquest held in the Memorial Chapel at Santa Fe, New Mexico, late in the afternoon of November 20th, 1945, that I was placed under oath and testified at said inquest. This testimony I now repudiate."

Captain Martinez of the State Police testified that all persons, including defendant, who may have been in the vicinity of the Kennedy apartment at the time of the homicide, were questioned at city police headquarters on the night thereafter. The next day defendant was questioned at the district attorney's office, and he was a witness on the afternoon of the same day at the inquest. Other references were made to these questionings, but there is nothing in the record regarding the time taken, or any other detail connected therewith, except that on each of these occasions defendant denied that he killed the deceased; and that he was advised that he was entitled to the advice of an attorney; and that he was not compelled to answer questions. There is nothing to indicate that he was mistreated or that any attempt was made to coerce him into making a confession. He was illiterate, but a surprisingly intelligent witness.

We come now to the questioning of defendant that resulted in his confession of having committed the homicide.

At 10:30 P.M. on the night of November 21, 1945, the defendant was questioned regarding the homicide, in the inner office within the walls of the state penitentiary. Between 9 and 9:30 on that evening Captain A. B. Martinez of the State Police and Assistant District Attorney Albert Clancy were in the inner office. In an outer office there were present Frank Young, Chief of State Police; W. L. McDonald a prison guard; Manuel Montoya, Jr., Chief of Police of the city of Santa Fe, and Eddie Mack, special investigator for the district attorney. There was a flat-topped desk in

the inner office, on which lay four butcher knives, the property of Chief Young. The defendant was brought into this office for questioning. He was advised that he did not have to make a statement, that he was entitled to the counsel of an attorney but that any statement he made would have to be voluntary and made without any promises or threats. The knives were shown to the defendant and he denied having ever seen them. He was questioned about thirty or forty minutes by the assistant district attorney regarding the homicide, Mr. Clancy insisting that he tell the truth, but he persistently refused to admit his guilt. The above testimony is in substance that of Captain Martinez and assistant district attorney Clancy. At this time Chief Young was called into the room and placed a blood-stained butcher knife on the table, one of a set to which the other four belonged. The defendant looked at the knife, hesitated and said, "I did it, I will tell you all about it." The above was testified to by the three officers present.

At this time the other officers named were called into the room to witness the statement. Defendant was again told of his constitutional rights, that he was entitled to an attorney if he wanted one; that under no circumstances would he have to say anything, but that anything he might say would be used against him; that if he made a statement it would have to be voluntarily made, and it was the opinion of the witnesses that defendant understood his rights as stated to him by the officers. The witnesses testified that defendant sat quietly, that no attempt was made to coerce him, nor were any threats made to elicit evidence from him. He asked for a cigarette and a full package was given him; coffee was brought in and served to all, including the defendant. It was about 10:15 when the defendant stated that he would tell everything and about 10:30 when the questioning began by the assistant district attorney. Defendant was told that he had been well treated by Chief Young. Nothing was said to him about his having been seen coming out of the Kennedy apartment or about finger prints being on the knife. The questions were asked by Mr. Clancy, answered by defendant, and typed by Captain Martinez. One question and answer was eliminated and the page rewritten and reread to the defendant and he understood it before signing this page. The defendant did not ask to lie down on the floor. After the confession was written it was read to the defendant by Chief Young. The defendant was sitting in a chair and was not tied. At one time he slumped in his chair for two or three seconds, as though drowsy. Mr. McDonald tapped his arm and asked him what was the matter, and he straightened up and asked to go to the toilet. The blood-stained knife and the other knives on the table were a part of the same set, and belonged to Chief Young and were kept in

his apartment in the same apartment house in which the Kennedys lived. Chief Frank Young made the following statement, among others:

"I asked him if he knew that knife and he looked at it and studied it just a short while and said 'Yes sir, it is your knife and it came out of your kitchen,' and I said, 'Well, Louis, if you want to make the statement tell this man the truth; and he sat there, hesitated, and said, 'I did it, and I will tell you all about it.' I would not think I was there over ten minutes."

The defendant was sitting in a chair, appeared to be comfortable and calm, he was not nervous. He was not put under any physical compulsion and his statement was free and voluntary. He initialed the pages and signed the last one. After the confession was typed it was read to the defendant, just as it now appears, before he signed it.

The foregoing testimony regarding the taking of the confession was substantially that given by the six officers who were present.

After the State had closed, the defendant testified in great detail. He stated that on the evening of the 19th of November he was brought into the back office on the inside of the prison yard, and that Captain Martinez and Mr. Clancy were present. He was given a chair in which to sit. He stated that Mr. Clancy had told him that two people had seen him coming away from Mrs. Kennedy's apartment and that these witnesses were then available. He was asked if he cared for Chief Young, Mrs. Young, their daughter, and others; and he answered that they had always treated him like a child and that he loved them; that Captain Martinez then began hitting one fist into the other and said, "They are all over there crying, worried about you, if you care for Mrs. Young you will tell us the truth in this case." He answered that he had already told them the truth. Captain Martinez then said "Do you know that Chief Young and his family is all in an uproar, everybody in Santa Fe loves Chief Young and his family, and Mrs. Kennedy is well thought of." "I say, 'Yes, I like the people and Mrs. Kennedy * * * but if I have to go to my grave and one of you was to put a gun on me now I would die saying I did not know anything about it.'." He stated that he had never seen any knives at Chief Young's home; that they continued to insist that they were there to hear the truth from him, and he said "I have told you the truth each time I have talked to you, from here to God." He stated that Captain Martinez said to him "I hate to get mad at you and the only thing that will keep me from getting mad at you is that you will come on and tell us that you did kill Mrs. Eloise Kennedy." And that he answered, "That would be a story; when I have sworn each time I have told you the truth." He stated

that he was in the upper end of Mrs. Young's room when Mrs. Flanagan left in her car; and again he stated that Captain Martinez insisted on him telling that he killed Mrs. Kennedy and thereby help Chief Young and Mrs. Young and Mrs. Kennedy's husband. He stated that he heard Mrs. Flanagan call Mrs. Kennedy early in the morning while he was in Mrs. Young's kitchen; that he said to Captain Martinez "If you want me to tell you a story I can tell you one and you all write it down, but some day somebody will read it and find out I did not do it. I say, 'Of course there is nothing for me to do. I don't know what you all is going to do with me, but if it will please you all I will say yes.'" He said that Chief Young came in, threw a knife on the table and said "That is the knife you used." "I sat there and looked at the knife. I did not know what to say because I knowed I had not used it, but I did not know what they was going to do to me if I did not answer the question like they wanted me to, from the way they had been talking to me, and I say 'I reckon I did,' and I got these words to face now and press my dying pillow." They brought in a typewriter and Mr. Clancy began asking questions. Chief Young began to read the statement. They gave the warning after the last writing on the page was signed. "They told me at the court house that I could have an attorney. At the time the paper was written in the penitentiary no lawyer nor nothing was mentioned until my name was signed to the paper. The answers on the paper are all false.

"Q. When you gave your statement what did you think they were doing? A. I gave that statement to stop Mrs. Young and them from crying.

"Q. You thought they were in difficulties? A. Yes sir.

"Q. And you wanted to help them? A. Yes sir."

He stated that while Chief Young was reading the statement he became unconscious, and when he "knew anything he was lying back," and somebody hit him on the arm and asked him what was the matter. He told them he was sick and asked them to let him lie on the floor for a few minutes, but they finished reading the paper. Chief Young asked him if he understood what was said, and he answered, "I say, 'Anything you all do is O. K. I would like to lie down.'"

He testified that he felt sick, that there was a time he did not know what was going on. He gave the answers because he wanted to help Mrs. Young and her family, but the answers were not true.

The following statements made by the defendant were each specifically denied by one or more of the state's witnesses, who testified regarding the securing of the confession:

The defendant testified that Mr. Clancy had stated that there were two witnesses at hand who would testify that they saw him coming from Mrs. Kennedy's apartment; that he never saw any of the butcher knives displayed to him, though he had packed up the Chief's household goods for moving to Roswell; that he had agreed to admit having killed Mrs. Kennedy before Chief Young was called into the room. In this regard he testified "I say, 'I don't know what you all is going to do with me but if it will please you all, if you all just want me to say yes, I will say yes.'" Defendant testified that he was afraid he would be assaulted if he did not admit the killing of Mrs. Kennedy; that he was not warned nor offered the services of an attorney prior to the signing of the confession; that he asked for permission to lie down on the floor when he became sick, but was not allowed to do so.

The examinations at the office of the City Police Captain and the inquest at the morgue were held for the purpose of a general inquiry, and all the testimony that could be obtained by the state was introduced. The only time, so far as the record shows, in which the defendant alone was examined was at the district attorney's office. There is no evidence in the record to indicate that the defendant was influenced by any of these examinations in making his confession.

It has been held a number of times by the Supreme Court of the United States that the mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. Lyons v. Oklahoma, 322 U.S. 596, 607, 64 S.Ct. 1208, 88 L.Ed. 1481, and cases cited therein. The trial judge heard the testimony in this case and the great weight thereof indicates that there was no unfair advantage taken of the defendant at any time. In fact he does not claim to have been coerced into making a confession, but states that he did so to keep the wife of Chief Young and others of her family from crying.

He protested his innocence until he was confronted with the blood-stained knife with which Mrs. Kennedy was killed, and this seemed to have so impressed him that after a short silence he stated, "I did it, I will tell you all about it." The examination only lasted thirty or forty minutes and he was not coerced, promised anything, or threatened. He was advised of all his constitutional rights. There was no such invasion of his constitutional rights as occurred in the cases decided by the Supreme Court of the United States, cited by the appellant, and they do not require a discussion here. The recent case of Lyons v. Oklahoma, supra, affirmed by the Supreme Court of the United States was much stronger in favor of the appellant than the one before us.

[redacted] It is asserted that the verdict is without support in the evidence, in that express malice was not proved. We are of the opinion that the evidence amply supports the verdict of the jury. The knife in question was in the apartment of Chief Frank Young and the defendant had used it a day or two before for quartering a hog. He had access to that apartment and was working there just prior to the homicide. He stated in his confession that he had secured the knife and that he killed the deceased with it, but that he did not take it for that purpose; that he intended to cut some rags with it to use in waxing floors for Mrs. Flanigan. However in his examination before the jury he was asked:

"Q. You did not have a knife to cut rags? A. No sir, I did not have to have no knife to cut rags because the rags we used is sent to the state police station in wiping size, is already wipe rags."

He denied when questioned in the penitentiary that he had ever seen the knives displayed to him there, but stated in his testimony before the jury that he knew there were knives in the Chief's house.

"Q. You have seen a knife just like that over there (in Chief Young's apartment)? A. I have seen some knives in Chief Young's house but I can't say I have seen one like that."

Now the jury was warranted in accepting his testimony in his confession to the effect that he took the knife from Chief Young's house with him to the apartment of Mrs. Kennedy; also his statement regarding the size of the pieces of cloth used for waxing floors, and that he did not get a knife to cut cloth. The jury was warranted in believing that he secured the knife which he put in his pocket, not for cutting rags, but to kill Mrs. Kennedy, if she refused to comply with his request for sexual intercourse. There could not be any other reasonable conclusion from the evidence. Also, there was no other person found, after an examination of all witnesses accessible to the police, that was at or near Mrs. Kennedy's apartment at the time the murder was committed. They were likewise warranted in believing from his tearing of her levis with other circumstances, that he attempted to, and may have, raped her. The defendant had human blood on his trousers, shoes, *undershirt and shorts,* and evidently her levis were torn from the waist to the knee before she was killed, and while facing him, as the torn place was in front and under her body when she was found dead face down on the bathroom floor. These facts and his admission to the District Attorney that he had intended to rape her, in addition to the wound in the vagina, indicate an attempt was made by defendant to rape her, or the jury might reasonably have so concluded.

We have stated that the jury was justified under the evidence in finding express malice, and we will now elaborate somewhat upon our reasons.

The following are New Mexico statutes regarding murder:

"Murder is the unlawful killing of a human being, with malice aforethought, either express or implied. The unlawful killing may be effected by any of the various means by which death may be occasioned." Sec. 41-2401, N.M.Sts.1941.

"Express malice is that deliberate intention, unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof." Sec. 41-2402, N.M.Sts.1941.

"Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show a wicked and malignant heart." Sec. 41-2403, N.M. Sts.1941.

"All murder which shall be perpetrated by means of poison or lying in wait, torture, or by any kind of wilful, deliberate and premeditated killing, or which is committed in the perpetration of or attempt to perpetrate any felony, or perpetrated from a deliberate and premeditated design unlawfully and maliciously to effect the death of any human being, or perpetrated by any act greatly dangerous to the lives of others, and indicating a depraved mind regardless of human life, shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder in the second degree." Sec. 41-2404, N.M.Sts.1941.

It has been said that the only difference between express malice and implied malice is the manner of proof; each means "That condition of the mind which prompts one person to take the life of another without just cause or provocation, and it signifies a state of disposition which shows a heart regardless of social duty and fatally bent on mischief." Lewis v. Chapman, 16 N.Y. 369; Craft v. State, 3 Kan. 450; United States v. King, C.C., 34 F. 302.

But the New Mexico statutes define two kinds of malice, (1) express malice, in which *deliberation* is an essential element, and which is manifested by external circumstances capable of proof; and (2) implied or common law malice.

The distinction between the two was elaborately considered in State v. Smith, 26 N.M. 482, 194 P. 869, and State v. Sanchez, 27 N.M. 62, 196 P. 175. In Torres v. State, 39 N.M. 191, 43 P.2d 929, 931, we reviewed the Smith and Sanchez cases, stating:

"State v. Smith, [26 N.M. 482, 194 P. 869,] has been often cited to the proposition that the true distinction between murder in first degree and murder in the second degree is in the kind of malice present. If it be the ordinary malice aforethought of

the common law, it is murder in the second degree. But if it be 'intensified malice,' a 'deliberate intention unlawfully to take away the life of a fellow creature,' it is murder in the first degree; that 'kind of murder * * * deemed more atrocious than others'; not to be implied as a matter of law 'when no considerable provocation appears or when all the circumstances of the killing show a wicked and malignant heart'; but to be proven by external circumstances 'raising' the offense to that grade of enormity for which the statute reserves the extreme penalty. This is the result to which many readings of this decision and much reflection bring us.

"Just a little later the same author and the same concurring justices reduced the matter to this: Murder in the second degree is 'murder with malice, but without deliberation.' Malice includes 'premeditation'. Deliberation is more than mere premeditation, and is the distinguishing characteristic of murder in the first degree. State v. Sanchez, 27 N.M. 62, 196 P. 175.

* * * * * *

" 'Premeditation,' as said in the Smith decision, means merely 'thought of beforehand.' That meaning has led the courts from time immemorial to give the stock instruction that the intent to kill, if entertained but for a moment, is sufficient. But 'deliberation,' as said in the Smith case, means 'a thinking over with calm and reflective mind.' A little later this court employed the slightly different expression, 'fixed and settled deliberation and coolness of mind.' State v. Kile, 29 N.M. 55, 218 P. 347, 352."

The question here is whether there is evidence in the record, consisting of proof of external circumstances, from which the jury was justified in finding that the defendant formed a design to kill deceased after thinking the matter over with a calm and reflective mind, and carried out such design. There can be no question but that malice in the common law sense was proved; for that is implied, or the jury was authorized to so find, from the detailed circumstances of the crime.

The following facts proved express malice:

The defendant was working in the Frank Young apartment on the morning of the homicide. He there conceived the design of having intercourse with the deceased, with or without her consent. He stated to the district attorney that he intended to rape her, although he stated in his confession that he would not have done so. That he intended to rape her, is shown further by the fact that he tore her levis from the waist to the knee. That he may have raped her (though he did not complete this act) was shown by the laceration in the vagina, and the blood on his shorts and undershirt. He was a negro convict and must have realized that it was so im-

probable the deceased would submit herself to him, that to accomplish his purpose he would almost certainly have to resort to force. He weighed these probabilities and determined that he would rape her (unless, as a remote possibility, she would submit), and then slay her. This is proved by the fact that he armed himself with a butcher knife that he knew was in the Young apartment, and put it in his pocket. He stated in his confession that when deceased threatened to "tell on him," he stabbed her as fast as he could strike, that "I just don't know how it happened, it was done so quick." He had no other use for the knife, according to his own testimony before the jury, which contradicted his statement in his confession that he got the knife to cut waxing cloth. He had an abundance of time to, and did, calmly and deliberately plan his crime. The unexpected presence of Mrs. Flanigan may have interrupted his design to rape.

The jury was warranted, from the facts herein stated, in finding that the defendant was the murderer; that express malice was proved, and that the murder was committed with deliberation.

The judgment of the district court should be affirmed.

It is so ordered.

LUJAN, and SADLER, JJ., and LUIS E. ARMIJO, District Judge, concur.

179 P.2d 263

LIBBY v. DE BACA et al.

No. 4976.

Supreme Court of New Mexico.

March 1, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

H. A. Kiker and Manuel A. Sanchez, both of Santa Fe, for appellants.

Seth and Montgomery, of Santa Fe, for appellee.

McGHEE, Justice.

This is an appeal from a decree cancelling a ten year "unless" oil and gas lease, for non-compliance with the implied covenants to diligently develop and operate the lease following discovery of carbon dioxide gas (CO_2) in paying quantities. We will refer to the parties as they appeared in the trial court.

The plaintiff is the son-in-law of the lessor and acquired title shortly prior to the filing of this suit with knowledge of the rights of the defendants. The lease was made March 4, 1935, covering 26,000 acres in Harding County, and the only consideration was the promise of development or the annual payment of one dollar per acre as delay rental. The beginning of drilling operations was delayed beyond the sixty day period provided in the lease and there is controversy as to whether they started in 1935 or 1936, but as the lease was validated by a writing signed by de Baca December 2, 1936, the date is immaterial.

The trial court made the following findings of fact, all of which we find are sustained by substantial evidence.

Findings of Fact

I.

"The answering Defendants' right, title or interest (if any) in the premises is based upon that certain Oil and Gas Mining Lease dated March 4th, 1935, between Plaintiff's predecessors and Defendant, John P. Healy.

II.

"After the making of the lease of March 4th, 1935, an extension of time was granted to lessees in which to begin drilling operations.

III.

"The first drilling operations under the aforesaid lease were begun on or about June, 1936, and prior to that time, F. C. de Baca, one of the lessors, had repeatedly

notified said John P. Healy that the lease was subject to cancellation by reason of his failure to begin operations for drilling a well within 60 days, as provided in said lease.

IV.

"That some time during the latter part of 1936 or in 1937, carbon dioxide gas was discovered in the Waddell and McFan well, which is located in Section 19, Township 20 North, Range 31 East, and thereafter certain machinery and equipment was installed for the purpose of manufacturing dry ice from said gas, and a small amount of such ice was produced. Shortly after such production, the persons operating said well and manufacturing equipment, for some reason not appearing in evidence, removed all said machinery and equipment from said location, and no one has attempted to operate said well and produce gas therefrom subsequent to that time.

V.

"On November 30th, 1936, Fulgencio C. de Baca and Nestor C. de Baca, predecessors in interest of the Plaintiff herein, in writing acknowledged that compliance with the terms of the said lease had been made, and that said lease on said 30th day of November, 1936, had become validated and was then in full force and effect.

VI.

"That although said F. C. de Baca threatened on various occasions to cancel said lease because of failure by the lessee, or others, to drill on the property, as provided therein, nevertheless, said de Baca made it known he wanted drilling operations to proceed by lessees, and did grant several extensions of time within which to begin or to renew drilling operations at times when said Lease was in default; that no consideration was paid to said de Baca, or other lessors, for reinstating or validating said lease on such occasions.

VII.

"That the said threats of cancellation of said lease had little or no deterring effect upon said John P. Healy, and others claiming through or under him in said lease, nor did such threats hinder or materially interfere with the drilling or development operations.

VIII.

"That no rental was paid to the lessors and owners of the property in said lease at any time, although repeated demands for such payments were made, or that in lieu of such payment, development be commenced; the expected royalties by the lessors was the principal consideration for granting said lease.

IX.

"Prior to the 13th of May, 1936, lessors had given notice in writing to lessees that said lease was terminated and forfeited, and on said 13th day of May, 1936, lessors executed an instrument in writing in which they withdrew said notice of termination

and forfeiture of said lease, and thereafter the well was brought in.

X.

"That on or about December 10th, 1938, a considerable flow and pressure of carbon dioxide gas was discovered on the property in the so-called Head & Miller well at approximately 2142 feet. Thereafter said Healy and his associates made numerous efforts to finance a plant to be built on the property for the purpose of making dry ice from said gas.

XI.

"That following such discovery of carbon dioxide gas, the said de Baca and John P. Healy discussed development of the property by the construction of an ice manufacturing plant and the sale of such product, and said de Baca was anxious and willing that said Healy and associates operate the property and market such product; that the said Healy and his associates were unable to finance such operations, and were unable to locate others willing to finance such operations, with the result that no marketing of the product has been made.

XII.

"The Court finds that the lessees, in their drilling operations, failed to stop a leak of gas from said discovery well, known as the Head & Miller well, in Section 31, Township 20 North, Range 31 East, and a considerable waste of the gas has resulted from such drilling operations since shortly after discovery and continuing to the date of trial herein.

XIII.

"The Court finds that said Defendants, as lessees, have not been diligent in their efforts to develop the property and to market the product thereform subsequent to such discovery of gas, but instead of such development and marketing, have relied upon such discovery in paying quantities as sufficient to extend or continue said lease in full force and effect.

XIV.

"That thereafter, the Waddell and McFan well was completed as aforesaid, and after the aforesaid writing had been executed by said Fulgencio C. de Baca and Nestor C. de Baca, acknowledging that said lease was in full force and effect, lessees began the drilling of a second well, known as the Head and Miller well, and thereafter, on December 10th, 1938, the said well came in with a flow of CO_2 gas of approximately 3,950,000 cubic feet per day of 24 hours with a pressure of 510 pounds; that none of such gas so discovered has been saved and marketed from said well.

XV.

"On September 6th, 1938, after gas in considerable quantity had been discovered, lessors, predecessors in title of Plaintiff herein, instituted suit No. 1483 on the docket of the District Court of Harding County, New Mexico, seeking therein to cancel

and annul the lease on said premises held by lessee; said suit No. 1483 in Harding County, New Mexico, was dismissed upon motion of the plaintiff, by order of Court, on March 9th, 1939.

XVI.

"On October 25th, 1939, lessors, the predecessors in title of Plaintiff, filed suit against lessees, seeking therein to cancel and annul said lease; on April 14th, 1941, on motion of the Plaintiffs, said cause No. 1547 was by order of the Court dismissed.

XVII.

"The present suit, No. 1704 on the docket of the District Court of Harding County, was filed on the 23rd day of October, 1942."

To which we add the following:

a. The defendants have expended considerable sums of money, (probably in excess of $50,000) in the drilling of the two wells and have received no returns from them.

b. After December 7, 1941, it was impossible to provide materials with which to build a plant for the manufacture of dry ice.

c. That at and prior to the filing of each of the suits by de Baca the defendants had defaulted in the performance of their obligations under the lease, after demand for performance and a reasonable time therefor had expired.

We have considered the assignments of error based on the refusal of the trial court to adopt the defendants' requested findings of fact, and find that except as added by us above, they were covered by adverse findings, were immaterial or recitations of evidentiary facts.

We here reaffirm our holding in State ex rel. Shell Petroleum Corp. v. Worden, 44 N.M. 400, 103 P.2d 124, 126, as follows: "The object of the lessor in making the lease was to secure the devolopment of the leased premises for oil and gas. There is an implied covenant on the part of the lessee (in the absence of any expressed on the subject as in this lease) that after production of oil and gas in paying quantities is obtained, he will thereafter continue the work of development for production of oil and gas with reasonable diligence as to the undeveloped portion of the leased land."

But the duty of lessee does not end there. He must proceed with reasonable diligence, as viewed from the standpoint of a reasonably prudent operator, having in mind his own interest as well as that of the lessor, to market the product. 2 Summers Oil & Gas, Perm.Ed., § 415. The record shows that gas from the commercial well could only be marketed by the erection of a plant so that it might be converted into dry ice. No plant was even started following the final completion of this well in December, 1938.

The defendants urge they were unable to raise money to develop the lease because of threats of cancellation and the filing of the suits by de Baca attacking their title, and that such acts tolled the time for development. They cite many cases in support of such claims, but an examination of them shows they were based on wrongful claims and suits, and they are, therefore, not applicable here.

They also cite many cases holding that even though a lessee be in default for failure to develop under the implied covenants following discovery in paying quantities, cancellation will not be decreed where the lessor has failed to make demand for development and allowed a reasonable time therefor. In this case, however, many demands were made by de Baca for such development or payment of delay rentals, and although promises were made to comply with such demands they were not kept.

Owing to the expenditures made on the second well in which gas was found in paying quantities, we will give the answering defendants another opportunity to market the gas therein. Under the rules of the Oil Conservation Commission forty acres constitute a drilling unit, and we will direct the trial court to modify its decree and deny cancellation of the interests of such defendants in the lease on the forty acre tract on which the paying well was completed in December, 1938, on the condition that they proceed with reasonable diligence to market the gas from the well, and if there be no purchaser available that they proceed to the erection and operation of a plant to process it. Neither party will be allowed costs to date.

The decree of the District Court will be affirmed except for the modification here directed, and it is so ordered.

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

179 P.2d 524

NICKSON v. GARRY et al.

No. 4962.

Supreme Court of New Mexico.

April 9, 1947.

Reese & Reese, of Roswell, for appellants.

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

BRICE, Chief Justice.

The plaintiff brought this action to quiet title to the south 15 feet of Lot Four in Block Ten of the Original Town of Roswell, New Mexico. The intervener is the wife of the plaintiff, and claims a community interest in this property. The defendant answered, denying that plaintiff or intervener has an interest in the property, and by cross action sought to quiet title in herself. The facts are substantially as follows:

On January 9, 1897 Joseph C. Lea was the owner of Lot Four Block Ten (50 feet by 198 feet) in the city of Roswell, Chaves County, New Mexico. On that date he, joined by his wife Mabel Lea (who had no interest in the property), conveyed to Gertrude L. Dills the north 35 feet thereof.

This conveyance contained the following: "* * * and it is hereby understood and agreed that the remaining 15 feet of said lot shall be perpetually reserved for an alley." It is this "reserved" property, 15 feet by 198 feet, that is involved in this suit. It extends from Virginia Avenue to the public alley running north and south through the center of Block Ten.

Joseph C. Lea died intestate in 1904, and his heirs at law, insofar as this property is concerned, were his children, Harry Wildy Lea and Ella Lea who subsequently married Hiram M. Dow. Harry Wildy Lea was adjudged insane in 1905, and committed to the state institution for the insane, where he remained until his death on March 19, 1938. He was survived by his wife Alice Howard Lea and his daughter Annie Wildy Lea. Alice Howard Lea died intestate November 8, 1938, leaving as her only heir at law the defendant, who were formerly Annie Wildy Lea.

After the execution of the deed by Joseph C. Lea, conveying the north 35 feet of Lot Four to Gertrude L. Dills, the property in suit was never rendered for taxation by Joseph C. Lea or any other person until rendered by the plaintiff herein in 1944, for the years of 1934 to 1944 inclusive. Thereafter the plaintiff paid the taxes assessed under this rendition.

Although all of the predecessors in title of the parties to this action and the taxing authorities have consistently treated the land in suit as a public alley not subject to taxation, the only written evidence of its dedication as a public way (if it was so dedicated), was that contained in the deed from Joseph C. Lea and wife to Gertrude L. Dills. It has never appeared on any map or plat of the city of Roswell as an alley.

Ella Lea Dow and her husband Hiram M. Dow in 1927 conveyed the property in suit by quitclaim deed to plaintiff and intervener, and the latter have claimed and used this property since that date. Of late years this property, together with a part of the adjoining lot Five, has been used principally as an automobile parking space for guests of plaintiff's hotel, and as a way to the rear entrance of the hotel for the delivery of goods; but it has always been open to the public as a passageway. The hotel is situated on lots Seven and Six and a part of lot Five, which adjoin the property in suit on the south.

This property was not claimed as a part of the estate of Joseph C. Lea by his administrator or by his heirs, until claimed by the defendant. The plaintiff and intervener bought the north 35 feet of lot Four in 1944, and now own all private property adjoining that in suit.

The trial court concluded that any right or title the defendant may have had in the property was barred by the four year statute of limitation; and that plaintiff's and intervener's title should be quieted, and entered a decree accordingly.

The trial court erred in holding that the defendant's interest (if any), was barred by the four year statute of limitations, which is as follows: "Those founded upon accounts and unwritten contracts; those brought for injuries to property or for the conversion of personal property or for relief upon the ground of fraud, and all other actions not herein otherwise provided for and specified within four [4] years." Sec. 27-104 N.M.Sts.1941.

The trial court concluded: "That the possession, occupation and use of the property in dispute and its improvements at the death of Harry Wildy Lea was sufficient notice to his heir that the plaintiff and intervener were claiming rights in the property, which was sufficient notice to her to set the statute of limitations in operation and require her to sue for any rights or claims she might wish to assert to such property within the period fixed by the statute of limitations."

[redacted] The reference is to the statute just quoted. It would be an anomaly to hold that the owner of property, as against one who claimed it and who had possession, and had used it, but who did not comply with the requirements of the 10 year statute of limitation, could be barred by the four year statute. The only way open to one claiming real estate by limitation because of possession and use is by complying with the 10 year statute, which is as follows: "No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against any one having adverse possession of the same continuously in good faith, under color of title, but within ten [10] years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements or heriditaments so held, shall be commenced within ten [10] years next after the cause of action therefor has accrued: Provided, that if any person entitled to commence or prosecute such suit or action is or shall be, at the time the cause of action therefor first accrued, imprisoned, of unsound mind, or under the age of twenty-one [21] years, then the time for commencing such action shall in favor of such persons be extended so that they shall have one [1] year after the termination of such disability to commence such action; but no cumulative disability shall prevent the bar of the above limitation, and this proviso shall only apply to those disabilities which existed when the cause of action first accrued and to no other. 'Adverse possession' is defined to be an actual and visible appropriation of land, commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another; and in no case must 'adverse possession' be considered established within the meaning of the law, unless the party

claiming adverse possession, his predecessors or grantors, have for the period mentioned in this section continuously paid all the taxes, state, county and municipal, which during that period have been levied upon the land or interest claimed, whether assessed in his name or that of another." Sec. 27-121 N.M.Sts.1941.

Neither the plaintiff nor the intervener was ever in adverse possession of the property in question; but the general public at all times had access to and used it. Indeed it is admitted by them that defendant's claim is not barred by the 10 year statute; and that being true it is not barred at all.

The defendant asserts that the reservation in the deed from Lea to Dills conveyed no interest or title in or to the land in suit to Dills; and therefore none was conveyed to plaintiff and intervener by Dills' deed to them, which contained no reference to the land in suit.

The Lea deed does not purport to convey to Dills any interest in the land in suit; but it was *agreed* that it should be "perpetually reserved for an alley."

The so-called reservation was written into the deed for the benefit of the grantee. As Lea, the grantor, owned all of the 15 feet in controversy, it could not have been made for his benefit. Except for this provision in the deed, Lea could have used the property for an alley, or for any other lawful purpose. It was an agreement and representation on the part of the grantor that the 15 feet which he owned adjoining the property conveyed would be used perpetually as an alley. If it was to be used so perpetually its existence as an alley began at the time of the execution of the deed. The language used is not clear, but it is at least as clear as that used in Zimmerman v. Kirchner, 151 Iowa 483, 131 N.W. 756, 757, wherein the deed conveyed "'One hundred and fifty (150) feet off the west side of block four (4) * * * excepting sixty (60) feet of south side of said block which shall be left for a driveway.'" The question was whether the 60 feet was withheld from the title or was merely a reserved easement. It was held that the deed conveyed the whole block but left to the grantor the driveway as an easement. The word "excepting" was construed to mean "reserving."

It was held in Winston v. Johnson, 42 Minn. 398, 45 N.W. 958, that where there is no declaration in a deed of the intention of the parties in regard to the nature of a way provided for, that resort may be had in such case to other circumstances surrounding the transaction for the purpose of ascertaining the intent and the effect to be given to the instrument. And see Huttemeier v. Albro, 18 N.Y. 48.

We are of the opinion that the heirs of the grantor, J. C. Lea, are estopped from claiming that the alley, though not in fact in existence prior to the execution of the deed by Lea, was created by the deed itself.

No other reasonable construction can be placed upon the language of the deed.

If land is purchased under an agreement and representation that it would abut upon a street or alley, existing or to exist by the terms of the deed, and the grantor owns the land to be so used; the grantor and his heirs are estopped to deny the existence of the alley; and the purchaser acquires a right of way over the land in question.

"'But there is no such difficulty in the claim of Burch. In the deed from Wilson to Burch the lot conveyed is described as fronting on "the continuation of a strip of ground 60 feet by 330 feet intended and reserved for the continuation of South street." A boundary on "an intended street" grants an appurtenant private right of way. O'Linda v. Lothrop, 21 Pick. [38 Mass.] 292, 32 Am.Dec. 261; Smith v. Lock, 18 Mich. 56; Jones on Easements, §§ 227-228.

"'"When a grantor conveys land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way," and, "the description of the way, in the deed, as a contemplated passageway, shows the agreement of the parties that there should be such a passageway, as distinctly as if it had been already laid out; and has the like effect." Tufts v. City of Charlestown, 2 Gray, [68 Mass. 271] 272; Stetson v. Dow, 16 Gray, [82 Mass.] 372; Franklin Ins. Co. v. Cousens, 127 Mass. 258; Gaw v. Hughes, 111 Mass. 296.'" Teasley v. Stanton et al., 136 Ala. 641, 33 So. 823, 824, 96 Am.St.Rep. 88.

"'The whole extent of the doctrine is, that a grantor of land, describing the same by a boundary on a street or way, if he be the owner of such adjacent land, is estopped from setting up any claim, or doing any acts, inconsistent with the grantee's use of the street or way.' * * * In one sense the deed operates as a conveyance of a right of way over the street; that is to say, the grantors and all claiming under them are estopped to deny the existence of the street, or do any act inconsistent with the plaintiff's use of it as such." Hennessey v. Old Colony & N. R. Co. 101 Mass. 540, 100 Am.Dec. 127.

In Garstang v. Davenport, 90 Iowa 359, 57 N.W. 876, 878, the question was the effect of the following description in a deed: "'150 feet, to a twenty-foot alley, hereafter to be laid out.'" The land belonged to the grantor. The Iowa court said: "We do not think it open to serious dispute that the deed to intervener contemplated the laying out of an alley as the southern boundary of the lot. In Parker v. Smith, 17 Mass. 411, [9 Am.Dec. 157,] it is said: 'The principal question in this case arises upon the construction of the deed from John Russell to Benjamin Faber,

in which he conveys a piece of land in what is now the town of New Bedford, bounding it southwardly and westwardly on a way or street. By this description the grantors and his heirs are estopped from denying that there is a street or way to the extent of the land on those two sides. We consider this to be not merely a description, but an implied covenant that there are such streets.' See, also, Thomas v. Poole, 7 Gray, [73 Mass.] 83. In Tufts v. City of Charleston, 2 Gray, [68 Mass.] 271, the syllabus states the rule as follows: 'A deed of land bounding on a passageway two rods wide, which is to be laid out between the premises and land of A., the grantor to make and maintain all the fence between the said contemplated passageway and premises, estops the grantor, and those claiming under him, to deny the existence of the passageway.' In the opinion it is said: 'When a grantor conveys land, bounding it on a way or street, he and his heirs are estopped to deny that there is such a street or way. This is not descriptive merely, but an implied covenant of the existence of the way.' We think the entire current of authorities is with this view." White v. Tide Water Oil Co., 50 N.J.Eq., 1, 25 A. 199; Malone v. Jones, 211 Ala. 461, 100 So. 831; Loustannau v. Robertson, 21 Tex.Civ.App. 85, 50 S.W. 489; 2 Thompson on Real Property, Sec. 471.

It is asserted by appellant that the provision in the Lea deed regarding an alley did not extend the fee of the land conveyed to the center of the proposed alley.

[redacted] It is a rule practically without exception that a conveyance of land abutting on a road, highway, alley, or other way, is presumed to take the fee to the center line of the way. Re Application of City of New York, Etc., 209 N.Y. 344, 103 N.E. 508, 2 A.L.R. 1; Rio Bravo Co. v. Weed, 121 Tex. 427, 50 S.W.2d 1080, 85 A.L.R. 391; Nashville v. Lawrence, 153 Tenn. 606, 284 S.W. 882, 47 A.L.R. 1266; Hensley v. Lewis, 278 Ky. 510, 128 S.W.2d 917, 123 A.L.R. 537, and see case notes in A.L.R. following each of the above cases. The presumption, however, is a rebuttable one. After all, it depends upon the intention of the parties to the deed, to be ascertained from its language, viewed in the light of the surrounding circumstances, Henderson v. Hatterman, 146 Ill. 555, 34 N.E. 1041. The presumption may be overcome either by express words or by the use of such words as necessarily exclude the highway from the description of the premises conveyed; but in case the language is of doubtful meaning, the presumption will prevail. Van Winkle v. Van Winkle, 184 N.Y. 193, 77 N.E. 33, and see annotations in A.L.R. last mentioned.

[redacted] We are of the opinion that the words "That the remaining 15 feet * * * shall be perpetually reserved for an alley," did not reserve the fee in the grantor. The language is of doubtful

meaning, but holding as we have, that an alley was established by this language, it may reasonably be held that only the alley, or easement, was reserved by the grantor for the use of the public and for the benefit of the adjacent property owners. In Richardson v. Palmer, 38 N.H. 212, it was held that the words "reserving to the public the use" of a highway, means that the fee passed to the land owners. We will resolve the doubt in favor of the grantee in the Lea deed, and hold that it was intended that the fee to the center of the alley should pass to Dills, and that the alley, or easement, alone was reserved for the benefit of the adjacent property owners, and perhaps the public, Wellman v. Dickey, 78 Me. 29, 2 A. 133.

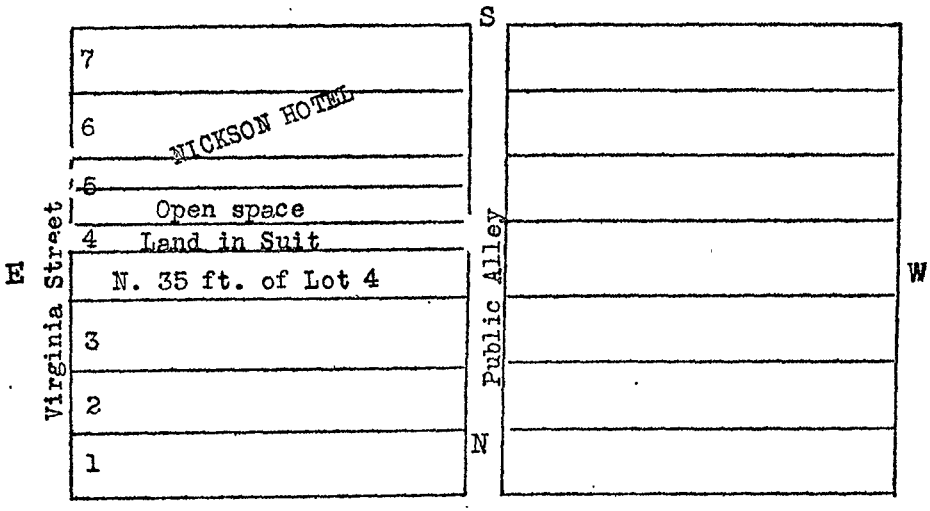
The following plat of Block Ten will assist in understanding the location of the property in suit and its surroundings:

The trial court correctly held that the defendant had no right or interest in the property; for which reason other interesting questions presented are not decided. The plaintiff is the owner of the property in suit, as against the defendant. The rights of the public, if any, because of a user for a half century, are not involved and cannot be determined.

The decree of the district court should be affirmed and

It is so ordered.

LUJAN and SADLER, JJ., concur.



179 P.2d 528

COMMISSIONER OF PUBLIC LANDS v. VAN BRUGGEN.

No. 4955.

Supreme Court of New Mexico.

March 14, 1947.

Rehearing Denied May 2, 1947.

George Graham, of Santa Fe, C. C. McCulloh, Atty. Gen., and H. A. Kiker, of Santa Fe, for appellant.

Crampton & Robertson, of Raton, for appellee.

McGHEE, Justice.

The Commissioner of Public Lands cancelled grazing leases for subleasing them without his written consent. An appeal was taken to the District Court where on trial de novo judgment was rendered in favor of the lessee and the Commissioner has appealed to this court.

As we view this case the determination of two questions settle it. They are:

1. Does Section 8-866, 1941 Comp., grant lessee the right of appeal in this case?

2. If she does have such right, does the order to show cause issued by the Commissioner following the filing of an affidavit fulfil the requirements of Sec. 8-847, 1941

Comp., as to written notice before cancellation?

On September 18, 1943, an affidavit made by Carl Hennigan was filed with the Commissioner (omitting the exhibit), reading as follows:

"State Land Office Sep 18 1147 A M '43 Santa Fe, N. M.

"Statement Directed to Hon. R. H. Rodgers, Commissioner of Public Lands of the State of New Mexico.

"The undersigned states that he is a resident of Colfax County, New Meixco, and his post office address is Chico, New Mexico.

"That he is the owner of grazing lands in said County of Colfax and is engaged in the livestock business.

"That he is thoroughly familiar with the location, situation, condition and manner of use of the State lands described in Exhibit I hereto attached, as lands held under lease issued by the State of New Mexico to William Van Bruggen and to Anita Van Bruggen; and knows that Anita Van Bruggen is the daughter of William Van Bruggen, now deceased, and that said Anita Van Bruggen is Administratrix of the Estate of William Van Bruggen in process of probate in the Probate Court of Colfax County, New Mexico.

"That said State leases have been held by William Van Bruggen and Anita Van Bruggen as his successor for a period of more than 10 years and probably in excess of 15 years and affiant knows that at no time since the first year of the holding thereof by William Van Bruggen has the said Van Bruggen or the said Anita Van Bruggen as his successor ever made use of said lands for the grazing of cattle of their own thereon, and that for a period of at least 10 years the said Van Bruggens, being the owners of certain deeded lands of about equal acreage as said leased lands, contiguous to said leased lands, have at all times subleased said lands to other owners of cattle; and that for a period of several years last past the said lands so held under lease as aforesaid from the State of New Mexico have been subleased to one Tom Cobb, a citizen and resident of the State of Texas, who has run cattle on said lands for a period of approximately 6 months in each year.

"Affiant is informed and believes, and on information and belief states, that said State lands so leased from the State of New Mexico have been subleased by the holders of said leases at a profit of several hundred per cent on the price paid to the State therefor, and that said lands are being so subleased at the present time, and that said subletting has been done without permission from the State Land Commissioner; and affiant is further informed and believes that said subletting done as aforesaid is in direct violation of the rules and regulations of the State Land Office.

"Affiant, as a bonafide resident of the State of New Mexico, who owns land and cattle in said County of Colfax and who is required to pay taxes on land and cattle throughout the entire year in each and every year, is ready, willing and able to lease said lands which are contiguous to lands by him owned, and to make use of them in a bonafide cattle business and not in a speculative manner by subleasing or subletting.

"He accordingly calls the attention of the Commissioner of Public Lands to the situation existing with respect to said lands, and requests that such action be taken by the State Land Office as will result in said State lands being made use of in accordance with the rules and regulations of the State Land Office and in full compliance with the laws of the State.

"Carl Hennigan

"State of New Mexico, County of Santa Fe—ss

"Carl Hennigan, being first duly sworn, on oath states: That he has read the foregoing statement made to the Commissioner of Public Lands of the State of New Mexico, and knows the contents thereof; and that the statements made therein are true of his own knowledge, except such as are made on information and belief and as to those he believes such statements to be true.

"Carl Hennigan."

Attached was a supporting affidavit of J. A. Torres that the lands had been subleased on Sept. 30. The commission issued an order to the lessee to show cause before him at Santa Fe on November 2, 1943, why the leases should not be cancelled, reading as follows, except for the land descriptions:

"To: William Van Bruggen

"Anita Van Bruggen, as Administratrix of The Estate of William Van Bruggen, deceased

"Anita Van Bruggen

"Maxwell, New Mexico

"Comes now H. R. Rodgers, Commissioner of Public Lands of the State of New Mexico, and gives notice, directs and orders you to show cause before him why the hereinafter described State Institutional Grazing Leases, heretofore entered into by and between the Commissioner of Public Lands, acting for the State of New Mexico, and the parties herein mentioned, under the respective dates as hereinafter set out, should not be cancelled.

"Grazing Lease #H-6562, Application No. H-6878, to William Van Bruggen, dated October 1, 1939, with expiration date October 1, 1944, covering the following described lands: * * *

"Grazing Lease #H-5678, Application No. H-5566, to William Van Bruggen, dated October 1, 1938, with expiration date October 1, 1943, covering the following described lands: * * *

"Grazing Lease H-7708, Application No. H-9150, to Anita Van Bruggen, dated July 16, 1940, with expiration date July 16, 1944,

covering the following described lands: * * *

"and Grazing Lease H-9949, Application No. H-11800, to Anita Van Bruggen, dated October 1, 1941, with expiration date October 1, 1946, covering the following described lands: * * *

"As grounds for this notice it is averred:

"(1) That information has been made available to the Commissioner of Public Lands that you, and each of you, as hereinabove set out, have violated the express terms of said leases, in that you have been using the said grazing lands for purposes other than grazing your own livestock, and

"(2) That you have speculatively sublet the said lands without the written approval of the Commissioner of Public Lands, in violation of the rules and regulations of the New Mexico State Land Office.

"The time and place for the hearing on this Order to Show Cause is Tuesday, November 2, 1943 at the hour of 10 o'clock A.M. at the office of the Commissioner of Public Lands in the Capitol, Santa Fe, New Mexico.

"Dated at the City of Santa Fe, State of New Mexico, this thirtieth day of September, one thousand nine hundred and forty-three.

"H. R. Rodgers

"Commissioner of Public Lands [Seal]

"Return Receipt Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

"Anita Van Bruggen

"Date of delivery 10/2, 1943."

We now turn to the rules relating to contests adopted by the Commissioner of Public Lands on August 23, 1930, under the authority of Sec. 8-863, 1941 Code. The applicable rules read:

"Sec. 2. Contests may be initiated by the filing of a complaint or affidavit duly verified, specifically setting forth the grounds of the action. * * *"

"Sec. 3. If, upon consideration of the matters and things set up in the complaint and an examination of the records, the Commissioner shall deem the complaint to be sufficient to constitute a cause of contest, a notice of contest will be issued, * * *"

The remaining sections provide for service, making up of issues, etc.

At the opening of the hearing before the Commissioner we find the following:

"At this point, Mr. Graham, attorney for the Commissioner of Public Lands, asked that Judge H. A. Kiker be considered as associated with the case for the Land Office as he represented some of the interests who had promoted the action * * *"

Objection of the lessee was overruled. Mr. Graham then offered the "statement" of Hennigan to which was attached the

affidavit of Torres as evidence. Objection was made that it was hearsay. Again quoting:

"Judge Kiker intervened to say that it was entered as the complaint. Mr. Montoya (attorney for lessee) insisted that it not be used as evidence, whereupon the Commissioner ruled that it be introduced as the complaint, which is required by law and be made a part of the records."

At the conclusion of the hearing on November 2, 1943, the Commissioner stated he would withhold any final decision until the attorneys had submitted "facts and findings" and his decision was not filed until February 21, 1944. We find he leased the lands involved to Hennigan on January 3, 1944, with the following clause inserted therein:

"It is hereby understood and agreed that this lease may be cancelled by the Commissioner if the *contest* (emphasis ours) against Anita Van Bruggen is appealed to the courts and the decision of the Commissioner is reversed * * *"

It is plain to our minds that the affidavit of Hennigan was filed as an affidavit of contest under Rule 2, supra, and treated as such by the Commissioner, and that the "order to show cause" was issued and served as a notice of contest as provided by Rule 3, supra.

The lessee had the right of appeal to the district court, and the ruling denying the motion of the Commissioner to dismiss on the ground there was no statute allowing an appeal of this case was correct.

We now proceed to the second point.

The leases contained the following provisions made under the authority of Rule 4 of the General Regulations relating to grazing and agricultural leases of the Commissioner adopted August 23, 1930:

"It is understood and agreed that this lease is made for the sole use and benefit of the lessee. That no sub-lease or underlease (written or verbal) shall be made by the said lessee without the written consent of the Commissioner, and any violation of this agreement and understanding will subject this lease to cancellation."

The statute authorizing the cancellation for the violation of the terms of a lease is Sec. 8-847, N.M. Statutes 1941, as follows:

"8-847. Violation of lease or instrument covering state lands—Notice—Forfeiture for noncompliance with demand—The violation of any of the terms, covenants or conditions of any lease or instrument in writing executed by the commissioner covering state lands, or the nonpayment by any lessee of such lands of rental when due, shall, at the option of the commissioner work a forfeiture of any such lease or instrument in writing after thirty (30) days' notice thereof to the lessee and the holders of any collateral assignments by registered mail, addressed to his or their

last known post-office address of record in the state land office; provided, if within said thirty (30) days the lessee or the holders of any collateral assignments shall comply with the demand made in any such notice, cancelation shall not be made."

The only notice given the lessee that claim had been made she had violated the terms of the lease was the order to show cause, which we have held was in fact a notice of contest. By the terms of the statute an offending lessee is entitled to notice of the claimed violation of the terms of the lease, and if he ceases such violation or meets the demands within the thirty days no cause exists for cancellation.

The judgment of the District Court will be affirmed, and it is so ordered.

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

179 P.2d 757

BELL v. LAMMON.

No. 4995.

Supreme Court of New Mexico.

April 14, 1947.

Otto Smith and L. G. Skarda, both of Clovis, for appellant.

James J. McNamara, of Clovis, for appellee.

McGHEE, Justice.

The appellee was given judgment for money paid to appellant as part of the purchase price of real estate and a package liquor store. We will refer to the parties as they appeared below.

The defendant was the owner of some lots and a building in Taiban, New Mexico, in which he operated a package liquor store under a state license. The plaintiff had worked as a liquor salesman for between four and five years for Ilfeld & Company, wholesale liquor dealers, and had later owned and operated a retail liquor estab-

lishment in Clovis, New Mexico. On June 1, 1945, he came to the defendant's liquor store and asked if it was for sale and on being told that it was he took a pencil and paper and spent between one and two hours in the storeroom checking the stock. On his return from the stock room he and the defendant soon agreed upon a sale of the lots, building, fixtures and stock and went to Fort Sumner where Keith W. Edwards, an able and reputable member of the bar, acting for both parties, prepared and they signed the following contract:

"This Contract, Made and Entered into by and between Harry V. Lammon, of Taiban, New Mexico, party of the first part, and Tony G. Bell, of Clovis, New Mexico, party of the second part,

Witnesseth

"1. That the party of the first part agrees to sell and the party of the second part to buy the following described real and personal property, to-wit:

"Lots one and two in block nineteen of the Lindsey-Oldham Addition to Taiban, within the County of De Baca and State of New Mexico, together with all of the fixtures and equipment in the dwelling on said premises, including the cash register, frigidaire, etc., and the well, windmill, storage tank, electric plant and all other equipment on the said premises, it being understood that the first party is to remove only his purely personal effects and the bed and other personal property.

"All of the beer, whiskey, wine and other liquors, gin, etc. and etc., constituting the stock of goods and merchandise now in the said dwelling, which is being used as a package house and in which the first party is now doing business, together with the good will of the business of retailing beer, wines, whiskey, etc.

"One (1) Dodge truck (pick-up)

"One (1) certain contract between the first party and the Duke City Wine Company, of Alburquerque, New Mexico, for delivery of certain liquors under the terms and conditions thereof, and on which said contract the first party has paid a deposit of $3600.00 to the said Duke City Wine Company.

"2. That the first party shall furnish a properly certified abstract, showing a merchantable title in fee simple in said first party, free and clear of all liens and encumbrances, with taxes paid to and including 1944, which said abstract shall be paid for by first party and become the property of the second party upon payment by him of the full purchase price of the said real estate hereinafter described. That the second party shall have a reasonable time within which to cure any objections to the title properly raised by the second party. That the purchase price of said real estate shall be the sum of Five Thousand ($5000.00) Dollars, payable as follows: $1500.00 in cash and a promissory note in the sum of $3500.00, payable on or before the 1st day

of June, 1946, secured by a mortgage deed back on said real estate, for and in consideration of which the first party agrees to deliver to the second party a good and sufficient warranty deed, executed by said first party and his wife, running to the second party, the said cash payment and note and mortgage to be delivered to the first party upon acceptance of said real estate, and upon tender of said cash, note and mortgage deed, the said first party shall deliver the said deed, the delivery of said cash, note and mortgage and the said deed to be simultaneous acts.

"3. That the purchase price of the stock of beer, wines, whiskey, gin and all other liquors, etc., shall be such sum as may aggregate the invoice price thereof on the 3rd day of June, 1945, when the said parties are to inventory said stock, and such sum shall be paid in cash when the said inventory is completed, when and whereupon the second party is to take possession of the premises and the said stock.

"4. That the said Dodge truck (pick-up) shall be delivered when the said inventory of the stock is completed and shall be paid for in the amount and at the time to be later agreed upon by and between the parties hereto.

"5. That the said contract between the first party and the said Duke City Wine Company shall be assigned to the second party upon payment by him to the first party of the said sum of $3600.00, being the amount heretofore paid by the first party to the said company, it being agreed that the parties hereto will go to Albuquerque and complete the payment of the said $3600.00 to the first party.

"6. That the party of the second part agrees to pay to the party of the first part upon the execution of this contract the sum of $3000.00, to bind the bargain and to be retained by the first party as part payment on the stock of liquors, beer, wine, whiskey, etc.

"7. It is agreed by and between the parties hereto that time is of the essence of this contract and that all things to be done hereunder shall be done promptly and in an expeditious manner.

"8. This contract shall extend to and be binding upon the heirs, executors, administrators and assigns of the parties hereto.

"In Witness Whereof, the parties hereto have hereunto set their hands on this 1st day of June, A.D., 1945.

"(Signed) Harry V. Lammon
"(Signed) Tony G. Bell

"Witnesses:
"G. W. Heisel"

The plaintiff immediately made the $3,000 down payment as provided. They met at the store on Sunday, June 3, 1945, and with the assistance of two others spent the day taking inventory and extending the prices, although the final computations were

not completed for two or three days. The inventory value was approximately $25,000. At the completion of taking the inventory on June 3 the plaintiff made the second payment of $3,000, took possession of the store, and arranged for a Mr. Baker to continue as the salesman. On the next Wednesday plaintiff and defendant went to Albuquerque in the Dodge truck where they called at various wholesale houses and informed them of the sale and the plaintiff, according to the defendant's testimony, purchased additional stock amounting to $788, which was sent to the store by a truck line company and paid for by plaintiff while the defendant says it was a regular shipment made to defendant. The plaintiff had stopped at the store Wednesday morning and received $766 from the salesman Baker, which was the receipts for two days business.

After learning that the stock totalled approximately $25,000, the plaintiff refused to make further payments, abandoned the store and filed suit on August 27, 1945, to recover the $6,000. No transfer of the license had been made by defendant pending final payment and the execution and delivery of the mortgage on the real estate.

The plaintiff bases his action on his claim that he advised the defendant he had only $8,000 and the statement of the defendant that such sum would be sufficient to make all cash outlays called for by the contract, and that the defendant wilfully and maliciously concealed the value of the stock. He also pleads mutual mistake, that there was no meeting of the minds and failure of consideration.

The trial court found the facts for him on all counts, and in conclusion of law No. 1 held: "That said agreement, resting partly in writing and partly in parol does not violate the parol evidence rule."

The defendant assigns error on the admission of parol evidence to show a representation that $8,000 would be sufficient to make the cash payments, and the plaintiff answers that such evidence was admissible, but in any event its admission and consideration is not available as grounds of error as it was not raised below. An examination of the record shows that the defendant's attorney in his opening statement said: "Our theory is that there was a written contract made and entered into between the two men, after full inspection of the premises and the goods, wares and merchandise to be purchased. We think everything was embodied in the contract; it was well drawn and well written. * * *"

As the plaintiff was asked as to the amount of money he had to purchase the place, objection was made that it was immaterial but the court overruled the objection with the statement that if the testimony was not material it would not be considered. Then followed testimony in support of his claim that it was represented

$8,000 would be sufficient. On the question of whether the parties intended that their writing covered the entire contract, we here quote our approval in Locke v. Murdoch, 20 N.M. 522, 533, 534, 151 P. 298, 302, L.R. A. 1917B, 267, of Prof. Wigmore's statement on this point: "Although in form the witnesses may be allowed to recite the facts, yet in truth, the facts will afterwards be treated as immaterial and legally void, if the rule is held applicable. There is a preliminary question for the judge to decide as to the intent of the parties, and upon this he hears evidence of both sides; his decision here, pro or con, concerns merely this question preliminary to the ruling of law. If he decides that the transaction was covered by the writing, he does not decide that the excluded negotiations did not take place, but merely that if they did take place they are nevertheless legally immaterial. If he decides that the transaction was not intended to be covered by the writing, he does not decide that the negotiations did take place, but merely that, if they did, they are legally effective, and he then leaves to the jury the determination of facts whether they did take place. * * *"

The question was squarely raised in the defendant's requested findings of fact and conclusions of law, as well as in his exceptions to those made by the court.

The rule in New Mexico is stated in Locke v. Murdoch, supra, 20 N.M. , 151 P. 300, as follows:

"'But a complete, valid, written contract merges all prior and contemporaneous negotiations and agreements within its purview, and if the oral agreement is not really collateral, but is an element of the written contract, or tends to vary or contradict the same, either in its express provisions or legal import, it is inadmissible * * *'."

Further the Court there adopted Mr. Wigmore's approach in ascertaining whether the rule excluded the offered evidence and quoted that legal writer as follows:

"'More correctly, the inquiry is whether the writing was intended to cover a certain subject of negotiation; * * * and one of the circumstances of decision will be whether the one subject is so associated with the others that they are in effect "parts" of the same transaction, and therefore, if reduced to writing at all, they must be governed by the same writing.

"'The intent must be sought where always intent must be sought, * * * namely, in the conduct and language of the parties and the surrounding circumstances. The document alone will not suffice. * * *

"'In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing.

"'If it is mentioned, covered, or dealt with in the writing, then presumably the

writing was meant to represent all of the transaction on that element; * * *. This test is the one used by the most careful judges, and is in contrast with the looser and incorrect inquiry * * * whether the alleged extrinsic negotiation contradicts the terms of the writing.' "

By the written contract the plaintiff assumed the contract with the Duke City Wine Co. and was to pay the defendant $3,600 on that account, was to pay $5,000 for the real estate and certain personal property payable $1,500 in cash and the remainder by note. To these items he has lodged no objection. Does the written contract cover the element of the purchase price of the liquor? Paragraph 3 reads: " 'That the purchase price of the stock of beer, wines, whiskey, gin and all other liquors, etc., shall be such sum as may aggregate the invoice price thereof on the 3d day of June, 1945, when the said parties are to inventory said stock, and such sum shall be paid in cash when the said inventory is completed, when and whereupon the second party is to take possession of the premises and the said stock.' "

To sustain plaintiff's contention we must let him add the following: "provided, however, the total cost of the truck and liquor shall in no event exceed the sum of $2,900.-00." Plainly this would add to the terms of the written instrument, and the court erred in holding the sales price of the liquor was limited by any such agreement.

The trial court also held the defendant liable for deceit and constructive fraud based upon the claimed assurance that the stock of liquors would not exceed the sum of $8,000, and the plaintiff claims such evidence is admissible on that theory of his case.

We passed upon this question in Alford v. Rowell, 44 N.M. 392, 103 P.2d 119, 122, where we said:

"The mere allegation of fraud does not constitute a blanket invitation to disregard utterly the parol evidence rule. The field for employing such evidence even where fraud is alleged, is not unlimited.

"If a parol contemporaneous agreement be the inducing cause of the written contract, or forms a part of the consideration therefor, and it appears the writing was executed on the faith of the parol agreement or representation, extrinsic evidence is admissible. In such cases, the real basis for its admission is to show fraud. The principle which admits such evidence under the conditions stated has no application, however, where the parol agreement relates directly to the subject of the written contract, even though it be alleged, as in the case at bar, that the written contract was signed upon the faith of the oral promises."

The contract in this case is plain, covers all phases of their deal and the claimed misrepresentation relates directly to the subject of the contract, that is, the price.

Even if such representations could be considered, it would avail the plaintiff nothing, as announced in Berrendo Irrigated Farms Co. v. Jacobs, 23 N.M. 290, 305, 168 P. 483, 487:

"The law is that where a vendee undertakes to make investigation of his own, and is given full means to ascertain all the facts, and is not prevented from making the examination as full as he likes, he cannot be heard to complain because he relied upon representations of the vendor if his purchase proves unsuccessful. In Page on Contracts, § 123, it is said:

" 'If the person to whom the false statements are made did not rely on them but investigates for himself, and acts and relies on his own knowledge, no fraud exists, if the falsity of such representations was or could be discovered thereby, and if no artifice was resorted to to prevent him from discovering the truth.' " See also 61 A.L.R. 493.

By his own admission the plaintiff has had many years experience in the liquor business, and as heretofore stated, examined the stock before opening negotiations for its purchase, helped all day with the inventory and then made the second payment. To accept his statement that he believed the stock would not exceed $2,900 (the amount that would be available) and sustain the judgment, we would be credulous indeed.

It is settled in this state by our decisions in Dunken v. Guess, 40 N.M. 156, 56 P.2d 1123, and Montgomery v. First Mortgage Co., 38 N.M. 148, 29 P.2d 331, that a defaulting vendee may not recover back his partial payments. In Dunken v. Guess we quoted with approval the following from Hansbrough v. Peck, 5 Wall, 497, 18 L.Ed. 520 [40 N.M. 156, 56 P.2d 1126]: " 'No rule in respect to the contract is better, settled than this: that the party who has advanced money or done an act in part performance of the agreement, and then stops short, and refuses to proceed to its ultimate conclusion, the other party being ready and willing to proceed and fulfill all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done.' "

The situation in which the plaintiff finds himself is aptly expressed in Montgomery v. First Mortgage Co., supra [38 N.M. 148, 29 P.2d 334], as follows: "No breach of the contract is shown to have occurred on the part of appellant when the vendee assumed to rescind it and assigned his cause of action. By his early attempt to rescind, he risked all."

The plaintiff devotes a considerable part of his brief in an argument that the defendant did not say at the trial he was ready to accept the balance of the purchase price and deliver the property. A sufficient answer to this argument is that the plaintiff did not make such a tender.

The judgment will be reversed and the case remanded to the District Court with instructions to dismiss the complaint and render judgment for the defendant for his costs, and it is so ordered.

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

179 P.2d 762

GONZALES v. SHARP & FELLOWS CONTRACTING CO. et al.

No. 4954.

Supreme Court of New Mexico.

April 19, 1947.

Joseph L. Smith and Mechem & Hannett, all of Albuquerque, for appellants.

Gilbert & Gilbert, of Santa Fe, for appellee.

LUJAN, Justice.

This is a second appeal of this workman's compensation case. See Gonzales v. Sharp & Fellows Contracting Co., 48 N.M. 528, 153 P.2d 676. The facts, which are not controverted, are as follows:

On July 10, 1939 Cayetano L. Gonzales while working for the Sharp & Fellows Contracting Co., (hereinafter styled appellant) suffered an accidental injury arising out of and in the course of his employment. As a result of this injury he immediately became totally disabled, and so continued until the time of his death (a result of the injury) on July 8, 1943. Because of this injury the deceased, prior to his death, was awarded compensation for 550 weeks at $18 per week. Had he lived payments would have continued until February 8, 1950. He had received compensation for 207 weeks at the time of his death, and there remained 343 weeks before his weekly compensation would have ended, had he lived.

The deceased was survived by his wife (appellee herein), and four children, all under the age of 18 years; all of whom were dependent solely upon deceased for support. This proceeding was filed in the district court within one year after the death of Gonzales.

The parties agreed: "That the sole issues in this cause were whether or not the plaintiff was entitled to recover the unpaid portion of the 550 weeks' compensation which said Cayetano L. Gonzales would have been entitled to receive if he had continued to live, and what allowance, if any, should be made as attorney's fees."

The question then is whether the facts stated support the judgment.

The answer depends upon our construction of the following statutes, under which appellee claims:

"In case death of any workman who would himself have been entitled had such death not occurred, to recover from such employer on account of any such injuries under the terms hereof, claim may be filed therefor on behalf of his dependents as provided in section 8 [§ 57-917]." Sec. 57-913, N.M.Comp.1941.

"In event any injury from accident arising out of and in the course of the employment of a workman should result in and be the proximate cause of his death and he

should leave surviving him any dependents, as herein defined, entitled to compensation under the terms hereof, payment thereof may be received or claim therefor filed by such person as the court may authorize or permit, on behalf of the beneficiaries entitled thereto, and such claim shall be filed and answer made thereto and other procedure had as in cases filed by the injured workman. Provided, that no claim shall be filed or suit brought to recover such compensation unless claim therefor be filed within one [1] year after the date of such death." Sec. 57-917 N.M.Comp.1941.

It is obvious that these statutes are not ambiguous, and standing alone, support the widow's contention that she and her four children have succeeded to the statutory benefits that had theretofore been awarded to her husband.

Counsel for appellants call our attention to the fact that compensation is provided for the widow and the minor children of a workman who lost his life by accident in the course of his employment, in the following language:

"* * *.

"In case death proximately results from the injury within the period of one [1] year, compensation shall be in the amounts and to the persons as follows:

"(1) If there be no dependents, the compensation shall be limited to the funeral expenses not to exceed one hundred and fifty dollars ($150.00) and the expenses provided for medical and hospital services for deceased, together with such other sums as deceased may have paid for disability.

"(2) If there are dependents at the time of the death, the payment shall consist of not to exceed one hundred and fifty dollars ($150.00) for funeral expenses and the percentage hereinafter specified of the average weekly earnings, subject to the limitations of this act (§ 57-901—57-931), to continue for the period of three hundred (300) weeks from the date of injury of such workman; Provided that the total death compensation payable in any of the cases hereinafter mentioned, unless otherwise specified, shall not be less than ten ($10.00) dollars per week nor more than eighteen ($18.00) dollars per week.

"If there be dependents entitled thereto, such compensation shall be paid to such dependents or to the person appointed by the court to receive the same for the benefit of such dependents in such portions and in such amounts as the court, bearing in mind the necessities of the case and the best interests of such dependents and of the public may determine, to be computed on the following basis, and distributed to the following persons:

* * * * * *

"6. To the widow or widower, if there be four [4] or more children, sixty [60] per centum of earnings. * * *" Sec. 57-918 N.M.Comp.1941.

The statute from which we have last quoted has been the law of this state in substantially the same language since 1917, though re-enacted several times. It is unambiguous, and totally unconnected with the provision in Sec. 57-913 under which appellee claims.

We then have two separate laws, each unambiguous and providing for a different relief for the widow and dependent children of a deceased workman, under different circumstances.

We stated in Atlantic Oil Producing Co. v. Crile, 34 N.M. 650, 287 P. 696, 698, "If the statute is ambiguous, we shall have a case for construction. * * * We may resort to the established canons of construction. * * * We pass it now, and shall never reach it, unless appellant can introduce ambiguity and put us to interpretation."

In Wenning v. Turk, 78 Ind.App. 355, 135 N.E. 665, 666, an almost identical situation confronted the court. The question there was whether the unpaid balance of compensation to the next of kin depending upon deceased for support, had reference to the total amount that he would have received had he lived. The Indiana court held to the latter meaning. This being the only case we have found almost in point, we liberally quote therefrom, as follows:

"Section 36 of the Workmen's Compensation Act, § 8020t, 1 Burns Supp. 1921, reads as follows:

" 'When an employe receives or is entitled to compensation under this act for an injury and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support.'

"Appellants contend that the words 'unpaid balance of compensation' as used in this section must be construed to mean compensation actually due the injured employe at the date of his death, and that it does not apply to the weekly installments of compensation that would have been paid to the employe had he lived. Section 31 of the Workmen's Compensation Act * * * provides that the employe shall receive, in lieu of all other compensation on account of his injuries, a weekly compensation of 55 per cent. of his weekly wages for the period of 150 weeks for the loss of an eye.

"Appellants contend that the law only required them to pay compensation to the date of the employe's death, and that the award for compensation subsequent to his death is contrary to law.

* * * * * *

"Appellees base their claim to the unpaid balance of the compensation accruing after the death of the injured employe on section 36 supra. Appellants, however, insist that the 'unpaid balance of compensation' must be construed to mean the unpaid bal-

ance due when the injured employe dies, and that it has no reference to the installments that would have become due and payable to the employe had he not died. In this connection appellants call attention to section 37 of the Compensation Act * * *, and argue that the Legislature certainly did not intend that the 'next of kin' of an employe, who dies from causes other than the injury for which compensation was being paid, should receive more than the dependents of such employe would have received if the injured employe had died from the injury itself. Said section 37 provides that:

"'When death results from the injury within three hundred weeks, there shall be paid a weekly compensation * * * during such remaining part of three hundred weeks as compensation shall not have been paid to the deceased, on account of the injury in equal shares, to all dependents of the employee wholly dependent upon him for support at the time of the death. * * *'

"There is nothing ambiguous about section 36. There is nothing in it that calls for judicial construction. We are not at liberty to read into the statute the words 'due at the time of the death of such employe' as we would have to do in order to have it read as appellants contend. The situation presented by these two sections is anomalous, but it is a matter for legislative enactment rather than judicial interpretation. We are strongly impressed with the language used in City of Pittsburgh v. Kalchthaler, 114 Pa.St. 547, 7 A. 921, quoted in Kunkalman v. Gibson, 171 Ind. 503, 510, 84 N.E. 985, 987, 86 N.E. 850, wherein it is said:

"'We think it is always unsafe to depart from the plain and literal meaning of the words contained in legislative enactments out of deference to some supposed intent, or absence of intent, which would prevent the application of the words actually used to a given subject. Such a practice is really substituting the theories of a court, which may, and often do, vary with the personality of the individuals who compose it, in place of the express words of the law as enacted by the lawmaking power. It is a practice to be avoided. It has been condemned by many text-writers and by many courts. Occasionally it has been departed from, but the path is a devious and a dangerous one, which ought never to be trodden, except upon considerations of the most convincing character and the gravest moment.'"

The only substantial difference between the Indiana statutes and those considered here is that the succession statute of Indiana runs to the heirs at law instead of the dependents. Here the succession statute and the compensation statute both run to the dependents. Ordinarily they are the same persons.

We have said more than once that when the language of a statute is plain and unambiguous there is no occasion to resort to the rules of statutory construction, and that such statute must be given its plain and obvious meaning. Vukovich v. St. Louis, Rocky Mountain & Pacific Co., 40 N.M. 374, 60 P.2d 356; DeGraftenreid v. Strong, 28 N.M. 91, 206 P. 694; Harrison v. Harrison, 21 N.M. 372, 155 P. 356; L.R.A.1916E, 854; Atlantic Oil Producing Co. v. Crile, 34 N.M. 650, 287 P. 696.

It is sought here, not to construe the statute under which appellee claims her right, but to totally eliminate it from the laws of the state. It is in no wise connected with Sec. 57-918 quoted above. They have no reference to each other. One of the statutes gives the dependents a cause of action in which the workman never had an interest. They are allowed specific weekly amounts depending on the number of children or other dependents. The other statute (the one under which appellee claims) provides for the succession of property rights of a deceased person to his dependents, which prior to his death had been awarded to him personally, either by the court or by the acts of the parties, and would ordinarily lapse at his death. We see no reason why the dependents should not be allowed this money that belonged to the workman.

We have no doubt but that the legislature intended to do exactly what it did do in passing these two statutes. Whether the widow and children could obtain benefits under both statutes is not a question in this case and need not be decided; but the legislature may have so intended notwithstanding the larger compensation that would have resulted had Gonzales died within a year after his injury. However, that is a legislative matter, and is foreclosed here by the statutes, which are clear, specific and unambiguous.

We have often held that the Workmen's Compensation Laws should be liberally construed (Stevenson v. Lee Moor Const. Co., 45 N.M. 354, 115 P.2d 342) but whether liberally construed or not the result in this case would not be different. We are not authorized judicially to eliminate rights conferred by the legislature.

We are of the opinion, and so hold, that the right to receive payments under the award of July 10, 1939, did not terminate by virtue of Sec. 57-918 on July 10, 1943, with the death of Cayetano L. Gonzales, and has not yet terminated, but survives for the benefit of his dependents under the provisions of Sec. 57-913.

For the reasons herein stated, the judgment of the trial court will be affirmed, with directions to the district court to enter judgment against appellant and its supersedeas sureties. Appellee is allowed

$750.00 attorneys fees for the prosecution of her appeal in this court, and

It is so ordered.

BRICE, C. J., and McGHEE and COMPTON, JJ., concur.

SADLER, Justice (dissenting).

I dissent.

Shortly prior to his recent death the late Chief Justice BICKLEY had prepared what he proposed should be the majority opinion in this case. It represents such a clear and logical exposition of the proper construction of the statutes involved, thereby demonstrating the error into which the majority have fallen in the prevailing opinion, that it is presented herewith as the basis of my dissent, with the addition of any personal observations it shall be my choice to make at the conclusion thereof. Omitting only the preamble in which the issue determined by the trial court was stated, the able observations and discussion of the late Chief Justice BICKLEY are as follows:

"The Court resolved the issue in favor of the plaintiff and rendered judgment in her favor. Whether or not this decision is correct depends upon a proper construction of the provisions of 1941 Comp., §§ 57-913, 57-917 and 57-918. The pertinent portions of these sections are as follows:

"'Sec. 57-913. * * * In case death of any workman who would himself have been entitled had such death not occurred, to recover from such employer on account of any such injuries under the terms hereof, claim may be filed therefor on behalf of his dependents as provided in section 8(57-917) hereof.'

"'Sec. 57-917. * * * In event any injury from accident arising out of and in the course of the employment of a workman should result in and be the proximate cause of his death and he should leave surviving him any dependents, as herein defined, entitled to compensation under the terms hereof, payment thereof may be received or claim therefor filed by such person as the court may authorize or permit, on behalf of the beneficiaries entitled thereto, and such claim shall be filed and answer made thereto and other procedure had as in cases filed by the injured workman. Provided, that no claim shall be filed or suit brought to recover such compensation unless claim therefor be filed within one [1] year after the date of such death.'

"'Sec. 57-918. * * * In case death proximately results from the injury within the period of one [1] year, compensation shall be in the amounts and to the persons as follows: * * *.'

"Counsel for appellee assert that the fixed 'death benefit' of 300 weeks provided by section 57-918 is a right of the depend-

ents which comes into existence only upon the death of the workman and which never belonged to the workman himself, and invoke language in our original opinion in Gonzales v. Sharp & Fellows Contracting Company, supra [48 N.M. 528, 153 P.2d 681] that: '* * * the beneficiaries of a death claim are new parties asserting a cause of action separate and distinct from that obtaining in favor of the workman for loss of time from injuries during his lifetime.' We reaffirm that statement. 71 C.J. Workmen's Compensation Acts, Sec. 270, discussing 'Death Benefits', says: 'The right to compensation rests on the obligation of the employer imposed by statute to pay the beneficiaries named therein, and implied in the contract of employment, and exists independently of rights or benefits in favor of the injured employee, but such right is subject to the conditions, and limitations contained in the statute.'

"We think where the trial court fell into error, was in supposing that the right of the dependents of the deceased workman who died as a result of the injury to him *arises* out of the provisions of section 57-918 alone. So assuming, as do counsel for appellee, they argue that the quoted provisions of section 57-913 must refer to some other cause of action which may be asserted by the dependents of the injured and deceased workman separate and distinct from 'death benefits'. The argument is faulty and is based upon a false premise.

"As we view the matter, the right or cause of action in the dependents to recover death benefits is not created solely by the provisions of Section 57-918, if at all. We think this right to recover death benefits is created by the quoted provisions of Section 57-913 and 57-917 and that Section 57-918 merely defines *the amount* the dependents shall receive, if entitled to recover them, and contains words of restriction and limitations upon a right theretofore in the statute created. We think the language in Section 57-913: 'In case death of any workman who would himself have been entitled had such death not occurred, to recover from such employer on account of any such injuries under the terms hereof, claim may be filed therefor on behalf of his dependents as provided in section 8 (57-917) hereof.' was quite appropriate for the purpose of creating in the dependents a right to recover death benefits under the conditions further described in sections 57-917 and 57-918.

"Close examination of the quoted provisions of Sec. 57-913 brings us to the conclusion that it in itself is a death statute. The first clause 'in case [of] death of any workman' does not expressly embrace the element that the injury must be the cause of the death, but it says later on in the same sentence: 'Claim may be filed *therefor* on behalf of his dependents'. (Emphasis supplied.) We think 'therefor' means for the loss to the dependents aris-

ing from the death resulting from the injury. (As provided in Sec. 8(57-917).)

"The authors of the 1941 Statutes Annotated attach to Section 57-917 a significant cross-reference, as follows:

" 'Action for Death by Wrongful Act, Secs. 24-101–24-103.' Section 24-101 is as follows:

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

"The foregoing statute and the portions of Section 57-913 heretofore quoted are not essentially different from the provisions of 'Lord Campbell's Act' passed in 1846, the provisions of which may be found in Tiffany's 'Death by Wrongful Act', 2d Ed., Sec. 21, and which for convenience of comparison, we quote a portion thereof: '(1) That whensover the death of a person shall be caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured;'

"We have indulged these comparisons because our examination of these various statutes has convinced us that the quoted language of Section 57-913 created or helped to create a cause of action of the same general nature as our Death by Wrongful Act Statute and Lord Campbell's Act, and we may consequently avail ourselves of the conclusions of the courts and text writers as to the nature of the cause of action created thereby.

"The article in 16 Am.Jur. 'Death', after saying in section 49 that 'Lord Campbell's Act was followed in the United States and in Canada by statutes modelled after it, and having in view the same general purpose as the English Act' goes on in Section 60 to discuss the nature and purpose of the Act, and in Section 61 to discuss the question as to whether what is accomplished is 'Survival or new cause of action'. The two theories are thus stated:

" 'Survival Theory.—There is authority to the effect that the statutes giving a right of action for wrongful death create no new cause of action, but simply continue or transmit the right to sue which the de-

ceased had until his death; that the effect of the statutes is to pick up the abated right of the decedent and permit it to be prosecuted by the personal representative for the benefit of the designated beneficiaries. This view sometimes seems to be based upon the provision commonly found in wrongful death statutes which allows a right of action only if the deceased could have maintained an action for the same wrongful act if death had not ensued.

" 'New Cause of Action Theory.—The view which is believed to be based upon the better reasoning that wrongful death statutes are not "survival statutes", but create a new cause of action, is the one supported by the courts generally and by the later trend of authority in particular. Under this view, the cause of action is not for the injury to the decedent, but is for the loss sustained by the beneficiaries because of the death and is distinct from any cause of action that the deceased might have had if he had survived. Various provisions of the statutes help to reach this conclusion, particularly provisions under which the damages recoverable consist of compensation for the losses of the beneficiaries, and do not include loss to the deceased or his estate, and under which damages recovered do not become assets of the estate, but are to be distributed to the beneficiaries.'

"From an examination of some of the cited cases, and from our previous examination of the subject as indicated in our former opinion, from which we have herein quoted, we conclude that the 'New Cause of Action Theory' is based upon the better reasoning and is abundantly supported in the adjudicated cases, and we now adopt it, if indeed, we have not heretofore done so, in our former opinion.

"It will thus be seen that counsel for appellee are mistaken in asserting that the language quoted from section 57-913 is 'a completely useless, meaningless provision' unless it serves to simply continue or transmit the right to sue which the deceased had until his death. On the contrary, it is useful and appropriate to create a new cause of action in the dependents for the recovery of 'death benefits'.

"The same argument applies to the provisions of Section 57-917. They are useful and important as creating or aiding in the creation of a new cause of action in dependents. In fact, the provisions of Sections 57-913, 57-917 and 57-918 dovetail together in creating this new right and placing limitations thereon.

"The Legislature perhaps could, if it so desired, enact a law continuing and transmitting to the dependents of the workman a cause of action which he had while living, but they have not done so.

"We are not here concerned with the instances where the workman is injured and lives several years and dies from causes *other* than the injury received.

"Several state legislatures have taken care of that situation. By way of illustration, we point to a statute of our neighboring state of Colorado. The 1935 Colorado Statutes Annotated, Vol. 3 at page 1346, c. 97, Sec. 343, contains the following:

"'When death not proximate result—Benefits to persons wholly dependent.—If death occurs to an injured employee, other than as a proximate result of accident before disability indemnity ceased, and the deceased leaves a person or persons wholly dependent upon him for support, death benefits shall be as follows:

"'(a) Where the accident proximately caused permanent total disability, the death benefit shall consist of the unpaid and unaccrued portion of the permanent total disability benefit which the employee would have received had he lived until he had received the sum of four thousand three hundred seventy-five dollars ($4,375.00).

"'(b) Where the accident proximately caused permanent partial disability, the death benefit shall consist of the unpaid and unaccrued portion of the permanent partial disability benefit which the employee would have received had he lived.'

"A contemplation of the provisions of this Colorado statute shows what our statute is not.

"The reason, doubtless, why the provisions of the Colorado statute just quoted are limited to death arising from causes other than injury, is because the dependents would have a claim for death benefits under other sections of the statute if the injury caused the death. See Sienko v. Bopp & Morgenstern, 248 N.Y. 40, 161 N.E. 324.

"An examination of other provisions of the Colorado Workman's Compensation Act (See Sec. 342 Statutes heretofore cited), indicates that where death results from the injury, death benefits may be recovered by dependents in the maximum amount of $4,375.00 and that under the section quoted above where death occurs from causes *other* than the injury, the cause of action which the workman had is continued and transferred to his dependents, the maximum recovery, however, being limited to the amount recoverable as death benefits.

"Counsel for appellee are confronted with the difficult task of convincing us that the language quoted from Sec. 57-913, which as we have seen is at least appropriate to the creation of a new cause of action in the dependents for death benefits, *also* continues and transfers to the dependents the cause of action which the defendant had while he lived.

"Such a pronouncement by us could lead to extraordinary results. As we pointed out in our former opinion: 'Under ordinary circumstances the number of weeks thus accrued could not exceed fifty-two,

since if death occurs more than one year after injury, liability for death benefits does not exist.' Now let us suppose a case where the workman was totally and permanently disabled as a result of an injury and died as a result of such injury two weeks prior to the expiration of one year after injury, having received compensation for 50 weeks, leaving 500 weekly installments unaccrued. If our statutes quoted have accomplished the double purpose of creating a new cause of action in the dependents for death benefits and also have continued and transferred to dependents the cause of action which the workman would have had if he had lived, and these causes of action are different, separate and distinct, as the approved authorities say they are, what would prevent the dependents from asserting both causes of action on the theory of a single recovery for a double wrong, viz: injury resulting in total permanent disability and injury resulting in death? The result would be a recovery substantially equivalent to compensation for 800 weeks.

"If by construction we could say that the dependents could not assert both causes of action but must elect which of them would be pursued, the dependents would then have an election to take compensation for 300 weeks as death benefits at possibly only 40 percent of the workman's earnings, or take 500 weeks at 60 percent of the workmen's earnings. Can we suppose the legislature intended such an absurd and choiceless election? Obviously not.

"Whether the legislature could accomplish such interesting results we do not undertake to say, but we are unwilling to say they have done so by the language employed.

"Even if it were possible by construction to accomplish something similar to the Colorado system as we understand it, and have attempted to describe it, appellee would not be helped, because situations where a workman is injured and totally disabled and later dies from causes other than the injury are not within the facts of the case at bar, since it is agreed by all that the deceased workman Gonzales died as a result of the injury. No amount of liberal construction will support a view that the language of Sections 57-913, 57-917 and 57-918 created a new cause of action in dependents for death benefits and *also* continued and transmitted to dependents some sort of a cause of action which deceased would himself have had if he had lived.

"Counsel for appellee speak of the equities. These appeal to our humanitarian feelings, but do not impel us in an attempt at judicial legislation. See Vukovich v. St. Louis, Rocky Mountain & Pacific Co., 40 N.M. 374, 60 P.2d 356.

"The provisions in Section 57-918 that the cause of action for death benefits does not arise unless the death shall have occurred within the period of one year from the injury, may seem to some to be inhospitable, but that is a matter for the legis-

lature. We remark in passing that several states have enlarged this period to two years and The Congress in an Act Providing for Compensation for Injuries to Employees of the United States, 5 U.S.C.A. § 760, says that 'If death results from the injury within six years the United States shall pay,' etc. These statutes offer suggestions as to what the legislature might do, but have no bearing upon what they have done."

So wrote the late Chief Justice BICKLEY in what, because of the force of his argument and the persuasiveness with which he presented it, there was every reason to feel would be a majority opinion in this case. The arguments he advances seem unanswerable and represent my own views. One has only to contrast our statute and that involved in the Indiana case of Wenning v. Turk, 78 Ind.App. 355, 135 N.E. 665, the case relied upon by the majority, to note how widely different they are. The Indiana statute reads: "When an employee receives or is entitled to compensation under this act for an injury and dies from any other cause than the injury for which he was entitled to compensation, payment of the unpaid balance of compensation shall be made to his next of kin dependent upon him for support." Sec. 36, Workmen's Compensation Act. § 8020t1, Burns Supp.1921.

The questioned statute in our own Workmen's Compensation Act provides: "In case death of any workman who would himself have been entitled had such death not occurred, to recover from such employer on account of any such injuries under the terms hereof, claim may be filed therefor on behalf of his dependents as provided in section 8 (§ 57-917) hereof." 1941 Comp., § 57-913.

Note that the Indiana statute provides for survival in the next of kin dependent on the employee for support a cause of action for payment of unpaid balance of compensation where the employee dies from *a cause other than the injury.* Our statute, § 57-913, if not alone, certainly in connection with §§ 57-917 and 57-918, creates a new cause of action in dependents for "death benefits" and by language of survival establishes it as a basis of recovery after the employee's death *where death results from the injury.*

The effect of the Indiana statutes in force when Wenning v. Turk was decided is well stated in National Power Const. Co. v. Rouleau, 81 Ind.App. 585, 144 N.E. 557, 558, as follows: "After making provisions for compensation to the injured employe, the Legislature, having in mind that such employe might die leaving dependents, made provisions for the payment of compensation or death benefits to those who were dependent upon him for support. This it did in sections 36, 37, and 38. As heretofore stated, section 36 provides, in case the employe dies from a cause other

than the injury, for payment of the unpaid balance of compensation to the next of kin dependent upon the employee for support. Under section 37, if death results from the injury within 300 weeks, the remaining part of the 300 weeks' compensation as shall not have been paid to the deceased employe shall be paid in equal shares to all of his dependents who are wholly dependent upon him for support at the time of his death. If he leaves dependents only partially dependent upon him for support, the compensation to be paid to such partial dependents is to be in the same proportion to the weekly compensation for persons wholly dependent as the average amount contributed weekly by the deceased to such partial dependents bears to the average weekly wage at the time of the injury."

The opinion in this case also explains the anomaly in the Indiana statute mentioned in Wenning v. Turk, supra, to-wit: "The statute is anomalous, in that the widow of an employee who dies from causes other than the injury may receive compensation for a longer period of time than she would if her husband had died as a result of the injury. It was this provision of the statute that we had in mind in Wenning v. Turk, 78 Ind.App. 355, 135 N.E. 665, when we said the situation presented by the two sections was a matter for legislative enactment rather than judicial determination."

Just how these statutes operated while in force is exemplified in Sanders Lumber Co. v. Watkins, 94 Ind.App. 276, 179 N.E. 919. See also, Weber Milk Co. v. Dunn, 108 Ind. App. 463, 29 N.E.2d 797, 799, on the operation of the Indiana Statute. These cases demonstrate indisputably that an altogether different section of the Indiana statute, to-wit, section 37, dealt with the rights of beneficiaries where, *as here,* death results from the injury within the specified period of 300 weeks. See National Power Const. Co. v. Rouleau, supra. And in Weber Milk Co. v. Dunn, supra, the court said: "While it is true that the Workmen's Compensation Act makes no provision for the payment of compensation for death of an injured employee which results from the accident after 300 weeks, yet it does not follow that the dependents are left without remedy in every instance. Sec. 36 of the Act above quoted (Sec. 40–1401, Burns' Ind.St. 1933, Sec. 16412, Baldwin's Ind. Statutes 1934) was intended to provide compensation for any loss or impairment suffered by such injured workman during a 300-week period. *This right to compensation if not exercised by the injured employee may be exercised by his dependents.*" (Emphasis mine.)

In Fort Branch Mining Co. v. Parley, 76 Ind.App. 37, 130 N.E. 132, 133, 131 N.E. 228, the Indiana Court of Appeals recognized that *death of the workman from the injury* within the maximum period of com-

pensation would bring to an end the actual compensation period for total disability. Of course, if death should occur within the period of 300 weeks, a right to the uncollected portion of the 300 weeks was to be paid in equal shares to all of the workman's dependents wholly dependent upon him for support at the time of his death. This right, however, arose not on the language of section 36 concerned with payment of uncollected compensation where death was occasioned by a cause other than the injury but from the language of section 37 instead where death has resulted from the injury. The court said: "The maximum compensation period for total disability is fixed definitely by the law; but the actual compensation period for total disability may terminate at any time before the maximum limit has been reached—depending upon the condition of the injured workman. His complete or partial recovery, *or his death* [our italics] within the maximum period, would bring to an end the actual compensation period for total disability."

For other cases throwing some light on the question at issue see Bassett v. Stratford Lumber Co., 105 Conn. 297, 135 A. 574, and La Chapelle v. Union Pacific Coal Co., 29 Wyo. 449, 214 P. 587. Many cases may be found in extensive annotations of the subject "Survival of right to compensation under Workmen's Compensation Act upon the death of the person entitled to the award" in 15 A.L.R. 821, supplemented in 24 A.L.R. 441; 29 A.L.R. 1426; 51 A.L.R. 1446; 87 A.L.R. 864 and 95 A.L.R. 254. In the first annotation of the subject, 15 A.L.R. 821, the author states the well established rule as follows: "The question under annotation is, of course, one as to the construction and effect of the various statutes relating to workmen's compensation, and depends upon the provisions of the particular statute. It may be said in general, however, that under the statutes of the majority of the states in which the courts have considered the question, the right to compensation not yet accrued, to which a dependent or beneficiary would become entitled, is terminated by his death, and does not pass to his personal representatives or heirs."

Other decisions from sister states the opinions in which are illuminating and are persuasive of the correctness of the conclusion reached by me in the case at bar are C. & G. Potts & Co. v. Fortney, Ind. App., 69 N.E.2d 752; Black Gold Petroleum Co. v. Hirshfield, 182 Okl. 634, 79 P. 2d 566; Sorensen v. Six Companies, 53 Ariz. 83, 85 P.2d 980; Harrison v. Tierney, 276 Ky. 637, 124 S.W.2d 757; Turner v. Shropshire, 285 Ky. 256, 147 S.W.2d 388; Lawrence v. Natural Gas Pipe-Line Co., 152 Kan. 558, 106 P.2d 685; Hogsten v. Compensation Commissioner, 124 W.Va. 153, 19 S.E.2d 439; State v. Industrial Commission, 141 Ohio St. 174, 47 N.E.2d 217. Feeling, as I do, that the provisions of 1941

Comp., § 57–913, were never designed to work survivorship of a claim such as that here made, the Kentucky cases of Harrison v. Tierney Mining Co., supra, and Turner v. Shropshire, supra, impress me as on all fours with the case at bar and deny recovery to the plaintiff.

Even if we had the Indiana statute construed in Wenning v. Turk, supra, as we do not, it would in no wise aid the plaintiff as is made abundantly clear by the opinions in the cases of Hogsten v. Compensation Commissioner (W.Va.) supra, and State v. Industrial Commission, (Ohio) supra [141 Ohio St. 174, 47 N.E.2d 219]. In the last mentioned case the court said:

"To restate for clarity and emphasis, the commission may at its discretion pay the dependents the unpaid balance of an award previously made to the workman in his lifetime or it may award and pay to the dependents what the injured workman would have been entitled to receive during his lifetime.

"However, nothing may be paid under the quoted part of this section unless the workman died from a cause other than the compensable injury. It is at this point that relator's case fails."

Let us consider a result, not improbable, under the construction announced by the majority. If the injury suffered by Cayetano L. Gonzales, the workman, had caused his death ten weeks later and after having been adjudged totally, permanently disabled thereby and after receiving an award therefor of $18.00 per week for 550 weeks, his dependents would be entitled to 540 weeks, as the compensation he would have received, had he continued to live in the same state of disability, plus death benefits of 300 weeks being a total of 840 weeks, the aggregate of 16-1/3 years, during which compensation would be payable in the total sum of fifteen thousand two hundred ninety-four ($15,294.23) and 24/100 dollars. Not too great an award, admittedly, for the loss of a life. But contrast it with the death benefit of 300 weeks at $18.00 per week, or $5,400.00, the admitted award had the dependents suffered the still greater loss of the breadwinner through instant death from the injury. Then ask ourselves whether the legislature ever intended so absurd and incongruous a result. Obviously not.

Employing as a precedent, the decision of an Appellate Court of Indiana (Wenning v. Turk) construing a local statute creating a right of survivorship in named beneficiaries for unpaid and unaccrued installments of compensation on account of a compensable injury, *where death is from another cause than the injury* (there being no similar statute in New Mexico) the majority apply it by analogy to a claim of survivorship as to unaccrued installments of compensation for a compensable injury *where death results from the injury.* Thus

they give no significance whatever to the fact, obviously noticed and provided for in the Indiana statute, that death in the latter instance within a specified time *always* is compensable, and in the former instance is *never* compensable. The failure to see and give proper weight to this significant fact, furnishing the rationale of the distinction made, has lead the majority into a construction as foreign to true legislative intent, in my humble opinion, as has ever been indulged by any court.

For the reasons given, I dissent.

179 P.2d 998

FREAR v. ROBERTS et al.

No. 5012.

Supreme Court of New Mexico.

April 23, 1947.

James A. Hall, of Clovis, for appellants.

Robert V. Wollard, of Santa Fe, for appellee.

McGHEE, Justice.

This is an appeal from a decree cancelling a deed executed and delivered on condition the property conveyed would not be used for business purposes. We will refer to the parties as they appeared below.

The only question presented is whether the quantum of proof is sufficient to sustain findings of fact and the judgment in a case of fraud. The findings of fact are as follows: "1. That Lot 6, block 23, of the Original Townsite of Clovis, is located in a residential district, on Gidding Street, in the City of Clovis, New Mexico.

"2. That the plaintiff, E. J. Frear, is the owner of, and resides upon a lot adjacent to said lot 6, block 23, and in order to prevent the construction of a business establishment of any kind upon said lot 6, purchased the same.

"3. That the said plaintiff, E. J. Frear, thereafter listed said lot 6, block 23, for sale as residential property with William N. Nelson, a real estate broker of Clovis, New Mexico; and that said real estate broker then caused a sales contract to be negotiated for the sale of said lot 6 to the defendant, M. C. Roberts, as residential property.

"4. That said sales contract rested partly in writing and partly in parol; that in addition to said written portion, the defendant, with the intention to deceive the plaintiff, fraudulently represented to the plaintiff, as an inducement for the plaintiff to enter into said contract, that said defendant was then purchasing said lot 6 for the purpose of building an apartment house or duplex of residential type thereon, and that said lot 6 would never be used for business purposes in any manner.

"5. That the defendant, M. C. Roberts, when making said oral representations to the plaintiff, did not have the present intention to perform said contract.

"6. That plaintiff, relying upon said representations and being deceived thereby, was induced to enter into said sales contract and to deliver a deed to said lot 6 to the defendant, M. C. Roberts.

"7. That, relying upon the fraudulent representations of the defendant, M. C. Roberts, as aforesaid, and being deceived thereby, the plaintiff has been materially injured.

"8. That shortly after delivery of the deed by the plaintiff to the defendant to said lot 6, the defendant entered into a sales contract therefor with the Southern Union Gas Company to purchase the same to be used for business purposes.

"9. That the defendant, M. C. Roberts, in violation of the terms of said contract, now threatens to use said lot 6 for establishment of a business building thereon, and unless restrained by the Court, will do so.

"10. That the construction of a business building on said lot 6 would irreparably in-

jure the plaintiff in the use and occupancy of his residential property adjacent to said lot 6, upon which he now resides, for which injury plaintiff has no adequate remedy at law.

"11. That when plaintiff learned the real purpose for which the defendant purchased said lot 6, a proper tender was made by the plaintiff to the defendant of the purchase price therefor, which was refused by the defendant."

In Berrendo Irrigated Farms Co. v. Jacobs, 23 N.M. 290, 300, 168 P. 483, 486, we approved and here reaffirm as the correct rule on the quantum of proof required to establish fraud the following from Smith on Fraud, par. 264, and Redwood v. Rogers, 105 Va. 155, 53 S.E. 6: "Where it is sought to recover for fraudulent representations in regard to the sale of land, there should be the clearest proof of the fraudulent representations, and the evidence must show that the contract was founded upon them." Smith on Fraud, supra.

"The charge of fraud is one easily made, and the burden is upon the party alleging it to establish its existence, not by doubtful and inconclusive evidence, but clearly and conclusively. Fraud cannot be presumed. It must be proved by clear and satisfactory evidence. It is true that fraud need not be proved by positive and direct evidence, but may be established by facts and circumstances sufficient to support the conclusion of fraud. But whether it be shown by direct and positive evidence, or established by circumstances, the proof must be clear and convincing, and such as to satisfy the conscience of the chancellor, who should be cautious not to lend too ready an ear to the charge."

With this rule in mind we examine the record and quote therefrom the following:

"Q. Now, Mr. Frear, what conversation took place, if any, between you and Mr. Roberts? A. I told him * * * that is, I told Mr. Roberts, that I had bought the property for the protection of my home on the corner there, and if he bought it we didn't want anything on there but residence property. Mr. Roberts said that would be alright; that he would put up residential property only, and he said he would like to put up an apartment house on it."

And on cross-examination:

"Q. You told him you didn't want a filling station on there, is that right? A. I told him I didn't want a filling station; I told him I didn't want any business property on it.

"Q. He told you he wouldn't put a filling station there? A. He told me he would put an apartment house on the lot.

"Q. You were really interested in a filling station because of the fact there was one two blocks below you, or just beyond the Baptist Church, isn't that right? A.

No. I didn't want business property there. Gidding street is not a business street.

"Q. You are sure you didn't want business property? A. Yes."

And on cross-examination:

"Q. Without repeating the conversation, was it (the lot) listed for sale with him (Nelson) as residential property? (Bracketed words added.) A. Yes sir; absolutely."

From the testimony of Mrs. Frear:

"Q. What conversation did you have, or what took place at that time, as you recall? A. The day Mr. Roberts brought the check in for $500 to hold the lot, before he presented it to my husband, I turned to my husband and said, 'Does he understand what is going to be built on the lot?' Mr. Roberts immediately answers, 'Yes, nothing but an apartment house or a duplex.' "

The real estate agent who handled the deal testified:

"Q. Did Mr. Frear have any conversation with you at the time he listed the property? A. He did.

"Q. Without repeating the conversation, was it listed for residential purposes, or for other purposes, or for all purposes? A. It was listed for residential purposes; as residential property."

* * * * * *

"Q. In your previous dealings with Mr. Roberts, before you got to the store, had you discussed with Mr. Roberts the fact that it had to be residence property? A. I did.

"Q. He was still interested? A. Yes.

* * * * * *

"Q. In your opinion, Mr. Nelson, would any type of business building to be built there, whether it was a gas station, or a grocery store, or whatever it might be; do you think it would injure your property? A. Yes, I certainly do.

"Q. Do you think it would damage Mr. Frear's property? A. Yes; definitely.

* * * * * *

"Q. I will ask you again, was there any specific mention that a gas station would be the only thing that was objectionable? A. No, Mr. Frear made it plain that he would object to anything that would be objectionable to his property. And, that was understood.

* * * * * *

"The Court: Mr. Nelson, can you not tell the Court what Mr. Frear said and what Mr. Roberts said at that time about any restrictions on business? A. Yes, he said he did not want any business building there.

"The Court: Who said that? A. Mr. Frear. I believe this came up; he wanted it understood before he accepted the check, that he did not want anything there that would interfere with his residence.

"The Court: Now, who said that? A. Mr. Frear.

"The Court: Mr. Frear said that. Was there any response to that? A. Probably that it would be alright.

"The Court: Don't you remember if there was any response to that? A. I can't tell you the exact words but, 'that will be alright,' or 'That is ok' or something along that order."

The defendant Roberts testified that the only promise on his part was that if he constructed a building on the lot it would not be a filling station, but says he told Frear, Mrs. Frear and Nelson that he was buying the lot as an investment and for speculation. In this he is corroborated by a Mr. Mills, who was present in the plaintiff's store at the time of the closing of the deal. Mills had sold grain to the defendant. He had also pastured and fed his cattle one winter.

There was some delay in the delivery of the deed and shortly thereafter the defendant contracted a sale of the lot at a profit of $2,300 to a purchaser who intended to construct a business building on the lot. On the filing of this action the purchaser withdrew from the contract.

The testimony introduced by plaintiff must have been believed by the trial court, and, if so, it is sufficient to meet the rule approved in Berrendo Irrigated Farms Co. v. Jacobs, supra.

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

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

COMPTON, J., having heard argument in court below, did not participate.

179 P.2d 1001

STATE v. JONES.

No. 4981.

Supreme Court of New Mexico.

March 20, 1947.

Rehearing Denied April 26, 1947.

O. O. Askren, of Roswell, and Neil B. Watson, of Artesia, for appellant.

C. C. McCulloh, Atty. Gen., and Wm. R. Federici, Asst. Atty. Gen., for appellee.

BRICE, Chief Justice.

This is an appeal from a judgment sentencing the defendant to serve a term in the state penitentiary upon conviction of the crime of murder.

It is first asserted that:

"The Court erred, while Morris J. Allen, the main eye witness for the State was being examined by the District Attorney, in overruling the objection made by counsel for the defense as follows:

"Mr. Askren: I object to the counsel for the State interrogating this witness from a blackboard, indicating places upon the map, because it cannot be made a permanent record. It should be made on some plat that could be filed as an exhibit in the case and the witness examined from that."

As stated by appellant, it appears that the district attorney "stood before the jury with a blackboard, and had the main (State's) witness indicate with a piece of chalk upon the blackboard the immovable

objects at the scene of the homicide and indicate with letters where the parties were at the time of the fatal difficulty."

The blackboard plat was not introduced in evidence and if it had been it could not have been made a part of the record for review in this court. It is generally held that permission to use a blackboard to illustrate the testimony of a witness rests in the sound discretion of the trial court. State v. Sibert, 113 W. Va. 717, 169 S.E. 410; Cincinnati St. R. Co. v. Waterman, 50 Ohio App. 380, 198 N.E. 494. But this practice cannot be commended. State v. Cottrell, 56 Wash. 543, 106 P. 179; Anderson v. Commonwealth, 205 Ky. 369, 265 S.W. 824; Lancaster Hotel Co. v. Commonwealth, 149 Ky. 443, 149 S.W. 942.

The witness could just as conveniently have illustrated his testimony on paper, a copy of which could have been inserted in the bill of exceptions. If the action of the trial court prevented the making of a complete record for review so that the defendant was injured thereby, it was an abuse of discretion.

The district attorney, however, sensing the danger of error, placed the witness on the stand a second time and had him make the same illustrations of his testimony on paper, which was introduced in evidence. We are of the opinion that the appellant was not injured because of the use of the blackboard. In fact we are able to understand the situation of the parties and the objects described on the plat sufficiently, as no question of fact is involved.

The appellant states: "The Court erred, while Davis H. Merchant, a character witness for the defendant, was testifying and after he was interrogated as to whether or not he knew the defendant in Hot Springs, New Mexico, whereupon the Court interrupted by saying: 'Wait a moment. When was he there at Hot Springs?', and Askren thereupon replied: 'Thank you, Judge, I will find that out.' 'When did you live in Hot Springs?', and the answer was: 'From March 1937 to March, 1938.' and the next question: 'Did you know the defendant?' And the Court said: 'Just a minute; the jury may retire.' It being the contention under this point that the Court should not have belittled before the jury the proof of the defendant that his character was good seven or eight years prior to the time of the homicide."

We fail to discover in the statement of the court any language injurious to the appellant or that "belittled" the testimony of the witness Merchant. The trial court evidently was doubtful of the admissibility of the proffered testimony, and heard argument in the absence of the jury. The district attorney agreed that the testimony should be admitted, and the trial court admitted it. The assignment is without merit.

The appellant asserts that the trial court erred in refusing to give to the jury the

following tendered instruction: "I charge you that, in weighing the evidence, if you should find beyond a reasonable doubt the defendant guilty of some degree, and are in doubt as to whether it is a higher or lesser degree, you should give the defendant the benefit of the doubt and convict him on the lesser degree than a higher degree."

In regard to this requested instruction appellee states: "There is a conflict of authority, outside this jurisdiction, as to whether there is error in refusing to grant an instruction such as the one tendered by appellant in this case. See McAfee v. United States, 70 App.D.C. 142, 105 F.2d 21, at page 31; and annotations in 20 A.L.R. 1258. However, in this jurisdiction, the rule is that where a court has given a correct general instruction as to reasonable doubt, repeating that instruction in dealing with each element of the case is unnecessary and a refusal of an additional instruction on the subject is not error. State v. Burrus, 38 N.M. 462, 35 P.2d 285; State v. Roybal, 33 N.M. 187, 262 P. 929."

There is no question but that the great weight of authority favors the giving of the instruction in question. See McAfee v. United States, 70 App.D.C. 142, 105 F.2d 21, authorities therein cited and annotations in 20 A.L.R. at page 1258 et seq. This question was before the Texas Court of Criminal Appeals in Richardson v. State, 91 Tex.Cr.R. 318, 239 S.W. 218, 224, 20 A.L.R. 1249. On rehearing that court stated: "We have reached the conclusion that we were in error in holding that the law of reasonable doubt as charged by the court as applicable to the question of guilt cured the failure to charge upon the same subject as between degrees. The jury might entertain no reasonable doubt as to the guilt of one upon trial, and yet be confused in reaching a conclusion as to the degree of the offense. The omission in the charge having been directed to the court's attention in a timely manner, the same should have been supplied."

Regarding the necessity for this instruction, it was said in McAfee v. United States, supra [70 App.D.C. 142, 105 F.2d 31]:

"It is thought that the jury, unless the reasonable doubt requirement is made specifically applicable to doubt as to the degree of the crime, may in confusion find the defendant guilty of a degree as to the existence of which they did have a reasonable doubt."

"But the weight of authority supports the view that in such circumstances the court should tell the jury that in case they have a reasonable doubt from the evidence between two degrees they should convict of the lower only, and that it is not sufficient for the court to charge generally that the guilt of the defendant must be proved beyond a reasonable doubt." 1 Reid's Branson Instructions to Juries, Sec. 57.

The cases of State v. Burrus and State v. Roybal, supra, cited by the appellees are not in point. The question here is regarding a reasonable doubt as between degrees of an offense. We do not find that this question has ever been raised before in this court.

Our attention is called to the fact that after the charge on murder in the first degree was given, the court instructed the jury as follows:

"If, * * * you entertain a reasonable doubt as to the truth of any one or more or all of the material allegations of the Information, under the charge of murder in the first degree, then you should find the defendant not guilty under said charge.

"* * * If you do not believe that the defendant shot, wounded and killed the said Edwin Hays under such circumstances as to constitute the crime of murder in the first degree, as already explained to you, or if you entertain a reasonable doubt from the evidence as to whether he did so, then you may consider whether the defendant is guilty of murder in the second degree."

And at the end of the instructions on murder in the second degree the following appears:

"* * * If, you entertain a reasonable doubt as to the truth of any one or more, or all the material allegations of the Information under the charge of murder in the second degree, then you should find the defendant not guilty under said charge."

* * * * * *

"If you do not believe that the defendant shot, wounded and killed the said Edwin Hays under such circumstances as to constitute the crime of murder in the first or second degree, as already explained to you, or if you entertain a reasonable doubt from the evidence as to whether he did so, then you may consider whether the defendant is guilty of voluntary manslaughter."

At the end of the instruction on manslaughter the court gave the following instruction: "* * * If, * * * you entertain a reasonable doubt as to the truth of any one or more or all of the material allegations of the Information under the charge of voluntary manslaughter, then you should find the defendant not guilty under such charge."

While it is not probable that a mistake would be made because of the failure to give the requested instruction, yet, as the Texas court (Richardson v. State, supra) said: "The jury might entertain no reasonable doubt as to the guilt of one upon trial, and yet be confused in reaching a conclusion as to the degree of the offense."

If there was a confusion in the minds of the jury as to whether the killing was premeditated, and they were satisfied he was guilty of either first or second-degree

murder, then such an instruction would clarify the situation for them and give the defendant the benefit of the doubt as between the two degrees; and the same may be said regarding second-degree murder and manslaughter.

The states of Indiana and Iowa have statutes which provide that such an instruction must be given. Two jurisdictions have held that it is unnecessary to give it, State v. May, 172 Mo. 630, 72 S.W. 918; Miller v. State, 139 Wis. 57, 119 N.W. 850. As the requested instruction is legally correct, and we have found no case which holds that it is not, we will follow the majority rule.

For the error in failing to give to the jury the requested instruction, the case must be reversed, and a new trial granted.

It is so ordered.

LUJAN, SADLER, and McGHEE, JJ., concur.

On Motion for Rehearing

BRICE, Chief Justice.

On motion for rehearing the Attorney General argues quite persuasively, citing much authority, that the tendered and requested instruction is erroneous, in that it failed to place before the word "doubt" in the portion of the instruction quoted in our original opinion, the word "reasonable." As ably argued by the State, the instruction should have read, "and are in reasonable doubt as to whether it is a higher or lesser degree, etc., then the defendant should be given the benefit of such doubt and convicted of a lesser degree only." The opinion as written states: "For the error in failing to give to the jury the requested instruction, the case must be reversed, and a new trial granted."

We are satisfied that the State's contention is correct, and that the tendered instruction was lacking in the particular stated above. McAffee v. United States, 70 App.D.C. 142, 105 F.2d 21; Shelton v. Commonwealth, 145 Ky. 543, 140 S.W. 670; Sewell v. Commonwealth (Ky.), 284 Ky. 183, 144 S.W.2d 223; Stephenson v. Commonwealth, 264 Ky. 390, 94 S.W.2d 1002; Hanners v. State, 104 Tex.Cr. 442, 284 S. W. 554; Sparks v. State, 108 Tex.Cr. 367, 300 S.W. 938; Richardson v. State, 91 Tex. Cr. 318, 239 S.W. 218, 20 A.L.R. 1249; Miller v. State, 139 Wis. 57, 119 N.W. 850; State v. Louther, 22 Wash.2d 497, 156 P. 2d 672; State v. May, 172 Mo. 630, 72 S. W. 918; 53 A.J. "Trial" Sec. 758; 23 C.J. S., Criminal Law, § 1289.

However, the tendered instruction sufficiently called to the trial court's attention the fact that a correct instruction should have been given. In State v. Williams, 39 N.M. 165, 42 P.2d 1111, 1112, and State v. Mitchell, 43 N.M. 138, 87 P.2d 432, this question was before the court. As indicated in the Williams case, "We are not

prepared to embrace * * * in any wholesale manner" the doctrine that a tendered instruction, though refused properly because in some respects it is incorrect, may still serve to put the Court in error for an omission in the instructions given, or to be given. Nevertheless, yielding to the higher consideration of justice, we stated: "It is essential to the orderly and effective administration of criminal justice that counsel for the accused assist the court in avoiding error. But rules of this kind must be consistent with and sometimes give way to the higher consideration of justice. Cf. Pettine v. Territory of New Mexico, 8 Cir., 201 F. 489, reversing Territory v. Pettine, 16 N.M. 40, 113 P. 843, quoted approvingly in State v. Houston, 33 N.M. 259, 263 P. 754. In this particular case, we feel that the ends of justice require a new trial, wherein the jury may have the opportunity to view appellant as the assailed, rather than the assailant, and to test what he did by the law governing persons in great peril in situations not of their own making."

Inasmuch as the defendant was convicted of murder in a case where it was open to the jury to convict him of manslaughter if a proper instruction had been given, the rule of the cases last cited should be applied. We are of the opinion that the ends of justice require a new trial so that the jury may be correctly instructed on this vital question. In the recent case of State v. Young, 51 N.M. 77, 178 P.2d 592, 596, the doctrine of the cited cases was invoked. We said: "We need not decide this question, as we are of the opinion that there was no evidence which authorized the trial court to submit to the jury the issue of manslaughter."

While counsel for defendant (inadvertently no doubt) failed in the particular stated to tender a correct instruction, the trial court could not have been in doubt as to the intention of counsel in presenting the defective instruction. It should have given a correct one. While the defendant is not, strictly speaking, entitled to a reversal, the ends of justice require it.

We adhere to the conclusion reached in our original opinion as to the disposition of the case.

SADLER and McGHEE, JJ., concur.

LUJAN and COMPTON, JJ., did not participate.

180 P.2d 242

COLLIER v. SAGE.

No. 5006.

Supreme Court of New Mexico.

April 28, 1947.

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

Holt & Holt, of Las Cruces, for appellee.

McGHEE, Justice.

This is an appeal from a declaratory judgment in which it was found fourteen acres of land had been omitted from a deed by mutual mistake and fixing its value. We will refer to the parties as they appeared in the district court.

The parties entered into an ordinary contract for the sale by the defendant to the plaintiff of real estate in Dona Ana County described as follows:

"1. That certain 43 acres, more or less, of land described in Amortization Mortgage dated Oct. 1, 1934, from W. H. Hand

and wife to Land Bank Commissioner, filed for record Nov. 6, 1934, at 9:00 A.M., and recorded in Book 52, page 135, of the Mortgage Records of Dona Ana County, New Mexico; and further described at page 4 of Abstract No. 14680, by The Southwestern Abstract and Title Co., of Las Cruces, New Mexico, to which reference is here made for a more definite description.

"2. That certain 43.25 acres of land, more or less, described in Amortization Mortgage dated Feb. 26, 1926, from Addie E. Rountree and Henry K. Rountree, her husband, to the Federal Land Bank of Wichita, Kansas, filed for record March 9, 1926, and recorded in Book 34, page 404, of the Mortgage Records of Dona Ana County, New Mexico; and further described at page 5 of Abstract No. 12936 by The Southwestern Abstract & Title Co., of Las Cruces, New Mexico, to which reference is here made for a more definite description.

"Said above described tracts of land being also designated as Tracts Nos. 10—93, 10—97B and 10—97E, on the plats of the U.S. Reclamation Service."

The 43 acres covered by paragraph 1 and the 43.25 acres covered by paragraph 2 were tracts 10—93 and 10—97B on the plats of the U.S. Reclamation Service and were later at the request of the plaintiff conveyed by deed to his brother, Grady J. Collier, but the land included in tract 10—97E was not included.

Shortly after the delivery of the deed the plaintiff found another person farming the tract in dispute under a lease from the defendant made a few days prior thereto.

The defendant ignored the written demand of plaintiff for a deed including the 14 acre tract and this suit followed. The trial court found that the plaintiff had agreed to buy and the defendant had agreed to sell the fourteen acres with the other tracts for a total consideration of $12,000, and that the tract in dispute was of the reasonable market value of $300 per acre, and that it had been omitted from the deed through mutual mistake and oversight of the plaintiff and defendant.

While the complaint was filed under our Declaratory Judgment Statute, Sec. 25-601, N.M. Statutes 1941 Ann., yet it is in effect an action to reform the deed. One may not by filing a suit under this statute circumvent the applicable decisions of this court such as Norment v. Turley, 24 N. M. 526, 174 P. 999, where we held that absent mistake or fraud a deed when accepted, merges all prior negotiations with respect thereto, including the written contract of sale, and the conveyance must be looked to in order to determine the rights and equities of the parties; First National Bank of Elida v. Hartford Fire Insurance Company, 17 N.M. 334, 127 P. 1115, that to obtain reformation the mistake must be mutual and common to both parties to the instrument, and Dearborn v. Niagara Fire Insurance Co., 17 N.M. 223, 232, 125 P.

606, and Franciscan Hotel Co. v. Albuquerque Hotel Co., 37 N.M. 456, 467, 24 P.2d 718, that the proof must be of the clearest and most satisfactory character.

While there is a sharp conflict in the testimony there is substantial evidence and corroboration by an apparently disinterested witness to support the findings, and in the absence of anything in the record to the contrary, we assume the trial judge had the above rules in mind in making his findings of fact, for his finding No. 9 reads:

"(9) That it was the plain intent and understanding of the parties that plaintiff was purchasing from the defendant and that the defendant was selling to plaintiff, for the aforesaid aggregate consideration of $12,000.00, the tract of land hereinabove specifically described, together with the other tracts of land referred to and described in plaintiff's aforesaid Exhibit "1", and that the failure and refusal of defendant to convey said specifically described tract precipitated the aforesaid actual controversy, as alleged in the Complaint herein."

We therefore refuse to overturn the findings of fact and conclusions of law made by the trial court.

We do not, however, like the undue advantage the judgment gives to the plaintiff, for as it now stands he may bide his time to petition for further relief and have reformation and take the title, or judgment for approximately $4,200. If the fourteen acre tract remains at its present value, or increases he will, no doubt, take the title, while if its value decreases he will then take his damages.

Judgments may not thus be made the vehicle for a free ride on a speculative market, and the plaintiff should have been required to make an election at the time of taking his judgment.

The judgment of the district court will be affirmed on condition that the plaintiff within ten days from the filing of this opinion file in this court his election of the relief he will take. If he fails to so elect the judgment will be reversed and the cause remanded with instructions to dismiss the complaint with costs to the defendant and leave him to his conventional remedy, and it is so ordered.

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

180 P.2d 244

SIERRA ELECTRIC COOPERATIVE, Inc. v. TOWN OF HOT SPRINGS.

No. 4933.

Supreme Court of New Mexico.

April 22, 1947.

Douglass K. FitzHugh, of Hot Springs, for appellant.

Nils T. Kjellstrom, of Hot Springs, for appellee.

SADLER, Justice.

The plaintiff below appears before us as appellant complaining of the action of the trial court in dismissing its complaint seeking permanently to enjoin the defendant, Town of Hot Springs, a municipal corporation, from the purchase and acquisition of electric transmission and distribution lines through and across territory outside the corporate boundaries of said municipal corporation. The plaintiff alleged itself to be a cooperative regularly organized on September 11, 1941, under the Rural Electric Cooperative Act with its principal office and place of business in Hillsboro, Sierra County, New Mexico. The complaint then went on to allege: "* * * that by virtue of the provisions of said Rural Electric Cooperative Act, plaintiff has now, and

since the date of the granting of its charter, aforesaid, has had, the right, privilege, authority and power to construct, maintain and operate electric transmission and distribution lines along, upon, under and across all public thoroughfares, including without limitation all roads, highways, streets, alleys and bridges and upon, under and across all publicly-owned lands throughout Sierra County, New Mexico; that the rights, privileges, franchises and authority aforesaid is necessary to said cooperative to enable it to serve and fulfill its pledges to members of said Cooperative, plaintiff herein, situate throughout said Sierra County; that plaintiff has pledges of service outstanding and existing throughout all parts of said Sierra County outside of the corporate limits of said municipal corporation, Town of Hot Springs, New Mexico, defendant herein, and has had such pledges during all the times and on all the dates hereinafter set forth;"

Then follow allegations that the defendant municipality was negotiating for the acquisition of certain electric transmission and distribution lines in territory outside its corporate limits in which area the plaintiff was alleged to hold previously acquired rights and franchises and that defendant planned to construct and maintain such lines in said territory in violation of the privileges, franchises and pledges of the plaintiff in said territory.

An order to show cause was issued and served on the defendant to which the latter filed its return as well as a formal answer to the complaint of the plaintiff. Briefly, the defendant admitted that negotiations were under way for the purchase by it of the transmission and distribution system of New Mexico Public Service Company within the corporate limits and outside the present corporate boundaries of the Town of Hot Springs, but that it had not yet acquired said properties nor was there any certainty that it ever would. The answer also carried an objection that New Mexico Public Service Company was not made a party defendant, as the owner of the transmission lines involved and then set up the claim that defendant, Town of Hot Springs, was improperly and prematurely joined as a defendant, having no interest in such property at the time.

The issues being thus made up, the matter came on for hearing, whereupon the court entered an order reading as follows: "This cause coming on this day to be heard, and on the call of this cause for trial the Court asked the Attorney for the Plaintiff whether it had constructed its lines and was ready to give service to the customers of the New Mexico Public Service Company, who thereupon stated that the contract for the construction of the lines had not been let, but when constructed, the plaintiff expected to enter the field outside the corporate limits of Hot Springs and immediately adjacent to the boundaries thereof, and it being agreed the defendant had not completed

the purchase of the light plant, and the Court being of the opinion that under such state of facts the action is prematurely brought, it is ordered that this cause be dismissed without prejudice to the bringing of another action in the event that the Town of Hot Springs completes the purchase of the electric plant and the plaintiff is in a position to supply the customers outside the Town of Hot Springs, to all of which the Plaintiff in open Court objects and excepts."

The plaintiff below then asked for and was granted an appeal to the Supreme Court from the judgment of dismissal so entered against it and the matter is before us on such appeal, the plaintiff as appellant asking a reversal of said judgment and a remand for further proceedings.

The plaintiff, apparently organized under the provisions of L.1939, c. 47, 1941 Comp., Chap. 48, Art. 4, §§ 48-401 to 48-432, known as the state "Rural Electric Cooperative Act", styles itself as a cooperative, having its domicile in Sierra County, New Mexico, with objects, purposes and powers as enumerated in the complaint hereinabove summarized. Its counsel argues that until the passage of L.1945, c. 132, the defendant municipality was without power to furnish electric light and power outside its territorial boundaries, citing Hyre v. Brown, 102 W.Va. 505, 135 S.E. 656, 49 A.L.R. 1230, and annotation of the subject beginning at page 1239; also Taylor v. Dimmitt, 336 Mo. 330, 78 S.W.2d 841, 98 A.L.R. 995, and annotation commencing at page 1001. He then reminds us that L.1945, c. 132, authorizing municipalities under certain conditions to furnish electricity and natural gas as a public utility to persons or properties located within a radius of five miles of the territorial limits of such municipality, did not carry the emergency clause. Hence, not becoming effective until about the middle of July, 1945, counsel states it could have no bearing on the rights asserted in plaintiff's complaint which was filed on June 4, 1945. Furthermore, sections 11 and 12 of the 1945 act are pointed to as expressly excepting from its provisions territory outside its corporate limits in which rights have been granted to an electric cooperative under the provisions of subsection (k) of section 3, Chapter 47, Laws of 1939, and denying application of the act where pledges had been made to any contemplated R. E. A. project.

All that counsel for plaintiff states may be conceded and still he fails to establish error in the trial court's action denying plaintiff the right to proceed further at the time and in dismissing its complaint without prejudice to a later filing of same. This is especially so in view of counsel's admission in open court that it had no present plant or transmission lines, that the contract for their construction had not even been let and that no agreement for the purchase by defendant of the plant and lines of New Mexico Public Service Company had as yet been entered into. Cer-

tainly, under such conditions, the plaintiff could make no showing of that irreparable damage so essential to support a right to injunctive relief. La Mesa Community Ditch v. Appelzoeller, 19 N.M. 75, 140 P. 1051. Even admitting that the defendant's action in engaging in the public utility business of furnishing electricity for light and power outside its territorial limits prior to the effective date of L.1945, c. 132, would be ultra vires, and as for that matter after its effective date, in areas beyond such limits where the plaintiff had prior rights, nevertheless, this could not properly concern such plaintiff—certainly, does not entitle it to injunctive relief—unless it can show damage. How can it do so if itself unable to give the service which it claims the defendant threatens unlawfully to furnish? The mere fact that the Town would be engaging in an ultra vires act, if it would, does not alone entitle the plaintiff to complain. Cf. Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573 and Shipley v. Smith, 45 N.M. 23, 107 P.2d 1050, 131 A.L.R. 1225.

We think there was no error in the trial court's action in dismissing the plaintiff's complaint as premature. There will be time enough for it to complain when it can show hurt. The judgment should be affirmed and it is so ordered.

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

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

180 P.2d 246

SANCHEZ v. NEW MEXICO STATE TAX COMMISSION et al. (MIDDLE RIO GRANDE CONSERVANCY DIST., Intervenor).

No. 5007.

Supreme Court of New Mexico.

April 28, 1947.

Wilson & Whitehouse, of Albuquerque, for appellant.

M. A. Threet and D. A. McPherson, Jr., both of Albuquerque, for appellee-intervenor.

E. P. Ripley, of Santa Fe, for appellees.

McGHEE, Justice.

The relator seeks the reversal of a judgment denying a writ of mandamus to compel the issuance to him of a tax deed covering property formerly owned by him and on which there are a large number of past due and unpaid assessments to the intervenor, Middle Rio Grande Conservancy District, under the provisions of Sec. 76-740 Comp.Stat.1941.

Sanchez failed to pay the state and county taxes on his land and in due course it was sold to the state. The finding of the court that the land was also sold for past-due conservancy assessments is without support in the record and must be set aside.

The respondent declined to issue a deed to relator because he refused to also pay the past-due conservancy assessments, and the conservancy district has intervened to assist in protecting its lien.

The applicable part of Sec. 76-740, supra, reads: "Section 76-740. The person or any lien holder whose title to or interest in property which has been extinguished by the issuance of a tax deed to the state shall have the first and prior right to repurchase such property, provided that application for such repurchase is received by the state tax commission before any other application to repurchase such property is received and accepted by said commission."

We construed this statute in Langhurst v. Langhurst, 49 N.M. 329, 164 P.2d 204, 205, and stated:

"We think the exercise by the 'person whose title to property has been extinguished by the issuance of a tax deed to the state,' of the exclusive privilege accorded to him is nothing more nor less than redemption of the property and the title thereto which has been so extinguished.

"The transaction is not essentially different from redemption before a tax deed is issued.

"Section 76-708 provides that: 'the tax sale certificate shall vest in the purchaser * * * the right to a complete title to the property described therein,' subject to the right of redemption as provided by law. In neither case (under 76-708 or 76-740) is the sale of the taxed property nor the subsequent proceedings a final and irrevocable divestiture of the title of the owner, or former owner, so long as the privilege of recapture extended to such owner, or former owner, may be lawfully exercised.

"As between redemption before deed is issued to the state and repurchase afterwards the result, so far as the person whose title has been extinguished is concerned, is the same. The mechanics only, are different. An examination of the definitions of the words 'redeem' and 'repurchase' found in Words and Phrases, Permanent Edition, Vols. 36 and 37, respectively, shows uniform holdings of the courts to the effect that the words are synonyms."

The relator will, therefore, retake his property with the taxes paid for the year for which it was sold to the state, but burdened with the unpaid conservancy assessments, and the intervenor will have the same remedies for their collection as it had before the sale. The relator cannot by allowing his property to be sold to the state and then redeeming it, extinguish valid liens thereon.

The judgment will be reversed and the case remanded to the district court with instructions to issue the peremptory writ, and it is so ordered.

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

180 P.2d 790

RINGLE DEVELOPMENT CORPORATION v. CHAVEZ et al.

No. 4992.

Supreme Court of New Mexico.
May 7, 1947.

R. P. Barnes, Allen M. Tonkin and William J. Truswell, all of Albuquerque, for appellant.

Gilberto Espinosa, of Albuquerque, for appellees.

McGHEE, Justice.

Appellant, plaintiff below, seeks a reversal of an order dismissing, with prejudice, his cause of action against appellees, made under the provisions Sec. 19-101(41) (e) (1), 1941 N.M.Code. We will hereafter refer to the parties as they appeared in the district court.

Complaint was filed October 30, 1943, service was had and issue joined in due course. On January 21, 1946, the defendants filed a motion setting out that nothing had been done toward bringing the case to final determination for more than two years and asking that it be dismissed with prejudice. The plaintiff thereupon filed the affidavit of its president reciting that his failure to act had been caused by the absence of two material witnesses; that one had been out of the jurisdiction of this court more than 2½ years in defense service of the United States, and that the other had been in the United States Navy about three years; that the witnesses had continued such service until a very recent date, so that he had been unable to safely have the case set for trial.

Incidentally, both witnesses were members of the bar, one residing in Bernalillo County and the other in Valencia County. The order does not state whether the trial judge deemed the rule made his action mandatory, or whether he exercised his discretion. The plaintiff contends that the rule is not mandatory and that the trial court so abused his discretion as to require a reversal.

The disposition of this case requires the consideration of two rules of this court: Rule 41(b), section 19-101, 41(b) 1941 Code, adopted from the Federal Rules of Civil Procedure, rule 41(b), 28 U.S.C.A. following section 723c, reading: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or

of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits."

and Rule 41(e), section 19-101, 41(e) (1), 1941 N.M.Code originally enacted by the Legislature as Chapter 121, Laws of 1937, and later adopted by us as a rule, reading: "In any civil action or proceeding pending in any district court in this state, when it shall be made to appear to the court that the plaintiff therein or any defendant filing a cross-complaint therein has failed to take any action to bring such action or proceeding to its final determination for a period of at least two years after the filing of said action or proceeding or of such cross-complaint unless a written stipulation signed by all parties to said action or proceeding has been filed suspending or postponing final action therein beyond two years, any party to such action or proceeding may have the same dismissed with prejudice to the prosecution of any other or further action or proceeding based on the same cause of action set up in the complaint or cross-complaint by filing in such pending action or proceeding a written motion moving the dismissal thereof with prejudice."

The federal rules do not contain a provision like our Rule 41(e), but see American Nat. Bank & Trust Co. of Chicago v. United States, 79 U.S.App.D.C. 62, 142 F.2d 571, in which it is held that while the federal rules did not provide for such a dismissal, yet under the inherent authority of the court it could be dismissed and Rule 41(b) operates so that it amounts to an adjudication on the merits, which means that it is with prejudice. Also see Barger v. Baltimore & O. R. Co., 75 U.S.App.D.C. 367, 130 F.2d 401; Partridge v. St. Louis Joint Stock Land Bank, 8 Cir., 130 F.2d 281; Sweeney v. Anderson, 10 Cir., 129 F.2d 756; Hicks v. Bekins Moving & Storage Co., 9 Cir., 115 F.2d 406.

Section 583 of the Code of Civil Procedure of California is quite similar. It reads: "Any action * * * shall be dismissed by the court * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended."

This statute has been construed by the California courts as requiring mandatory dismissal of actions within the statute. See annotations in 112 A.L.R. 1159.

We think the proper rule was announced by the Supreme Court of California in

Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 208, 112 A.L.R. 1153, 1155, 1157, where it said:

"The purpose of the statute is plain: to prevent avoidable delay for too long a period. It is not designed arbitrarily to close the proceeding at all events in five years, for it permits the parties to extend the period without limitation, by written stipulation. And, as we have already pointed out, despite the mandatory language implied exceptions are recognized. Are these exceptions based upon the technical concept of jurisdiction, and applicable only where the court is completely lacking in the legal power to proceed, or do they arise from the fact that the party is unable, from causes beyond his control, to bring the case to trial? The carefully reasoned opinion in Estate of Morrison, supra, [125 Cal.App. 504, 14 P.2d 102,] is illuminating here. The court declared that the case of Kinard v. Jordan, supra, [175 Cal. 13, 164 P. 894,] had 'established the precedent of disregarding the time during which the jurisdiction of the trial court was suspended, thereby setting reality above artificiality.' The opinion also states (at page 510 of 125 Cal. App., 14 P.2d 102, 106):

" 'Situations are thus recognized which repel a strained construction of the statute.

" 'No logical distinction can be made between a temporary suspension of proceedings in the trial court, consequent upon a dismissal induced by fraud or mistake, and a suspension of the power of the trial court to proceed by reason of the pendency of an appeal. In either case, the action or proceeding is withdrawn from the cognizance of the court of first instance during the period of suspension.'

"The theory of this decision seems to us to be equally applicable to a situation where, for all practical purposes, going to trial would be impossible, whether this was because of total lack of jurisdiction in the strict sense, or because proceeding to trial would be both impracticable and futile. In this connection, a useful analogy may be drawn from the rules on impossibility as a defense in the enforcement of contract obligations. Modern cases recognize as a defense not only objective impossibility in the true sense, but also impracticability due to excessive and unreasonable difficulty or expense. See Mineral Park Land Co. v. Howard, 172 Cal. 289, 156 P. 458, L.R.A. 1916F, 1; People v. Meyers, 215 Cal. 115, 8 P.2d 837; Restatement, Contracts, § 454."

■ Construing Rules 41(b) and 41(e) together, we hold that except where the time is tolled by statute, such as the Soldiers' and Sailors' Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521, or unless process has not been served because of inability to execute it on account of the absence of the defendant from the state, or his concealment within the state, or unless from some other good reason, the plaintiff

is unable, for causes beyond his control, to bring the case to trial, the provision for dismissal is mandatory.

It does not appear from the record in this case that there was any reason beyond the control of the plaintiff why this suit could not have been prosecuted.

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

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

180 P.2d 792

THE RINGLE DEVELOPMENT CORPORATION, a Corporation, Plaintiff and Appellant, v. Manuel SEDILLO, Jesus Sedillo, Amada Sedillo, if living, and if dead, her unknown heirs; Lodema G. Shellhorn and Gilberto Espinosa, Defendants and Appellees.

No. 4993.

Supreme Court of New Mexico.

May 7, 1947.

R. P. Barnes, Allen M. Tonkin and William J. Truswell, all of Albuquerque, for appellant.

Gilberto Espinosa, of Albuquerque, for appellees.

PER CURIAM.

As the facts and legal points in this case are identical with those in Ringle Development Corp. v. Chavez et al., 51 N.M. 156, 180 P.2d 790, the judgment of the District Court is affirmed on the authority of that case.

181 P.2d 159

TALBOT v. TAYLOR, District Judge.

No. 5014.

Supreme Court of New Mexico.

April 23, 1947.

Adolph J. Krehbiel, of Clayton, for petioner.

H. E. Blattman, of Las Vegas, D. A. Paddock, of Clayton, and Noble & Spiess, of Las Vegas, for respondent.

McGHEE, Justice.

This is an original action instituted by C. P. Talbot, as executor pendente lite of the last will and testament of Leck Burk, deceased, seeking a writ of prohibition against the Honorable Livingston N. Taylor, Judge of the Eighth Judicial District, to prevent the enforcement of an order appointing coadministrators and any acts on his part in general probate proceedings removed to the district court of Union County.

Probate of the will of Leck Burk, deceased, executed on June 16, 1944, was refused by order of Union County Probate Court. By the same order, C. P. Talbot was appointed executor pendente lite as required by Section 32-211 of the N.M.1941 Comp., and said purported last will and testament of decedent, together with all testimony taken, and a transcript of the proceedings was by the probate court transmitted to the clerk of the District Court of Union County for hearing de novo pur-

suant to Section 32-210 of the N.M.1941 Comp. This case was docketed as cause No. 10,191 by the clerk of the court and a trial was had thereon; on October 5, 1946, respondent stated in open court that he would refuse probate of said will, but did not enter judgment refusing probate of the will until December 16, 1946.

In the general probate proceedings on October 15, 1946, upon a petition theretofore filed on behalf of Bertha McGuire, objector, respondent ordered the removal of the general administration proceedings for probate of the estate in accordance with Section 16-420 of the N.M.1941 Comp. This case was docketed as cause No. 10,200 in the Union County District Court. Nothing was ever submitted to respondent by petitioner in Cause No. 10,200 for determination.

On November 8, 1946, the attorneys for the proponent and objector presented their requested findings of fact and conclusions of law in Cause No. 10,191 to the respondent, who announced he would reject all of them and would himself prepare and file findings and conclusions.

Immediately prior to the hearing in Cause No. 10,191, an affidavit of disqualification had been filed against Judge Taylor in the general probate Cause, No. 10,200, and the attorneys for the objector (sister of deceased) had been served with a copy thereof. The attorneys for the proponent did not advise Judge Taylor of its filing, but the statement is made in the brief and not denied that one of the attorneys for the objector told Judge Taylor of its filing before the application for the appointment of temporary administrators was presented and the order made thereon.

As soon as Judge Taylor stated that he would later prepare and file his findings and conclusions, the attorneys for the objector presented a motion in Cause No. 10,191 asking for the appointment of temporary administrators, and respondent, over the objection of petitioner, immediately sustained the motion and directed the petitioner to deliver the assets of the estate to them, the practical effect of which was the removal of petitioner as executor pendente lite. No service of the motion had been made on the petitioner or notice given his attorneys that such a request would be made.

The first question for determination is the power and jurisdiction of a district judge when a will is certified to the district court under the provisions of Sec. 32-210, N.M.Statutes 1941, reading as follows: "32-210. Finding as to validity of will—Invalidity—Hearing by district court—Jury trial—Transmission of district court judgment to probate court.—If the probate judge finds the due execution and validity of the will to be proved, he shall render a judgment approving it as the last will and testament of the decedent, which shall be

entered of record in the case. If such judge shall be of the opinion that the will is not valid, he shall endorse such opinion on the will and transmit the same, with all the testimony taken before him, and a transcript of the proceedings, to the clerk of the district court of his county. The matter shall then stand for hearing de novo in the district court the same as on appeal, but either party, on demand therefor, shall have the right to a trial by jury on such appeal; and the judgment of the district court declaring the will valid or void, shall, when the same becomes final, be certified by the clerk of the district court to the clerk of the probate court, and shall be entered of record in the latter court as a part of the proceedings in the case."

We hold that his power and jurisdiction is limited to a determination of the validity of the will and the entering of judgment, and sending the case back to the probate court unless an appeal be taken. We hold, therefore, that the order of the respondent appointing coadministrators was void. He would, of course, have the power to sign such orders as might be proper for the perfecting of an appeal to this court.

While the question of the validity of the will is before the district court the general probate remains with the probate court unless removed to the district court by separate petition and order.

The respondent asserts that on removal of the general probate case it should have been docketed and the papers filed in Cause No. 10,191 instead of being given a new number and place on the docket, and that in appointing administrators he was exercising general probate jurisdiction instead of limited jurisdiction following the certification of the will to the district court. We are unable to agree with this contention. We think the general probate case was properly docketed as a separate case, and that he was acting in No. 10,191 under an erroneous belief as to his powers in said cause.

The affidavit of disqualification in No. 10,200 (the general probate case) was prematurely filed due to the fact there was no adversary matter then pending. We hold a resident district Judge may be disqualified from hearing specific contested matters in a probate case in which the affiant is interested, leaving him free to hear the general probate matters.

The alternative writ will be made absolute as to Cause No. 10,191, and discharged as to Cause No. 10,200, subject to the above directions, and it is so ordered.

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

COMPTON, J., did not participate.

181 P.2d 161

ADES et al. v. SUPREME LODGE ORDER OF AHEPA et al.

No. 5013.

Supreme Court of New Mexico.

May 22, 1947.

Sam Dazzo and R. J. Nordhaus, both of Albuquerque, for appellants.

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

SADLER, Justice.

This is an appeal from a final decree in suit for specific performance of a purported contract to purchase real estate. Relief was denied and one of the original plaintiffs, Gus Bruskas, appearing before us as appellant, seeks reversal of the decree dismissing his complaint.

The defendant, Supreme Lodge Order of Ahepa, is a charitable organization, the membership in which, in the main, is made up of persons of Greek extraction. It constitutes the governing body of the national organization composed of subordinate lodges throughout the country. The defendant, Ahepa Silver District Sanatorium, Inc., is a New Mexico charitable corporation and

an agency of the national organization. At all times material to this controversy, it held title to the real estate involved in this suit. The two corporations conducted a tuberculosis sanatorium from 1937 to 1941 in buildings erected on the premises in question.

The plaintiffs long had been active and prominent in the affairs of the two corporations when the transaction out of which this suit arose took place. The one taking the leading part in such transactions, George Ades, had held the office of President and all subordinate offices of the Gallup Chapter and the office of District Governor of the district which includes New Mexico. He had also been a sponsor of the sanatorium corporation.

The plaintiff (and appellant) Gus Bruskas was likewise a member of Ahepa and was president of the lodge's Albuquerque Chapter in the years 1935, 1936, and 1937 during which the Sanatorium property was purchased. He was the Albuquerque Chapter's delegate to the national convention of Ahepa every year from 1936 to 1943. He had been interested in opening the Sanatorium and had helped raise funds for this purpose. He attended every national convention of the order and favored continuance of the sanatorium against strong sentiment in the order for closing it.

The parent organization of Ahepa held its national convention at Atlanta, Georgia, in December, 1941. A resolution was adopted at this convention authorizing the Supreme Lodge to sell the sanatorium property. Shortly thereafter it was closed and the property subsequently leased to New Mexico Board of Public Health. While so leased and on October 20, 1945, Ades, in Albuquerque, talked with the Supreme President of the Order of Ahepa, Harris J. Booras, in Chicago, by long distance telephone, making an offer of $50,000 for the property on behalf of himself and another called a "partner" in the deal, Bruskas, although the name of the partner was not disclosed to Booras, Supreme President. The price was agreeable and Booras informed Ades Ahepa would sell. No details were discussed, although mention was made by Ades of a $24,000 mortgage on the property which the purchasers would prefer to continue in effect, though prepared to pay all cash. Booras informed Ades in this conversation that it would be necessary that he and his partner send $10,000 earnest money to "verify" the sale and promised Ades to include all these matters in a wire to him specifying terms of the sale. Booras added that he would instruct the Order's Albuquerque attorneys to close the sale and emphasized that Order of Ahepa was to pay no broker's commission.

Negotiations were entirely oral down to this point and void of details, except for agreement on sale price, amount of down payment and that Ahepa was to pay no

[redacted]

commission. They were barren of such important details as the time within which the sale should be completed, whether the purchase price was to be all cash or cash only for excess of purchase price over amount of the mortgage, the purchaser assuming the mortgage, as well as any other terms essential to the completed transaction. However, on October 20, 1945, the telephone conversation was followed by a telegram from Booras as Supreme President Order of Ahepa in Boston, Massachusetts, to Ades in Albuquerque, reading as follows:

"GEORGE ADES LIBERTY CAFE:
"ALBQ

"OFFER TO SELL SANITORIUM FOR FIFTY THOUSAND DOLLARS CASH IS ACCEPTABLE TO THE SUPREME LODGE STOP TO BE BINDING OFFERER MUST BY LETTER ADDRESSED TO ME AS SUPREME PRESIDENT STATE THAT HE AGREES TO PAY FIFTY THOUSAND DOLLARS CASH FOR SANITORIUM PROPERTY AND ACCOMPANY HIS LETTER WITH TEN THOUSAND DOLLARS CERTIFIED CHECK PAYABLE TO SUPREME LODGE ORDER OF AHEPA STOP ANOTHER CONDITION BEING THAT WE SHALL HAVE ON OR BEFORE NOVEMBER 30TH TO COMPLETE TRANSACTION STOP UPON RECEIPT OF LETTER AND CERTIFIED CHECK WE WILL COMMUNICATE WITH YOU AND OFFERER FURTHER FOR FINAL ARRANGEMENTS TO PASS TITLE STOP UNDERSTOOD NO COMMISSION TO BE PAID BY AHEPA TO ANYONE

"HARRIS J. BOORAS SUPREME PRESIDENT ORDER OF AHEPA."

On the same date, October 20, 1945, Ades acknowledged receipt of the telegram by a letter to Booras as Supreme President Order of Ahepa, reading:

"October 20, 1945
"Mr. Harris J. Booris, Supreme Pres.
"Order of Ahepa
"10th Street
"Boston, Mass.
"Dear Harris:

"Received your telegram and am enclosing certified check in the amount of $10,000.00 as requested in the telegram.

"We perfer to have the mortage of $24,000.00 transfered to us from the Occidental Life Insurance Company: We will have the balance of $16,000.00, in escrow here in the bank as soon as the papers are ready.

"Yours truly,
"By Georges Ades"

Receipt of the certified check for $10,000 was acknowledged by a letter from Supreme President Booras to George Ades, dated October 29, 1945, reading as follows:

"Harris J. Booras
"Supreme President

Office of the Supreme President
Ten State Street
"Boston, Mass.

"Order of Ahepa
"Supreme Lodge Headquarters
"Washington, D. C.

"29 October 1945

"Mr. George Ades
"c/o The Liberty Cafe
"103 West Central Avenue
"Albuquerque, New Mexico

"My dear George:

"In response to my telegram I have received the $10,000 check relative to the sale of the property for the sum of $50,000. In the near future I shall make arrangements to either come to Albuquerque or to despatch some representative of Ahepa instead to consummate the deal. In the meantime, I would like to know as to who is purchasing the property and the address of same, for, according to your letter, it seems that you have sent the check and that you seem to be the purchaser.

"I enclose herewith copy of a letter which has been sent to Attorney Rodey, whom I have asked to act as our attorney to look up the status of the Silver District Sanitorium and as to what votes, authorities and documents are needed in order to consummate the transaction. You will please see him immediately, and, after consulting with him, report to me as to what is to be done.

"Mr. Rodey will also check into who the reported officers are now and as to whether or not we have to have special meetings to elect new officers to assign deeds and documents.

"With my best wishes to you and with the thanks of the fraternity for your very fine efforts, I remain,

"Cordially and fraternally yours,
"s/ Harris J. Booras
"Harris J. Booras
"Supreme President

"hjb/rm
"Enc."

The foregoing letter was dated October 29, 1945. On October 31, 1945, Bruskas was in Washington and talked to Booras and told Booras that Bruskas and Ades were buying the property. Booras said that he was glad of this. Booras then also told him that Ahepa was willing to sell on the basis of being paid merely for its equity, with the existing mortgage to be assumed by Bruskas and Ades.

On October 31, 1945, the Albuquerque attorneys for Ahepa wrote Ades to the effect that they had been advised to contact him "in regard to the sanatorium and to fix up the papers for contemplated sale and so

forth." On November 7, 1945, Booras wrote to Ades as follows:

"My dear Brother Ades:

"I had assumed from our talks in Chicago as well as from our talks on the phone that there was an outside purchaser interested in the property, and, accordingly, I had wired you that we had accepted the offer, subject, of course, to the approval of the Supreme Lodge, and that I should receive a letter from the offeror as to the definite terms. I have deposited the money with Headquarters subject to approval by the Supreme Lodge and/or the officers of the Sanitorium corporation.

"I told Brother Bruskas in Washington, not having received an answer to my previous letter as to the offeror, that we are sending the Supreme Treasurer, Brother C. G. Paris, to Albuquerque, with full power to go into the transaction further with you and such others that may be interested and close the matter once and for all.

"When Brother Paris comes there, which will be next Sunday or Monday, you will please accord him every facility and extend to him every explanation that may be necessary in order to realize the maximum returns from this investment.

"Cordially and fraternally yours,
"s/ Harris J. Booras
"Harris J. Booras
"Supreme President"

A few days later Ahepa sent the two representatives named in the foregoing letter to Albuquerque. They advised Ades and Bruskas that they had been instructed to repudiate the transaction and tendered them a repayment of the $10,000 which Ahepa had received with Ades's letter of October 20, 1945. This tender of repayment and subsequent ones were refused by the plaintiffs because of their belief that they had made an enforceable contract to buy the sanatorium property and not because of any deficiency as to time, manner, amount or other circumstances of the tender.

Under date of November 15, 1945, Ahepa proceeded to offer the sanatorium property for sale by publicly soliciting bids. Thereupon, on December 3, 1945, Ades and Bruskas filed their complaint in this cause.

The defendants filed their answer in which (1) the existence of a contract was denied; (2) sufficiency of the writings relied upon as showing a contract to satisfy the statute of frauds was raised; (3) fraud of the plaintiffs was charged; and (4) lack of clean hands on the part of plaintiffs was interposed as a defense. The filing of the defendants' joint answer was followed by the taking of the plaintiffs' depositions at the instance of the defendants and their filing with the papers in the cause. Thereupon the defendants moved for summary judgment attaching to the motion the

affidavit of one of defendants' attorneys denying the existence of any agreement in writing sufficient to satisfy the statute of frauds and enumerating the documents bearing upon same, the grounds of said motion being, to-wit:

"(a) That there is no genuine issue of fact upon the question that the purported contract sued upon is not a contract.

"(b) That there is no genuine issue of fact upon the question that the purported contract sued upon is not evidenced by an adequate written memorandum as required by the Statutes of frauds."

The plaintiffs filed their motion to make more definite and certain directed to the motion for summary judgment above mentioned. This provoked the defendants' clarifying Response which was filed with the papers in the cause. The trial court thereupon entered its decree which, so far as material, reads as follows:

"* * * the Court having examined the pleadings and exhibits thereto and having read the depositions and exhibits thereto on file herein and having heard the arguments of counsel; and the Court having determined on the basis of the foregoing that there is no genuine issue of material fact requiring a trial as to the following matters:

"1. That the negotiations of the parties as evidenced by the testimony of the plaintiffs in their deposition and by the exhibits to the Complaint and said depositions did not constitute or result in a contract.

"2. That the written instruments exchanged by the parties as shown by the pleadings, depositions and exhibits are insufficient to satisfy the requirements of the Statute of Frauds;

and the Court having found and ruled that either of the foregoing propositions as to the truth of which there is no genuine issue of fact constitute a complete defense to the plaintiffs' cause of action herein; thereupon, upon consideration thereof

"It is ordered, adjudged and decreed that the complaint and cause of action of the plaintiffs be, and it hereby is, dismissed with prejudice to which the plaintiffs object and except."

Counsel for plaintiffs question applicability of 1941 Comp. § 19-101(56), known also as District Court Rule 56. The pertinent provisions read:

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. The motion shall be served at least ten

days before the time specified for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that, except as to the amount of damages, there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

We entertain no doubt of the propriety of invoking this rule if the defendants are to be sustained on either ground of the motion for summary judgment upon which they rely. See 3 Moore's Federal Practice, c. 56; Johnston-Crews Co. v. United States, D.C., 38 F.Supp. 544; Ex parte Peterson, 253 U.S. 300, 40 S.Ct. 543, 64 L.Ed. 919; Norwood Morris Plan Co. v. McCarthy, 295 Mass. 597, 4 N.E.2d 450, 107 A.L.R. 1215, and Annotation in 69 A.L.R. 1031.

The plaintiff, Bruskas, presents two principal claims of error. It should be here stated that the sole heir and personal representative of Ades, the co-plaintiff, who died pendente lite, and who was substituted as a party plaintiff in his stead, does not join in this appeal. The two claims of error mentioned are that (1) the court erroneously ruled there was no contract formed and (2) the pertinent writings involved do not meet the requirements of the statute of frauds in their failure to identify with reasonable certainty the plaintiffs, Ades and Bruskas, as the purchasers. If either claim of error is ruled against the plaintiff, Bruskas, sole appellant, it becomes unnecessary to consider the other. This being true, we pass the question whether the court correctly decided that the negotiations relied upon did not result in a contract and enter immediately into a determination of the equally vital one: Do the pertinent writings meet the requirements of the statute of frauds in identifying the plaintiff, Bruskas, with reasonable certainty, as one of the purchasers?

The question whether Ades, himself, is disclosed with certainty by the writings as a purchaser is clouded by some doubt. The telegram of offer dated October 20, 1945, indicates considerable confusion on the subject. While addressed to Ades, it draws a distinction between him and the person referred to as "offeror" and again differentiates by designating them as *"you* and *offeror."* (Emphasis ours.) This same confusion is evidenced by the letter to Ades of October 29th, following, wherein Supreme President Booras states:

"In the meantime, I would like to know as to *who is purchasing the property* and the address of same, for, according to your letter, it seems that you have sent the check and that you seem to be the purchaser." (Emphasis ours.)

However, we need not be so much concerned whether Ades is sufficiently identi-

fied by the writings as a purchaser. The trial court ruled against him on the sufficiency of the writings to satisfy the statute of frauds and that ruling must stand since no appeal was prosecuted from the final decree by Corinne Silva Ades, substituted as a party plaintiff in his place and stead, both as the administratrix of his estate (he having died intestate, pendente lite) and as his sole heir at law and the next of kin. The plaintiff, Bruskas, thus appears before us as sole appellant. In order to secure a reversal, he must establish that the writings sufficiently identify him as a party purchaser to satisfy the requirements of the statute of frauds. The final decree gives an adverse answer as to the identification of both Ades and Bruskas. The former, or rather his personal representative and sole heir substituted as a plaintiff in his stead, has acquiesced in that adjudication, leaving only Bruskas to challenge the ruling.

The statute of frauds is with us as a part of the common law, 1941 Comp. § 19-303; Browning v. Browning, 3 N.M. (Gild.) 659, 3 N.M. (John.) 371, 9 P. 677; Childers v. Talbott, 4 N.M. (Gild.) 336, 4 N.M. (John.) 168, 16 P. 275. Restatement of the Law, Contracts, 207, speaks on the subject of identification under the statute as follows:

"§ 207. General Requisites of a Memorandum. A memorandum, in order to make enforceable a contract within the Statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty,

"(a) each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent."

In 37 C.J.S., Frauds, Statute of, § 193, p. 677, the rule is stated:

"To satisfy the statute of frauds the memorandum must state who are the parties to the contract, either by naming them, or by so designating or describing them that they may be recognized or identified without fair or reasonable doubt or dispute."

For authorities sustaining the foregoing texts, see 27 C.J. 275; 49 Am.Jur. 649; 2 Williston on Contracts, Rev.Ed., 1622, § 569; Grafton v. Cummings, 99 U.S. 100, 25 L.Ed. 366; Freeman v. Fishman, 245 Mass. 222, 139 N.E. 846.

The name of Bruskas appears nowhere in the critical memoranda—the telegram of offer and the letter acknowledging exchanged between Ades and Supreme President Booras on October 20, 1945. Indeed, not in any writing until the letter of November 7, 1945, from President Booras to Ades, does the name of Bruskas appear in the transaction, and the context found in connection with the mention of

his name in this letter itself repudiates any identification of him as one of the purchasers. It reads:

"I told Brother Bruskas in Washington, not having received an answer to my previous letter as to the offeror, that we are sending the Supreme Treasurer, Brother C. G. Paris, to Albuquerque, with full power to go into the transaction further with you and such others that may be interested and close the matter once and for all."

Nor can the memoranda be held to meet the requirements of the statute of frauds in this connection on the theory that Ades acted as agent for Bruskas as an undisclosed principal. The rule applicable is as follows:

"Except in a few jurisdictions where the contrary is held, it is a rule that the memorandum fails to designate one of the contracting parties and is insufficient in this respect where it discloses that a person named therein is avowedly acting as agent for someone else who is not named or described." 37 C.J.S., Frauds, Statute of, § 193, p. 679.

Still another reason would intervene to deny validity to the memoranda as an enforceable contract under the statute of frauds, since where agent is also a purchaser along with the principal, agent's signature alone is insufficient to bind the principal. Freeman v. Fishman, supra. If, as Bruskas contends, Ades was acting as agent for him as well as for himself, he nowhere signed as agent for Bruskas.

It follows from what has been said that the decree of the district court is correct and should be affirmed.

It is so ordered.

BRICE, C. J., and LUJAN, McGHEE, and COMPTON, JJ., concur.

181 P.2d 166

BARRINGTON v. JOHNN DRILLING CO. et al.

No. 4983.

Supreme Court of New Mexico.
May 21, 1947.

John R. Brand, of Hobbs, Jones, Hardie, Grambling & Howell, of El Paso, Tex., and Seth and Montgomery, of Santa Fe, for appellants.

Neal & Girand and Harris & Williams, all of Hobbs, for appellee.

COMPTON, Justice.

Appellee, Effie Mae Barrington, filed suit in the District Court of Lea County under

the Workmen's Compensation Act to recover compensation for the death of her husband, Richard M. Barrington.

Briefly, the basic facts are: Richard M. Barrington was an oil well driller and engaged in drilling wells in Lea County, in the vicinity of Eunice, some thirty miles from Hobbs, New Mexico, where he lived. He was employed by the defendant, Johnn Drilling Company, with American Employers' Insurance Company, insurer, as a driller. He was required, under his employment with the defendant, to furnish the drilling crew, usually consisting of three men besides himself. No housing facilities were provided at the job site and it became the duty of the driller to transport the drilling crew back and forth daily to work from their homes in Hobbs, New Mexico, in an automobile furnished by him. Barrington's employment required him to travel a distance of approximately sixty-five miles daily, for which he was to be and was paid by the defendant, seven cents per mile for transportation, in addition to his regular hourly wages. On the sixth day of September, 1945, while engaged in the transportation of the drilling crew from their place of work to their homes at Hobbs, an accident occurred, resulting in the death of the said employee, Richard M. Barrington. At the hearing before the trial court, it was admitted by the defendant that the employee Barrington was transporting himself and other members of the crew to and from work in the deceased's car. It was also stipulated that the accident was not caused by any negligence of the employer as a proximate cause of the injury.

The applicable provision of the Workmen's Compensation Law is Section 57-912, Subsection (*l*), which reads as follows:

"(*l*) The words "injuries sustained in extra-hazardous occupations or pursuit,' as used in this act (Secs. 57-901—57-931) shall include death resulting from injury, and injuries to workmen, as a result of their employment and while at work in or about the premises occupied, used or controlled by the employer, and injuries occurring elsewhere while at work in any place where their employer's business requires their presence and subjects them to extra-hazardous duties incident to the business, but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence."

At the conclusion of the hearing the Court rendered its decision, making the following pertinent findings of fact:

"4. That under the contract of employment between the employees and the drilling company, the Company furnished transportation for said employees, including the deceased, from their place of residence in Hobbs, New Mexico, to the well and return.

and that $.07 per mile was paid to the employee on the crew who furnished the car for transportation, mand it was the duty of the deceased, Richard M. Barrington as the driller to furnish the car for transportation or see that some member of the crew furnished it, and that the deceased had during the time he had been in the employ of the defendant drilling company for several months furnished such transportation and had been regularly paid therefor by checks of the Johnn Drilling Company, but it was immaterial to the employer as to which employee furnished and drive the car which transported them.

"5. That until a few months prior to the death of the deceased, drilling companies operating in Lea County, New Mexico, did not furnish transportation, and the defendant, Johnn Drilling Company did not furnish transportation to their employees, but due to the freezing of wages of employees in oil fields the Johnn Drilling Company agreed to and did furnish such transportation for its employees as an increase in wages and in order to get better crews.

"6. That the deceased Richard M. Barrington, was killed while driving the automobile which he had furnished and in which the fellow members of his crew were riding as the result of a collision with a truck on the highway approximately ten miles north of the drilling site and on the direct and usually traveled route from the drilling site to Hobbs, New Mexico, after he had completed his tower duty; that is, his drilling on the well for which he was paid an hourly wage, and the employer was not guilty of any negligence in connection with the collision.

"7. That it was the duty of the person furnishing the car, in this case Richard M. Barrington, to pick up the various members of the crew at their homes in Hobbs, New Mexico, transport them to the drilling site, and after their working hours were completed at the oil well to transport and deliver each member of the crew to his home in Hobbs, New Mexico, and the deceased was engaged in such mission at the time he met his death."

Appellants assign the following as error:

"Assignments of Error.

"Assignment of Error No. I. The Trial Court erred in rendering judgment in favor of Appellee and against Appellants for compensation, attorney's fees and funeral expenses because the undisputed evidence showed that the injuries which caused the death of Appellee's husband occurred after leaving the duties of his employment and the employer was not negligent.

"Assignment of Error No. II. The Trial Court erred in finding that the employer furnished transportation to the employees when the undisputed evidence showed that the means of transportation were furnished by the employees themselves and that the company exercised no supervision or con-

trol over its employees during the period when employees were travelling between their homes and the well site and the car in which the decedent was riding was owned by the decedent and under his sole control and supervision."

Appellants contend that the accident resulting in the death of the deceased did not arise out of and in the course of his employment, and that the deceased came within the latter provision of subsection (*l*), supra, to wit:

"* * * but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence."

and that in the absence of negligence, admittedly not present here, of the employer proximately causing the injury of the deceased, appellee would not come within the terms of the Workmen's Compensation Act, and for a reversal cite: Caviness v. Driscoll Construction Company, 39 N.M. 441, 49 P.2d 251; Cuellar v. American Employers' Insurance Company of Boston, Massachusetts, 36 N.M. 141, 9 P.2d 685; Lumberman's Reciprocal Association v. Behnken, 112 Tex. 103, 246 S.W. 72; McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867; Public Service Company of Northern Illinois v. Industrial Commission et al. 370 Ill. 334, 18 N.E.2d 914; Republic Underwriters v. Terrell, Tex.Civ.App., 126 S.W.2d 752.

Conversely, appellee concedes she is not relying upon the latter part of said subsection but maintains she is entitled to recover compensation under that part of said subsection reading as follows:

"* * * while at work in or about the premises occupied, used or controlled by the employer, and injuries occurring elsewhere while at work in any place where their employer's business requires their presence and subjects them to extra-hazardous duties incident to the business, * * *"

and that the injury complained of was sustained while the deceased was engaged in the performance of his contract of employment, and that said injury arose out of and in the course of his employment.

Appellants maintained that appellee, to come within the terms of the Act, must show negligence of the employer proximately resulting in said injury, and that the legislature by adding the latter part of said section precludes recovery of compensation in any event where negligence is not shown on the part of the employer. They maintain our decisions in Caviness v. Driscoll Construction Company and Cuellar v. American Employers' Insurance Company of Boston, Massachusetts, supra, are controlling here.

In the case of Caviness v. Driscoll Construction Company, supra, the deceased workman was employed at and around a rock crusher then being used to crush rock for a highway, and sustained injuries in an

automobile collision. The cause was brought to the trial court on the issue of negligence of the employer as the proximate cause of the injury.

In the case of Cuellar v. American Employers' Insurance Company of Boston, Massachusetts, supra, the workman was employed by the State Highway Department of New Mexico and was killed by being struck with a rock thrown into the air by blast set off by an employee of the defendant company while he was walking in the area of road then under construction. Here too the issue of negligence of the employer, as the proximate cause of the injury, was the sole issue to be determined.

The stipulation of counsel at the hearing renders unnecessary our further consideration of the latter portion of said subsection.

We therefore turn to a consideration of the correctness of the Court's finding that Barrington's injury arose out of and in the course of his employment. The trial court must necessarily determine that issue from the basic facts presented, and draw its inferences and deductions from them. Its finding that an injury did or did not arise out of and in the course of employment is conclusive, if supported by substantial evidence. That a judgment supported by substantial evidence will not be disturbed upon review is so well established that citation of authorities is deemed unnecessary.

The term "arising out of and in the course of employment" as applied to injuries received by employees while traveling between their homes and their regular places of work has been held to preclude compensation. Such injuries do not arise out of and in the course of employment if they arise out of ordinary hazards of a journey and such hazards as are faced by all travelers and which are unrelated to the employer's business. This general rule, however, has certain well recognized exceptions. These exceptions relate to situations where hazards of the journey may fairly be regarded as hazards of the service to be performed and are dependent upon the nature and the circumstances of the particular employment; also where the employer contracts to and does furnish transportation to and from work. See Cardillo v. Liberty Mutual Insurance Company, 67 S.Ct. 801, 808.

If, as a part of the contract of employment, the defendant agreed and did furnish transportation to and from work, and the deceased was injured while he was being transported, pursuant to said agreement, a case of injury in the course of employment is made out. In Cardillo v. Liberty Mutual Insurance Company, supra, the Court said:

"Each employment relationship must be perused to discover whether the employer,

by express agreement or by a course of dealing, contracted to and did furnish this type of transportation. For that reason it was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment. The presence or absence of control is certainly a factor to be considered. But it is not decisive. An employer may in fact furnish transportation for his employees without actually controlling them during the course of the journey or at the time and place where the injury occurs." (Emphasis ours)

It is also a general rule that the mere payment of cost of transportation by the employer where an injury sustained during the journey, does not arise out of and in the course of employment. More is required. The trial court found that Barrington's employer not only paid the cost of transportation, but that it paid it as a means of carrying out its contract to furnish transportation.

Reviewing the facts, we find ample evidence to sustain the findings made by the trial court.

There was no deviation from the regular course of travel to and from the drilling site, and had there been, so long as the employee was engaged in the service of his master and was injured, the circuitous route taken by him in its performance becomes immaterial. See Cardillo v. Liberty Mutual Ins. Co., supra, wherein the Court said:

"It was found that Ticer's employer paid the costs as a means of carrying out its contract obligation to furnish the transportation itself. Where there is that obligation, it becomes irrelevant in this setting whether the employer performs the obligation by supplying its own vehicle, hiring the vehicle of an independent contractor, making arrangements with a common carrier, reimbursing employees for the use of their own vehicles, or reimbursing employees for the cost of transportation by any means they desire to use. In other words, where the employer has promised to provide transportation to and from work, the compensability of the injury is in no way dependent upon the method of travel which is employed. From the statutory standpoint, the employer is free to carry out its transportation obligation in any way the parties desire; and the rights of the employees to compensation are unaffected by the choice made."

The McKinney v. Dorlac case, supra, presents a close analogy to the case at bar. While en route from Albuquerque to Roswell, McKinney was killed in an automobile accident. He was on his way to take other employment with the same employer. There was no negligence on the part of the

employer proximately causing the injury complained of, and in that case we said [48 N.M. 149, 146 P.2d 870]:

"It is undisputed that the deceased was in the employ of the appellant Dorlac at and before the time he was directed to proceed to Roswell, New Mexico, to take charge of a plastering job that appellant Dorlac had under contract. The deceased received his regular wages on the day of the accident, and was to receive pay as a foreman the following day if he arrived at Roswell in time to perform a day's work. There is no contention that appellee deviated from the regular route from Albuquerque, New Mexico, to Roswell, New Mexico."

In that case the injured workman was on a journey; in the case at bar the workman likewise was on a journey. The evidence shows that the work site was at a distant location; the wages of all workmen had been frozen and there was difficulty in obtaining efficient crews, adequate transportation facilities were unavailable, and that it was incumbent upon the driller, Barrington, under this condition to furnish and provide an efficient crew for the defendant. Quoting from Cardillo v. Liberty Mutual Ins. Co., supra, the Court further said:

"There was also evidence that the distant location of the Marine Base project, the hours of work and the inadequacy of public transportation facilities all combined to make it essential, as a practical matter, that the employer furnish transportation in some manner if employees were to be obtained for the job. This was not a case of employees traveling in the same city between home and work. Extended cross-country transportation was necessary. And it was transportation of a type that an employer might fairly be expected to furnish. Such evidence illustrates the setting in which the contract was drawn."

Similar cases have been decided, as in the case of Fairbank Co. v. Industrial Commission of Illinois, 285 Ill. 11, 120 N.E. 457, 458:

"When work for the day has ended and the employee has left the premises of his employer to go to his home, the liability of the employer ceases, unless after leaving the plant of the employer the employe is incidentally performing some act for the employer under his contract of employment."

See also Wineland v. Taylor, 59 Idaho 401, 83 P.2d 988; Dauphine v. Industrial Accident Commission, 57 Cal.App.2d 949, 135 P.2d 644; Fenton v. Industrial Accident Commission, 44 Cal.App.2d 379, 112 P.2d 763.

The recent case of Maryland Casualty Company v. Mason, 5 Cir., 158 F.2d 244, is analogous to the case at bar. Mason, the

injured workman, at the time of the injury was riding in an automobile, whereas the deceased in the case at bar was a driver. These were the only distinguishing facts. The decision of the Circuit Court of Appeals was that the injury rose out of and in the course of employment and overruled, or at least held Republic Underwriters v. Terrell, supra, to have been incorrectly decided.

From what has been said we conclude that the defendant agreed to, and did furnish transportation to the employee Barrington from and to his home as a part of his contract of employment, and that the injury and death of the workman arose out of and in the course of his employment.

Attorney's fees for services for appellee have been determined in the District Court. She now claims additional fees for the services of her attorneys in presenting this appeal. In view of the $1000 fee heretofore determined, an additional fee for $250 will be allowed.

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

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

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

181 P.2d 798

WILLIAMS v. WALLER.

No. 4984.

Supreme Court of New Mexico.

June 9, 1947.

A. T. Hannett, of Albuquerque, and Mather M. Eakes, of Farmington, for appellant.

Iden & Johnson and James T. Paulantis, all of Albuquerque, for appellee.

McGHEE, Justice.

Appellee recovered judgment for breach of contract for the drilling of an oil well and for conversion of parts of the drilling machinery. We will refer to the parties as they appeared in the trial court.

Lee Burns, a drilling contractor, had contracted to drill a well for plaintiff on a government permit in San Juan County and the defendant had been employed by him. Burns had given plaintiff a mortgage on a drilling rig, supposedly the one on the lease, for money advanced to him. When he reached a depth of 320 feet he abandoned the contract as well as his drilling equipment and left the country, owing both the plaintiff and defendant. Plaintiff and defendant then agreed that defendant would take the equipment and drill the well to 1000 feet, plaintiff to furnish $700 to be used for expenses and the defendant receive as his compensation the drilling rig or equipment, which they both thought belonged to Burns and was the equipment on which Burns had given plaintiff a mortgage. She says she later learned this was her rig and Burns had never owned it. Plaintiff had a written contract drawn by her attorney and both signed it. It reads as follows:

"It is hereby agreed between Ada Williams, party of the first part, and Jack Waller, party of the second part, as follows:

"Party of the second part agrees to drill the well on the lease of party of the first part in San Juan County, New Mexico, to a depth of one thousand (1,000) feet from the present depth of the well which is approximately three hundred twenty feet (320), cost of which not to exceed Seven Hundred ($700.00), and party of the first part agrees to advance the sum of Seven Hundred Dollars ($700.00) to pay for the cost of drilling said well to said depth of one thousand (1,000) feet.

"Party of the first part further agrees that upon party of the second part drilling said well to said depth of one thousand (1,000) feet, as provided in this contract,

that party of the first part will at such time release the mortgage which she now holds on the rig now located at said well, which said mortgage was heretofore given to party of the first part by Lee Burns.

"It is mutually agreed that in the event of a dry hole that the rig is not to be moved until the well is capped according to government regulations, and in the event oil is discovered in commercial quantities that the casing now at the well will be properly placed in the hole before the rig is moved. The expense of setting of such casing to be paid by party of the first part.

"In witness whereof, the parties have hereunto set their hands this 18th day of September, 1943."

It will be noted it omitted the only consideration the defendant was to receive, which was the drilling rig and equipment.

Following the execution of the contract the defendant began drilling operations. In December he discovered that no mention had been made of the consideration he was to receive, and after talking with the plaintiff in San Juan County they had a new contract prepared there by his attorney setting out the true contract and he also had prepared a bond from defendant to plaintiff guaranteeing that he would fulfill his contract. The plaintiff took the papers to her lawyer in Albuquerque and on his advice refused to sign it. Her attorney wrote the defendant's attorney of her action, saying, among other things: "when he shows some disposition to meet his obligations it will be time enough for Mrs. Williams to consider what she will do for Mr. Waller," and advising, in effect, that they were ready for a law suit. The defendant went ahead with the drilling, although he made slow progress.

On July 1, 1945, at a depth of 940 feet, the defendant rented a Fort Worth Spudder, and moved it in to complete the well, as the equipment he had been using was too light for such depth. He was ready to start drilling when he received a copy of a letter to plaintiff from the District Engineer of the United States Geological Survey to shut down the well until she got a new lease, and stating her lease had expired June 12, 1944. On August 31, 1944, the District Engineer gave permission to proceed, subject to his being first furnished with a complete log and other information.

Upon receipt of permission from the District Engineer to resume drilling operations, the defendant began work and had reached a depth of 977 feet when the owner of the Spudder required its removal to a drilling site near Chama and no further work was done on the well.

The plaintiff pleaded the written contract and asked for damages for the breach thereof by the defendant, and for damages for the claimed conversion of some of the

parts from the rig. The defendant answered denying any breach or conversion and pleaded that the contract copied above did not set out the true consideration in that it failed to state he was to get the drilling rig and equipment, and further alleging plaintiff was unable to convey title to the rig. He also filed a cross-complaint asking judgment for the reasonable value of his services. In her answer to the cross-complaint she stated the rights and liabilities of the parties were fixed by the written contract above quoted. No admission that the defendant was to get the drilling rig as his compensation was made by the plaintiff until it was wrung from her on cross-examination. Admittedly, the $700 was for gas, oil and other drilling expenses.

The original agreement was that the defendant would receive as his compensation the drilling equipment clear of the Burns mortgage. Under the contract as signed he would only receive a satisfaction of the mortgage. He might have acquired title from Burns and thus have received a benefit. Later she claimed this rig and equipment were her own property and had never been owned by Burns. At the request of the plaintiff, the court found this property had been purchased by her and rendered judgment against the defendant for the conversion of a part of it. Prior to the refusal of plaintiff to execute a contract embodying the real consideration it might be assumed the true consideration had been omitted by mistake, but not after the letter of her attorney dated December 10, 1943, to the defendant's attorney, which reads:

"Mrs. Ada Williams was in the office today and exhibited to me a proposed new contract between Mrs. Williams and Jack Waller.

"I have advised Mrs. Williams not to sign this agreement.

"Sometime ago Mrs. Williams and Mr. Waller entered into a written contract, which Mr. Waller has violated in every respect, and in addition thereto appears entirely lacking in good faith and fair dealing with Mrs. Williams. It is my suggestion and advice to Mrs. Williams that she sign no further documents or make any commitments whatever to Mr. Waller until he fulfills his present contract with Mrs. Williams. When he shows some disposition to meet his obligations it will be time enough for Mrs. Williams to consider what she will do for Mr. Waller.

"I consider that she has a very good damage suit against Mr. Waller and it is entirely up to him whether he wants to fulfill his present legal obligation or go to court.

"Please advise promptly, because if Mr. Waller is not going ahead with the drilling, we might as well bring this matter to a head without further waste of time."

[redacted]

[redacted] There must be mutuality of obligation to support a contract and what it might suit her fancy to pay is not sufficient to support an action for its breach. El Dorado Ice & Planing Mill Co. v. Kinard, 96 Ark. 184, 131 S.W. 460; Van Deren v. Heineke & Co., 122 Kan. 215, 252 P. 459.

The defendant went ahead and completed the well to 977 feet and with the spudder he had rented (on which he, incidentally, paid $1000 rental) would, no doubt, have completed it in a very short time had he not been shut down on account of the failure of the plaintiff to seasonably apply for a renewal of her lease and furnish the copies of log required by the government.

[redacted] Following the repudiation of her agreement to give the defendant the drilling rig as compensation, she became liable to him for the reasonable value of his services performed with her knowledge and consent, and he is liable to her for any damage she suffered on account of his negligence, if any, and for the value of any property converted by him, and the trial court will permit her to amend her complaint and set up such damages.

After an examination of the record we feel that a number of the findings of fact on the main issue of breach of contract, as well as on the issue of conversion, were erroneous and that there should be a complete new trial of the case.

The judgment of the district court will be reversed and the case remanded with instructions to grant the defendant a new trial, and it is so ordered.

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

[redacted]

181 P.2d 800

STATE v. SMITH.

No. 4947.

Supreme Court of New Mexico.

June 10, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

D. D. Archer and Paul R. Dillard, both of Artesia, and David Tant, of Oklahoma City, Okl., for appellant.

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

SADLER, Justice.

The defendant, L. O. Smith, was convicted of murder in the first degree and his punishment fixed at life imprisonment in the penitentiary in lieu of death by direction of the jury trying him. He prosecutes this appeal from the judgment of conviction so pronounced upon him.

The killing occurred at Artesia in Eddy County, New Mexico, on August 3, 1945. The deceased, Dr. Craig Cornett, was an osteopathic physician and surgeon residing and practicing his profession at Artesia at the time of his death and for some years prior thereto. The two families, that is to say, the deceased and his wife and the defendant and his wife, had been on friendly terms prior to and at the time of the fatal shooting which resulted in the death of the deceased. The defendant, a worker in the oil fields, with his wife, paid frequent visits to the home of the Cornetts, sometimes spending the night as did the Cornetts with them on occasions. They went on fishing and hunting trips together not infrequently. However, incidents had occurred, so the defendant testified, both at the home of the deceased, and on one of the fishing trips, which caused him to suspect undue intimacy between his wife and the deceased.

The doubts entertained by defendant concerning his wife's fidelity were not shared by deceased's wife to whom he divulged his suspicions following the claimed incident on the fishing trip above mentioned. Apparently her own faith in her husband and defendant's wife caused her to attribute defendant's suspicion to insane jealousy without support in fact. Nevertheless, whatever the basis for this feeling on defendant's part, whether with or without reason, it no doubt was responsible for the domestic unhappiness and difficulty which developed in his family resulting in a separation and the institution

on April 14, 1945, of a divorce suit by him against his wife in Eddy County, New Mexico. The separation continued for about two months when a reconciliation took place. The reunion lasted for a short time, then another separation occurred. It was followed in due course by the filing of the second divorce suit, this time by the wife of defendant, on June 29, 1945. It was still pending undetermined and untried when defendant shot and killed deceased as hereinafter related. Soon after the second and final separation, the defendant's wife went to the Cornett home to reside where, apparently in exchange for her room and board, she did the cooking and housework for the Cornett family.

On the night of August 3, 1945, at about 9:00 o'clock, the deceased with his wife, her nephew, a young boy fifteen years of age, an infant granddaughter, one and a half years old, and the defendant's wife, entered the Longacre Cafe in Artesia and seated themselves at the first table to the right near the plate glass window at the front facing west. The windows were equipped with Venetian blinds which at the time, although lowered, were adjusted so that the slats in same rested horizontally and anyone on the outside, with little effort, could see inside.

The Cornett party had been seated in the cafe for about fifteen minutes and had been partially served with their orders when the defendant drove up in his automobile and parked at the curbing. He got out of his car and walked to the front of the cafe and looked through the window opposite which the Cornett party was seated. He then returned to his automobile, took from it a 300 Savage rifle, returned to the cafe, entered same carrying the gun under his left arm and when inside drew his rifle on Mrs. Cornett, wife of the deceased. Mrs. Smith sprang up immediately, grabbed the rifle by the lower end of its barrel and endeavored to keep same pointed toward the floor. A bystander, one Clem B. Kukenmier, who happened to be in the cafe at the time, came to the aid of defendant's wife and joined in the scuffle over the gun. Just about the time he did so, the rifle was discharged into the body of the deceased, killing him instantly. Throughout the struggle for possession of the gun, the effort of Mrs. Smith was to keep its barrel pointed toward the floor until defendant could be relieved of it. It was obvious that his effort was to keep possession of the gun and get it pointed in the direction of the deceased or some member of the party sitting at his table.

The shot which killed the deceased also passed through the left arm of the nephew of his wife sitting at the same table before entering the body of deceased, inflicting a flesh wound. Following the discharge of the rifle, the scuffle over its

possession carried those participating out the front door of the cafe on to the sidewalk and, finally, across the sidewalk and in between some cars parked at the curb. During the progress of the scuffle, Kukenmier had called for aid, bringing in response one J. C. Mitchell who was in the cafe at the beginning of the affray. He seized defendant around the neck with his arm and choked him into submission. Indeed, he applied so much pressure that when he released it, the defendant dropped limply to the ground unconscious and so remained for more than ten minutes. The defendant was relieved of his rifle by Kukenmier who had assisted Mrs. Smith in the scuffle with defendant over its possession. It was found to have in its chamber one discharged shell and four loaded ones. Officers were quickly summoned, who took defendant into custody and removed him to jail.

Mrs. Cornett, deceased's wife, followed the struggling group out of the cafe and attempted to strike and kick the defendant. When she first laid hands upon him he said to her: "I am going to kill you yet." This threat was in line with others previously made by defendant against the Cornett family or some member of it. At the time defendant related to deceased's wife the incident which he said occurred on the fishing trip and caused him to doubt his wife's fidelity, he made the threat to Mrs. Cornett that he would kill her and her husband, Dr. Cornett, and his own wife. Several different persons had heard him make threats against the life of deceased, one as recently as two weeks prior to the time he actually killed him.

While defendant was still in front of the cafe and before he had been taken to the jail he was heard to say: "I got the one I wanted." When one of the officers arrived to take him into custody and while still at the scene of the shooting, defendant said: "It is me, fellows; it is me, fellows; I did it." When they arrived with him at the city jail he said to still another officer: "Well, I told the son-of-a-bitch I would get him."

All of the foregoing facts are within the verdict returned by the jury finding the defendant guilty of murder in the first degree and assessing his punishment at life imprisonment in the penitentiary. He took the stand in his own defense and denied knowing the Cornetts and his wife were in the Longacre Cafe when he went there shortly after 9:00 o'clock p. m. to eat. He gave as an explanation for looking in the window before entering that it was to learn whether or not the cafe was too crowded for him to get a seat. He admitted seeing his wife seated at the table but denied that he saw any of the Cornetts. He testified to a wish to effect a reconciliation with his wife, so returned and got his gun and entered the cafe, certain in his own mind that the Cornetts were there

even though unobserved by him and fearing there was a pistol or two in the party. He denied pointing the gun at anyone upon entering the cafe and then gave his version of the scuffle that followed his entry. The jury evidently placed little credence in his story and returned its verdict of guilty of murder in the first degree as above stated. In due course he received his sentence and the present appeal was prosecuted.

The defendant assigns seven separate errors claimed to have been committed by the trial court. He groups them under two points for argument. Under point I he first complains of the trial court's action in overruling his objection to deceased's wife being assisted to the witness stand by a young man dressed in the uniform of the United States Army who happened to be her son. She testified to having suffered from a broken back for many years and to having been in a state of practical invalidcy during such period, rendering it necessary that she be assisted in walking and in going up and down stairs. The sight of men in uniform at the time in question was commonplace. As a member of the armed forces, the son had no choice but to appear in uniform. Prejudice to defendant from the incident cannot be presumed and it is difficult to imagine any. The objection is wholly without merit.

The defendant next argues under Group one his assignments 2, 3, 4 and 5, which reduce themselves to a contention that the trial court erred in failing to grant defendant's request for an instructed verdict interposed both at the close of the state's case and again at the close of the whole case. The argument concerns itself with the contention that the evidence was insufficient to warrant submission of the case to the jury. In failing to stand on the ruling denying his motion made at the close of the State's case in chief, the defendant waived the error, if any, in the action taken by the trial court. This leaves for consideration the claimed error in denying a like motion interposed when the evidence was all in and both sides had rested.

Counsel for defendant have quoted in extenso the testimony of several witnesses for the state who observed the scuffle during which the shot was fired that killed the deceased and wounded his wife's nephew. It tended strongly to support his contention that defendant did not point the gun at, or handle the same in a threatening manner toward, Mrs. Craig Cornett, wife of the deceased, as claimed by her, thereby placing defendant in the act of committing a felony at the time of the homicide in violation of 1941 Comp., § 41-1703, and constituting first degree murder under 1941 Comp., § 41-2404.

This testimony, however, is to be weighed against the positive testimony of the only member of the Cornett party testifying, Mrs. Cornett herself, that immediately upon coming inside the cafe the defendant did point the gun at and toward her. Her testimony is corroborated in part, at least, by that of Mrs. Hazel Denton, a waitress in the cafe, who actually saw defendant as he entered the cafe with the gun under his left arm "holding it sort of up and then the gun went over towards the table kind of (the Cornett table) and then Mrs. Smith came over and grabbed the gun and held it down and then the gun came around like that" (demonstrating); also by still another witness who, immediately after defendant entered the cafe armed with an automatic rifle, heard his wife exclaim: "Do not do that," the instant before she seized the barrel of his rifle and began pressing the end of it toward the floor.

It was the jury's province to appraise the testimony of these various witnesses and its privilege, if it saw fit, to believe that of Mrs. Cornett with its partial corroboration, as coming from a person in better position than all others to observe what actually did take place. The finding, within the jury's verdict, that defendant was actually engaged in the commission of a felony at the time of the homicide cannot be disturbed as lacking substantial support in the evidence. The trial court correctly instructed the jury that, under such circumstances, the fact of the gun being accidentally discharged, if it was, would in no way reduce the homicide below the grade of first degree murder.

In his argument under Group two, so designated by him, counsel for defendant complain, among other things, of the trial court's failure to give certain instructions, namely, defendant's requested instructions 1, 2, 4, 5 and 6. No argument is presented as to the requested instructions 1 and 5, counsel being satisfied with the mere statement that they do not waive the error assigned as to the instructions and we are asked to "search the record for any prejudicial error brought about by refusal" to give them. Of course, the error assigned as to these requested instructions must be deemed abandoned.

The defendant's requested instruction No. 2 dealt with the question of his right to an acquittal on the theory of an accidental discharge of the gun during a scuffle. The court did not err in refusing this instruction. In the first place, it was not a proper instruction, if for no other reason, because it failed to recognize defendant's liability to conviction, even though the gun was accidentally discharged, if engaged in the commission of a felony or misdemeanor at the time of the homicide. In the second place, the trial court adequately instructed the jury in its general charge on the condi-

tions upon which defendant might be acquitted on the theory of an accidental killing.

What has been said regarding requested instruction No. 2, applies with equal force to defendant's requested instruction No. 4, dealing, as it does, with the defense of an accidental discharge of the gun, while not engaged in the commission of a felony. The subject was adequately covered in the court's general charge. The defendant was in no manner prejudiced by a refusal of this request. The testimony relied upon was insufficient to justify the giving of requested instruction No. 6. The court did not err in refusing it.

We come finally to perhaps the most serious claim of error presented by the defendant, his assignment of error No. 7, reading as follows:

"7. The court erred in not providing for the jury two forms of verdict to be returned on first degree murder, one of the forms to be returned in the event the defendant was found guilty of committing a murder while in the perpetration of a felony, and the other being guilty of murder under premeditation, malice and aforethought."

Counsel for defendant early recognize the handicap under which they labor in urging this assignment, for they make a deadly admission at the moment of presenting the assignment, to-wit:

"The record will show no objection to the form of verdict."

Accordingly, the plea for consideration of this claim of error is rested on the ground of "fundmental error."

The information charged common law murder and, so far as material, reads:

"That the defendant, L. O. Smith, in the County of Eddy, State of New Mexico, on the 2nd day of August, 1945, did unlawfully, feloniously, wilfully, deliberately, and maliciously and premeditatedly, kill and murder Craig Cornett, a human being, contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State of New Mexico."

The state obviously, as shown by the course of the trial, was relying upon two separate theories for a conviction of first degree murder—(1) a murder committed in the perpetration of a felony and (2) common law murder with deliberation and premeditation. This fact could not have escaped defense counsel. It was, of course, permissible to introduce proof of murder committed in the perpetration of a felony under an indictment or information charging murder in the ordinary form. 40 C.J.S., Homicide, § 148, p. 1038.

The defendant at no time, by motion for bill of particulars or otherwise, sought to compel the state to disclose the theory upon which it would seek a conviction. Nor when the evidence was all in and it had become abundantly clear the state would seek to go to the jury on two theories, did the de-

fense ask to compel the state to elect upon which theory it would seek a verdict if, indeed, such an election could have been compelled. Cf. State v. Ochoa, 41 N.M. 589, 72 P.2d 609.

Counsel for defendant apparently think the matter should properly have been handled by submitting two separate forms of verdict whereby the jury might specify the theory upon which it returned a verdict of first degree murder, if it did. Perhaps they are right, but they did not ask the court to do so. Under such circumstances what are the defendant's rights and what is this court's duty? Especially, where the jury brings in a verdict of guilty of murder in the first degree and there is substantial evidence to support the verdict on either theory.

Counsel for defendant tell us we shall find the answer to these inquiries in State v. Garcia, 19 N.M. 414, 143 P. 1012, 1015. We quite agree and the answer calls for an affirmance. Speaking of fundamental error in that case and in an early application of the doctrine, this Court said:

"The restrictions of the statute apply to the parties, not to this court. This court, of course, will exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims; nor will we consider the weight of evidence if any substantial evidence was submitted to support the verdict. *If substantial justice has been done,* parties must have duly taken and preserved exceptions in the lower court to the invasion of their legal right before we will notice them here." (Emphasis added).

See, also, State v. Klasner, 19 N.M. 479, 145 P. 679, Ann.Cas. 1917D, 824 and State v. Garcia, 46 N.M. 302, 128 P.2d 459.

There is substantial support in the record for a verdict of murder in the first degree on either theory developed in the evidence. No doubt, the trial court would have granted a request to submit forms of verdict reflecting the theory upon which a verdict of first degree was rendered, if one should follow. If to be relied upon as fundamental error without mention, it would profit a defendant to withhold request, gamble on the verdict and then assign fundamental error, if convicted. The record before us fails to convince that substantial justice has not been done. The verdict under the evidence could easily have been one demanding the death penalty. The judgment will be affirmed.

It is so ordered.

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

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

181 P.2d 806

FLOYD v. TOWNDROW et al.

No. 4935.

Supreme Court of New Mexico.
June 17, 1947.

See also 48 N.M. 444, 152 P.2d 391.

H. M. Rodrick, of Raton, for appellants.

L. S. Wilson, of Raton, for appellee.

COMPTON, Justice.

The last will and testament of Emma F. Towndrow was admitted to probate in the district court of Colfax County on removal from the probate court of that county on August 18, 1941; and Thomas Floyd was appointed and qualified as executor.

This action was brought by the executor in a separate proceeding in the district court of Colfax County, to recover principal, interest and attorney's fees alleged to be due on a promissory note in the principal sum of $2370, made by appellants (defendants) in deceased's lifetime and payable to her.

The appellants answered, admitting the execution and delivery of the note sued on, but as a defense pleaded an agreement wherein the deceased in her lifetime re-

leased and discharged appellants from their obligation to pay it, in consideration, it is said, of certain services performed, and material furnished by appellants.

As a counterclaim appellants alleged that deceased was indebted to them in the sum of $12,000, for which they prayed judgment, less any amount found by the court to be due by them on the note in suit. These claims had been filed with the executor in the probate proceedings but were not approved by him, or presented to the probate court for allowance. All defenses were denied in appellants' reply.

The court sustained appellee's motion to strike the amended counterclaim upon grounds hereafter stated. Thereafter the cause was submitted to a jury, and a directed verdict was returned in favor of the appellee, upon which judgment was entered.

It is asserted that the trial court erred in striking appellants' counterclaim and amended counterclaim, identical in effect. We are of the opinion that the trial court did not err. These claims, although duly filed in the probate proceeding, not having been allowed by the probate court, cannot be set off against the note sued on. That was our conclusion in Counts v. Woods, 46 N.M. 273, 127 P.2d 398, in which we said:

"* * * The only question presented is whether or not presentation and approval of a claim against a deceased person is necessary in order to make the same available as a set off in a suit by the administrator or distributee of the estate of the person against whom the claim is asserted.

"* * * It seems to us that there is an obvious answer to this contention. The statutes contemplate that all claims should be filed and notice given within a limited period or be barred. No special provision is made where accounts are owing by an individual to an estate, and in turn by the estate to the individual. However, for the account owing by the estate to remain collectible, the claim must be filed and notice given within the prescribed time. If this is not done, the claim against the estate is barred. *When the claim is approved it can be set off against the account owing to the estate.*

"The means were available whereby appellant could have protected himself. Having failed to have his claim against the estate allowed he should not be heard to complain because he is now denied the benefits of this barred claim." (Emphasis ours.)

The trial court did not err in striking appellants' counter claim.

At the conclusion of the testimony of appellants the trial court sustained appellee's motion for an instructed verdict. This action of the court is assigned by appellants as error.

The appellants' testimony amply sustained their defense that the deceased had, in her lifetime, cancelled the note in suit, except as to the interest, in consideration of material furnished and services performed by the respective appellants.

Appellant Margaret F. Towndrow testified to her living in the home of the Towndrows since she was two and a half years of age until she was approximately twenty-one; how she had worked in the field; her lack of social life; her lack of opportunity for higher education and those many things a girl in her station in life should have. Appellants also testified that they were to be compensated from the Towndrow estate, upon the death of the survivor of them, for the material and services mentioned; that Emma F. Towndrow agreed to make her last will and testament, leaving the bulk of her estate to Margaret F. Towndrow and that Emma F. Towndrow did make a will in August, 1936, shortly after the death of Arthur Towndrow, which was declared invalid by reason of a subsequent will having been established. In re Towndrow's Will, 47 N.M. 173, 138 P.2d 1001.

The testimony of the appellants regarding the deceased's agreement to cancel the principal of the note in suit was not corroborated by any other testimony. Without such corroboration the defense must fail; as it is so provided by Sec. 20-205, N.M.1941 Comp., as follows:

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

The evidence of the witnesses J. A. Douglas and Anna Douglas tends to corroborate appellants to the effect that Emma F. Towndrow promised to make a will and leave the bulk of her estate to appellant Margaret F. Towndrow.

But these matters are not a defense to this action; also they have been foreclosed by the probate of the last will of Emma F. Towndrow, deceased. See In re Towndrow's Will, 47 N.M. 173, 138 P.2d 1001.

The trial court correctly instructed the jury to return a verdict for appellee.

Finding no error in the record, the judgment is affirmed, and the cause remanded with directions to the district court to enter judgment in favor of plaintiff (appellee) and against the defendants (appellants) and the sureties on their supersedeas bond, and it is so ordered.

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

McGHEE, J., did not participate.

181 P.2d 808

STATE v. NUTTALL.

No. 5016.

Supreme Court of New Mexico.
June 11, 1947.

Lee R. York, of Hobbs, for appellant.

C. C. McCulloh, Atty. Gen., and Wm. R. Federici, Asst. Atty. Gen., for appellee.

COMPTON, Justice.

Appellant W. A. Nuttall was convicted by a jury of Lea County of the crime of directing, taking and transporting two women, (naming them) to the Harden Hotel in Hobbs for prostitution.

The applicable statute is Section 41-3401, N.M.S.A., 1941 Comp., reading as follows:

"From and after the passage of this act, it shall be unlawful: * * *

"(d) To direct, take or transport, or offer or agree to take or transport, any person to any place, structure, or building, or to any other person with knowledge or reasonable cause to know that the purpose of such directing, taking, or transporting is prostitution, lewdness, or assignation."

The questions are (1) whether the judgment of the trial court is supported by substantial evidence; and (2) if not so supported, whether the question can be raised for the first time in this court?

The evidence shows the women involved came to Hobbs, New Mexico on August 7, 1946, and registered at the Keller Hotel. The next day they contacted appellant, a taxi driver with whom they were acquainted, at a cab station in Hobbs, known as

Cab Station No. 2. They advised him at the time that they had no funds, and they intended to engage in prostitution.

They sought his opinion whether it would be safe for them to engage in prostitution in Hobbs. Appellant advised them to remain away from hotels as the officers were on the alert and it would be unsafe. He suggested to them to find a place elsewhere in the city and when they or he could find dates, he would arrange for their transportation to and from the place of their engagement. Following appellant's suggestions, the women left the Keller Hotel and went to the Jackson Apartments. The following day, August 8th, appellant contacted the women at the Jackson Apartments and rode around the city with them in his taxi. Late in the evening of that day, appellant went to the Ramona Night Club, informed the women he had dates for them at the Harden Hotel, and transported them from the Ramona Night Club to the Harden Hotel in his taxi. They filled their dates, receiving $10 each for their acts of sexual intercourse, this amount being theretofore suggested by appellant as the usual charge for such practices in Hobbs, after which they were transported in appellant's taxi by him to their home at the Jackson Apartments. On the 7th or 8th of August, 1946, appellant stated to Chester Smith, a porter of the Harden Hotel, if he needed any girls for prostitution, to call him at the cab station. On the 8th of August, 1946, appellant stated to Gus Williams, also a porter at the Harden Hotel, that if he should have a call for a girl, to call him and he would furnish the girl.

Appellant, testifying in his own behalf, admitted meeting the women involved under the circumstances substantially as related by them, but denied transporting them for prostitution. He denied knowing the witnesses Smith and Williams. He admitted knowing the women were without funds and he agreed to transport them to and from their place of employment in a restaurant until they could acquire sufficient funds with which to pay him.

Admittedly, no objections were made to the evidence, and no exceptions were taken to the actions of the trial court. It is admitted by appellant that the question of sufficiency of the evidence to support the verdict was not raised in the court below.

The method of preserving questions for review is governed by the following provisions:

Section 19-101, (46) N.M.S.A., 1941 Comp., reading as follows:

"Formal exceptions to rulings or orders of the court are unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought makes known to the court the action which he desires the court to take or his objection to

the action of the court and his grounds therefor; and if a party has no opportunity to object to a ruling or order at the time it is made the absence of an objection does not thereafter prejudice him."

Section 19-201, (20), being rule 20 of this court, reading as follows:

"1. None but jurisdictional questions shall be first raised in the Supreme Court.

"2. Formal exceptions shall not be required in any case, but *to preserve the question for review it must appear that a ruling or decision by the trial court was fairly invoked.* (Emphasis ours.)

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

It is a general rule that the question of sufficiency of evidence to authorize submission of the case to the jury, or to support the verdict, must be raised by proper objections in the trial court, and will not be considered if raised for the first time on appeal. 3 C.J. 836. See also 4 C.J.S., Appeal and Error, § 298. Baca, State ex rel., v. Board of County Commissioners, 22 N.M. 502, 165 P. 213; Irick v. Elkins, 38 N.M. 113, 28 P.2d 657. Blacklock v. Fox, 25 N.M. 391, 183 P. 402; Grant v. Booker, 31 N.M. 639, 249 P. 1013; State v. Board of Trustees, 32 N.M. 182, 253 P. 22; State v. Layton, 32 N.M. 188, 252 P. 997; State v. Knowles, 32 N.M. 189, 252 P. 987; State v. McKenzie, 47 N.M. 449, 144 P.2d 161.

Appellant having failed to raise the question of sufficiency of the evidence in the trial court, invoke a ruling thereon and preserve the question for review, cannot present the question on appeal for the first time.

Notwithstanding what has been said, fundamental error is an exception to the above rule. Under conditions invoking its application, the exception is as well recognized as the rule itself. It finds support in law only when it manifestly appears of record that injustice has been done. By assigning fundamental error, appellant seeks to bring the question of sufficiency of the evidence to support the verdict before this court on appeal for the first time.

In support of his claim of fundamental error, appellant urges that the conflict in the testimony of the women involved who were witnesses for the state, and his general denial of guilt, are sufficient for a reversal. Upon this ground, appellant urges fundamental error.

Fundamental error was invoked in the case State v. Garcia, 19 N.M. 414, 143 P. 1012, 1014. Garcia was convicted of a felony. The evidence not only failed to show the commission of a crime, but on the other hand shows conclusively that the crime charged could not have been committed by

him. Garcia failed to take and preserve proper exceptions in the trial court. Nevertheless this court in invoking the doctrine of fundamental error said:

"There exists in every court, however, an inherent power to see that a man's fundamental rights are protected in every case. Where a man's fundamental rights have been violated, while he may be precluded by the terms of the statute or the rules of appellate procedure from insisting in this court upon relief from the same, this court has the power, in its discretion, to relieve him and to see that injustice is not done.

"The restrictions of the statute apply to the parties, not to this court. *This court, of course, will exercise this discretion very guardedly, and only where some fundamental right has been invaded, and never in aid of strictly legal, technical, or unsubstantial claims; nor will we consider the weight of evidence if any substantial evidence was submitted to support the verdict. If substantial justice has been done, parties must have duly taken and preserved exceptions in the lower court to the invasion of their legal right before we will notice them here.* But in this case justice has not been done. A man has been convicted and sentenced to imprisonment for a term of years where there is, not only no evidence to support the verdict, but where the evidence conclusively establishes his innocence." (Emphasis ours.)

In the case of State v. Armijo, 35 N.M. 533, 2 P.2d 1075, 1080, the defendant was tried and convicted on the testimony of a single witness, whose evidence was so incredible that we invoked the doctrine of fundamental error, and said:

"The inherent improbability of Gentry's story we think turns the scales against its substantiality; its sufficiency to support the verdict. If it were consistent and had the ring or any stamp of truth, established principles of review might perhaps compel us to accept it, though it comes from the lips of a witness interested as someone's accomplice; interested in the result to himself and to others; actuated by fear of vengeance; a confessed perjurer; uncorroborated by word or circumstance. It taxes the detached judicial attitude to accept any testimony from such a source. *But when the evidence itself is incredible, and in parts plainly fabricated, and, as a whole, convinces the mind that the truth is still suppressed, the point is reached, as it seems to us, where an appellate court should intervene. The verdict rests upon evidence which fails to meet any test of truth.* We consider it unsubstantial. *In thus holding we do not deviate from anything said in the original opinion or depart from any principle established by former decisions of this court.*" (Emphasis ours.)

We refused to invoke this rule in State v. Hunter, 37 N.M. 382, 24 P.2d 251.

Hunter was convicted of unlawfully giving intoxicating liquor to a minor, a 20 year old girl; upon her testimony the conviction was obtained. Her testimony was contradicted by the defendant and other witnesses. The question of sufficiency of the testimony of the prosecuting witness to serve as a basis for the jury's verdict was raised for the first time upon motion for a new trial. We held that appellant could not demand as a matter of right a review of the question and stated:

"This court has, in some instances, in the exercise of its inherent power to prevent injustice, set aside verdicts of guilt not warranted by the evidence, in spite of a failure on the part of the defendant to take proper steps in the trial court to entitle him to a consideration in this court of the question of the sufficiency of the evidence. See State v. Garcia, 19 N.M. 414, 143 P. 1012; State v. Armijo, 25 N.M. 666, 187 P. 553; State v. Taylor, 32 N.M. 163, 252 P. 984; State v. Berry, 36 N.M. 318, 14 P. 2d 434. *We are not convinced, however, that the circumstances of the case at bar are such as to warrant interference by this court with the conclusion reached by the jury.*" (Emphasis ours.)

The rule was before us again for consideration in State v. Garcia, 46 N.M. 302, 128 P.2d 459, 462. Garcia was convicted of first degree murder from which he appealed. No objections were made to the instructions of the trial court and after the verdict of the jury was returned the defendant appealed, alleging fundamental error. In refusing to invoke the doctrine of fundamental error, we said:

"We have examined the case before us to see if fundamental error was committed under the theory enunciated by this court in the cases of State v. Garcia, 19 N.M. 414, 420, 143 P. 1012; Gonzales v. Rivera, 37 N.M. 562, 25 P.2d 802, and possibly others."

"Error that is fundamental must be such error as goes to the foundation or basis of a defendant's rights or must go to the foundation of the case or take from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive. Each case will of necessity, under such a rule, stand on its own merits. Out of the facts in each case will arise the law. Also, there may be such a case, as the Garcia case, supra, which would so shock the conscience of the court as to call for a reversal. When such a case is presented the court on its own motion would cut through all rules of appellate practice and procedure to insure justice.

"In the instant case the evidence supports the verdict. The appellant had a trial before a jury of his peers and before an able, capable and conscientious Judge. He was ably represented by counsel. There is no fundamental error." (Emphasis ours.)

So read certain of the decisions of this court where a claim of fundamental error had been invoked before us. We find nothing in the record of this case to warrant its application here. The testimony of the state's witnesses obviously implicated the appellant in the crime charged and furnished substantial support for the verdict of the jury. It was its function to judge the credibility of the witnesses and the weight to be given their testimony. The accused received a fair trial and the judgment pronounced upon him should be affirmed.

It is so ordered.

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

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

181 P.2d 811

Ex parte ROMERO.

No. 5042.

Supreme Court of New Mexico.

June 9, 1947.

Edwin L. Swope, of Albuquerque, for petitioner.

William T. O'Sullivan, of Albuquerque, for respondent.

McGHEE, Justice.

The petitioner seeks his release from the Nazareth Sanatorium where he is detained for treatment of claimed mental disorder caused by the excessive drinking of intoxicating liquors.

It was stipulated that pending the final determination of the issues herein, the petitioner would be paroled to his wife, and that such period would not be deemed a part of the maximum statutory period during which the right to detain him was claimed.

The petitioner was admitted to the sanitarium on his written application under Sec. 37-223, 1941 Code, and the certificate of a doctor of medicine as provided in the succeeding section, and it is under these statutes that the respondent denied the verbal demand of the petitioner for his release made four days after his admission, and now claims the right to detain him. These statutes read:

"37-223. Voluntary Commitments.—The manager or chief medical officer of any

Veterans' Administration Hospital in this state, or the superintendent or person in charge of any hospital or institution offering care and treatment for persons with mental disorders in this state, may receive and detain therein as a patient any person suitable for care and treatment, and who voluntarily makes written application therefor. A person thus received at such hospital or institution shall not be detained under such voluntary commitment more than ten (10) days from and inclusive of the date of notice in writing of his intention or desire to leave such hospital or institution. (Laws 1939, ch. 43, § 1, p. 81.)"

"37-224. Emergency Commitments.—In addition to and supplementing the laws of this state requiring the commitment by order of court of insane persons, mentally incompetent persons and habitual drunkards, any person requiring immediate institutional care for mental disorder, may be received and detained by the superintendent of the Veterans' Administration Facilities, or other institutions offering care and treatment for such persons, upon a certificate executed by any doctor of medicine duly licensed to practice in this state. Such certificate will contain adequate reasons why such person should be immediately received by such institution, and will constitute authority for the detention of such person not to exceed thirty (30) days. (Laws 1939, ch. 43, § 2, p. 81.)"

Do these statutes deprive the petitioner of his liberty without due process of law?

The respondent urges that by the voluntary act of the petitioner in making the request for admission, he contracted with it to there remain and receive treatment until ten days after written notice of his desire or intention to terminate the same was given, unless sooner released. Obviously, it does not require citation of authority that one may not enforce such a contract made with a person he knows to be so disordered in mind as to require treatment in an institution for the treatment of mental diseases.

Vermont had a statute providing that the probate judge could commit a pauper to an asylum on the certificate of two practicing physicians that such person was insane. Lydia Ann Allen was so committed and sued out a writ of habeas corpus to secure her release. In Ex parte Allen, 82 Vt. 365, 73 A. 1078, 1082, 26 L.R.A.,N.S., 232, the court said: "If a person's right of hearing depends upon the grace, favor, or discretion of the persons, board, or tribunal whose duty it is to decide the question at issue, he is not protected in his constitutional right. The law must require notice to him, give him a right to a hearing, and an opportunity to be heard. Durkee v. City of Barre, 81 Vt. 530, 71 A. 819; Stuart v. Palmer, 74 N.Y. 183, 30 Am.Rep. 289; Underwood v. People, 32 Mich. 1, 20 Am.Rep.

633; In re Lambert, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am.St.Rep. 296; State v. Billings, 55 Minn. 467, 57 N.W. 206, 794, 43 Am.St.Rep. 525."

While it was written many years ago, we think the following words of Judge Cooley in Van Deusen v. Newcomer, 40 Mich. 90, 127, relative to the confinement of a person thought to be insane on the judgment of a physician, are appropriate today.

"The careful study of the phenomena of insanity is confined almost exclusively to learned and humane members of this profession, and it would be gross ingratitude in society and in the State, if it were not ungrudgingly admitted that the amelioration of the condition of this unfortunate class, by relieving them of the barbarous and inhuman restraints to which ignorance formerly subjected them, and giving them the humane, soothing and healing treatment of comfortable asylums, is due mainly to the investigations and labors of this profession. But I cannot admit that because one is a practitioner of medicine, it is therefore proper or safe to suffer him to decide upon mental disease, and consign people to the asylum upon his judgment or certificate. While the high character of a large proportion of the medical profession, their learning, their self-devotion and humanity, entitle them to our highest respect and confidence, and give to their conclusions in questions of medical science a weight that must generally challenge conviction, we cannot for a moment shut out from view the fact that the law throws wide open the doors of that profession, and that the ignorant jostle the learned in entering it, the unworthy have equal rights with the high-minded and humane, and it is not uncommon that the most unfit succeed for a long period in imposing upon the public. By no means known to the existing laws can it be rendered reasonably certain that, in the absence of public investigation, questions of insanity will be considered by competent persons and mistakes guarded against by those who are fit to judge.

"Nor even when the investigation is public and conducted with the assistance of experts do we fail to encounter difficulties of the most serious nature, arising from differences of opinion among those who are called to give scientific evidence. In every case where the evidences of mental disease are obscure, opinion is certain to be divided, and we are brought face to face with this conclusion, that if physicians exclusively were to deal with the case, the person would be turned over to the asylum or discharged as sane, according as one physician rather than another happened to be called in as the adviser. If the liberty of the citizen must depend upon such accidental circumstances, it ought very clearly to be made to appear either that the safety of society requires that such perils should

be encountered, or that adequate protection to those who are really insane admits of no better course."

By Act of Congress, 24 U.S.C.A. § 193, it was provided: "Insane patients of the Public Health Service shall be admitted into Saint Elizabeth Hospital upon the order of the Secretary of the Treasury, and shall be cared for therein until cured or until removed by the same authority. * * *"

Thomas Barry was transferred to the Saint Elizabeth Hospital under such an order and there confined as an insane person. He sued out a writ of habeas corpus to secure his release. The statement of the court, as reported in Barry v. Hall, 68 App.D.C. 350, 98 F.2d 222, 225, 226, is so expressive of our views that we quote therefrom as follows:

"The appellant's confinement in Saint Elizabeths under the Treasury Department letter until the time of the order of remand on the writ of habeas corpus of January 26, 1937, was illegal. Insanity is not a crime and therefore the constitutional guaranty of jury trial is not applicable; nevertheless, confinement in a mental hospital is as full and effective a deprivation of personal liberty as is confinement in jail. The Fifth Amendment is applicable in the District of Columbia, Sims v. Rives, 1936, 66 App.D.C. 24, 31, 84 F.2d 871, 878, and cases cited; and it guarantees that no person shall be deprived of liberty without due process of law. Due process of law does not necessarily mean a judicial proceeding —the proceeding may be adapted to the nature of the case—but it does necessitate an opportunity for a hearing and a defense. Ballard v. Hunter, 1907, 204 U.S. 241, 255, 27 S.Ct. 261, 51 L.Ed. 461; Simon v. Craft, 1901, 182 U.S. 427, 437, 21 S.Ct. 836, 45 L.Ed. 1165; In re Bryant, 1885, 3 Mackey 489, 14 D.C. 489; See Logue v. Fenning, 1907, 29 App.D.C. 519, 525; cf. Matter of Lambert, 1901, 134 Cal. 626, 66 P. 851, 55 L.R.A. 856, 86 Am.St.Rep. 296; In re Wellman, 1896, 3 Kan.App. 100, 45 P. 726; State v. Billings, 1894, 55 Minn. 467, 57 N.W. 206, 794, 43 Am.St.Rep. 525; Allgor v. New Jersey State Hospital, 1912, 80 N. J.Eq. 386, 84 A. 711; In re Allen, 1909, 82 Vt. 365, 73 A. 1078, 26 L.R.A.,N.S., 232. In Re Wellman, supra, a person alleged to be insane was committed to and confined in an institution without notice of the nature and pendency of the proceedings and without opportunity to be heard. The Court of Appeals of Kansas, in a habeas corpus proceeding, ordered discharge from the confinement, saying:

" 'Independently of statutes, every person is entitled to his day in court, and to the right to be heard before he is condemned. No mere ex parte proceeding can affect either personal or property rights. Were the legislature to attempt to enact a law authorizing judicial proceedings, the object

of which was to affect the person or property of a citizen, without notice or opportunity to be heard, such legislation would be rejected and repudiated in advance as an intolerable outrage upon the rights of the citizen. It would not only be a serious infringement of natural rights, but would be a flagrant violation of the constitutional guaranty that no person shall be deprived of his liberty or property without due process of law.

" 'Notice and opportunity to be heard lie at the foundation of all judicial procedure. They are fundamental principles of justice which cannot be ignored. Without them no citizen would be safe from the machinations of secret tribunals, and the most sane member of the community might be adjudged insane and landed in a madhouse. It will not do to say that it is useless to serve notice upon an insane person; that it would avail nothing because of his inability to take advantage of it. His sanity is the very thing to be tried. At the threshold of the inquiry the court is supposed to have no knowledge of the mental condition, but the presumption of the law is in favor of sanity. Insanity, like crime, does not exist in law until it is established by evidence in a proper proceeding. A trial without notice—a mere ex parte proceeding—has no proper place in a court of justice. It is a nullity, and void as affecting those not parties to it.' (3 Kan.App. at pages 103, 104, 45 P. at page 727)."

In New Mexico the district court is the only tribunal with authority to commit a person to an institution for treatment of mental disorders.

[redacted] We are convinced that Secs. 37-223 and 37-224, supra, plainly violate the provisions of the Fourteenth Amendment to the Constitution of the United States, and Sec. 18 of Article 2 of the New Mexico Constitution, and that the petitioner is being illegally detained.

[redacted] The order for his discharge, however, will not be effective until two days after its issuance in order that those responsible for his care and safety may institute proper legal proceedings if they are thought necessary, for we approve the rule that an insane person may be temporarily restrained without legal process, if his being at large would be dangerous to himself or others, preliminary to the institution of judicial proceedings for the determination of his mental condition. Ex parte Allen, supra; Maxwell v. Maxwell, 189 Iowa 7, 177 N.W. 541, 10 A.L.R. 482; Crawford v. Brown, 321 Ill. 305, 151 N.E. 911, 45 A.L.R. 1457.

Subject to the opportunity to file proper legal proceedings as above provided, we direct that the petitioner be released, and it is so ordered.

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

182 P.2d 421

STATE ex rel. STATE GAME COMMISSION v. RED RIVER VALLEY CO.

No. 4847.

Supreme Court of New Mexico.

Sept. 24, 1945.

Rehearing Denied March 26, 1946.

Second Motion for Rehearing Denied June 18, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

C. C. McCulloh, Atty. Gen., and Harry L. Bigbee, Asst. Atty. Gen., for appellant.

Seth & Montgomery, of Santa Fe, for appellees.

Francis C. Wilson, of Santa Fe, Edwin C. Crampton, of Raton, Simms, Modrall & Seymour and Iden & Johnston, all of Albuquerque, Gilbert & Gilbert, of Santa Fe, and Robert J. Nordhaus, of Albuquerque, amici curiae.

MABRY, Chief Justice.

Appellant brought suit for a declaratory judgment against appellee, a corporation, to determine whether or not it could open to the public for fishing and general recreational use that portion of the Conchas Dam reservoir which has been and now is closed to the public use for such purposes.

The lower court held that various contracts which had been entered into by the State of New Mexico, the United States, and The Red River Valley Company precluded the State Game Commission from being able to legally allow the public to go upon the disputed portion of the lake and participate in fishing or any other recreational activities. The lower court further held that the waters involved were not navigable waters, but did hold that they were, in a limited sense, public waters, and therefore not private waters.

The State appealed from this decision on the primary basis that the waters involved are public waters and therefore the public would, when authorized by the State Game Commission, have the right to use such waters for fishing and general recreational purposes; and that they are also navigable waters (an additional method of determining them to be public waters) and that the various contracts involved and hereinafter to be noticed do not deprive the State Game Commission of its power to allow members of the public to make such recreational use. The State is the riparian owner of a portion of the lake area, and public fishing and recreational privileges are enjoyed as to this limited area, and in an additional area wherein the right to use for recreational purposes was specifically given by appellee; and said areas could afford access to all the water without touching appellee's lands; but it does not own any of the land area where the right to fish and boat is now in question.

The suit thus presents the question of the right of the public, when properly authorized by the State Game Commission, to participate in fishing and other recreational activities in the waters in question. The trial court held that the waters of the reservoir were "public waters" only in the sense that they were available for appropriation for irrigation, or like beneficial uses, apparently, and that appellee company had never parted with the fishing and recreational rights on the area of the reservoir involved in this proceeding.

In the year of 1936 the United States, acting through the Army Engineers of the War Department, constructed the Conchas Dam across the South Canadian River, just below its confluence with the Conchas River; and, by means of said dam, created what is known as the Conchas Reservoir, flooding areas in the valleys of both the South Canadian and Conchas Rivers.

Prior to the construction of this dam, appellee was the owner of the Pablo Montoya Grant, confirmed to its predecessors in title by act of congress in the year 1869, embracing some six hundred and fifty-five thousand acres of land in eastern San Miguel County, including the land occupied by the aforesaid dam, and all of the area flooded by the aforesaid reservoir and involved in this suit, including the beds of the Conchas and Canadian Rivers, lying within the exterior boundaries of the grant, except that small portion of the flooded area in the valley of the Canadian River and the Conchas tributary extending outside the boundaries of the grant. Appellee still is the owner of all the said lands within the Pablo Montoya Grant, except as it may have parted with its title by reason of the instruments hereinafter to be referred to. Prior to the construction of the dam, both the Canadian and its tributary, the Conchas River, were perennial streams or rivers, and, according to the court's finding, non-navigable.

On November 13, 1935, in order to facilitate the construction of the dam, appellee entered into an agreement with the Governor of the State of New Mexico, and members of the Interstate Stream Commission of the state, as trustees for the state, whereby appellee agreed to convey to such trustees a certain area in fee simple as the actual site of the proposed Conchas Dam, thereafter constructed, and also an easement to flood and impound water above the dam on a large tract of land owned by appellee. It was made a condition of such contract that the appellee reserved the right "to use the areas affected by this indenture for all purposes not inconsistent with the prior rights of the grantees." This agreement expressly contemplated that all rights so acquired would be at once transferred to the United States, which was done.

On May 8, 1936, appellee executed a further conveyance to the members of the Interstate Stream Commission of the State of New Mexico, as trustees, conveying the right, privilege, power and easement to overflow on account of the construction, maintenance, and operation of the Conchas Dam on the South Canadian River, and to flood and impound water on, and to take and use construction materials from a large area of land, being the same lands as those described in the contract of November 13, 1935. This deed further provided that the easement granted by it is subject to the following reservations and conditions: "Two. The grantor, its successors and assigns, at all times shall have the right to use the area affected by said easement for all purposes not inconsistent with the prior rights of the grantees." The area of the Conchas Reservoir involved

in this appeal is included within the area on which the aforesaid easement is granted.

By conveyance, dated May 13, 1936, members of the Interstate Stream Commission, as trustees, conveyed to the United States all rights acquired by the aforesaid conveyance of appellee, dated May 8, 1936, and this conveyance of May 13th was identical with appellee's conveyance of May 8, 1936, so far as the conditions of said conveyance and the rights reserved to defendant are concerned, appellee's conveyance dated May 8, 1936, and the trustee's conveyance to the United States, dated May 13, 1936, being delivered simultaneously. Pursuant to the aforesaid conveyances, the Conchas Dam was constructed by the Army Engineers of the United States.

About the first of January, 1940, the opening of a part of the Conchas Reservoir to fishing and other recreational uses, and the erection of recreational facilities on the banks of said reservoir, were the subject of conferences with the War Department and state officials. And, on January 25, 1940, appellee conveyed to the United States the fee simple title to 640 acres of land situate on the banks of the reservoir, and in the same conveyance conveyed to the United States "the right to use for fishing, boating, bathing, and any other recreational purposes, a limited water area of the Conchas Reservoir within the exterior boundaries of the Pablo Montoya Grant, except that portion thereof lying in the valley of the South Canadian River north of a line" described in said conveyance; and this omitted portion is alone involved in this suit. This conveyance of January 25, 1940 was made subject to the reservations and conditions attached to the grant of flowage easement by the deeds of May 8 and May 13, 1936.

Subsequent to appellee's deed of January 25, 1940 and on May 1, 1940, Congress enacted Public Law No. 504, 76th Congress, 54 Stat. 176, authorizing the Secretary of War to grant to the State of New Mexico for public recreational purposes, an easement for the use and occupation of such lands and water areas so owned or controlled by the United States in connection with the Conchas Dam and Reservoir, as the Secretary of War might deem advisable, and under such terms and conditions as he deemed advisable. Apparently pursuant to said Act of Congress, there has been prepared an easement deed, authorizing the State of New Mexico to use for recreational purposes the area conveyed by appellee to the United States in fee simple by the deed dated January 25, 1940 and also the water area covered by said deed.

This so-called easement deed had not been executed by the Secretary of War at the time of the suit but appellant has entered into possession of the areas described in said deed under a verbal understanding with some subordinate official of the War Department; and the public, under rules and regulations imposed by the state authorities, is now enjoying the recreational and fishing privileges on the

Conchas portion of the lake as though the easement deed had been finally executed. The easement deed from the United States to the State of New Mexico is expressly made subject to the reservations and conditions contained in appellee's deed to trustees, of the date of May 8, 1936, and to the provisions, reservations, and conditions in appellee's deed of January 25, 1940, to the United States, but, by its terms only pertains to a restricted portion of the lake not involved in this action.

The contentions of appellee, supported by the findings and conclusions of the trial court, and as they are challenged by appellant in its assignments of error and argument, may be stated briefly under five points, as follows: (1) Prior to the erection of the Conchas Dam, appellee owned the beds and banks of the South Canadian and Conchas Rivers within the Pablo Montoya Grant and had the exclusive rights of fishing therein; (2) the erection of the dam and the impounding of the waters constituting the Conchas Reservoir did not change the situation then existing under which appellee had the exclusive right to fish in the streams; (3) the conveyances executed by appellee passed only a flowage easement, and it retained its fishing and recreational rights in and on the area embraced in these easements; (4) the ownership by the state of the land under a portion of the reservoir extending outside the boundaries of the Pablo Montoya Grant does not give the public the right to fish over the entire area of the reservoir; (5) the United States acquired exclusive jurisdiction over all the rights conveyed by the appellee, and the state has no rights whatever in the premises except insofar as it may claim under the so-called easement deed, and if it can claim under such instrument, it must take subject to all the provisions thereof.

So far as non-navigable streams are concerned, the common law rule, seemingly without exception, is that the one owning both banks of a stream likewise owns the entire bed thereof, the waters are private waters, and the owner has the exclusive right to fish therein. The same rule is sometimes applied to navigable streams, but it is conceded that the weight of authority is, rather, that the bed and waters of a navigable stream are the property of the public with adjoining land owners having no exclusive right to fish therein. See Kinney on Irrigation and Water Rights, 2d Ed., Vol. 1, p. 605, where it is said:

"In fact, under a strict construction of the common-law rule, the right to fish in, or to hunt on certain waters, in the absence of grants or prescription, is in harmony with the ownership of the soil under those waters; if the title to the soil is in the State, the right to fish or hunt is in the public; but, upon the other hand, if the title to the soil is in the riparian owner, he has this right."

See also 36 C.J.S., Fish, § 4, p. 833; 22 Am.Jur., page 682; 24 Am.Jur., page 378; Millspaugh v. Northern Indiana Public Service Co., 104 Ind.App. 540, 12 N.E.2d

396; Griffith v. Holman, 23 Wash. 347, 63 P. 239, 54 L.R.A. 178, 83 Am.St.Rep. 821; Herrin v. Sutherland, 241 P. 328, 42 A.L.R. 937; Hood v. Murphy, 231 Ala. 408, 165 So. 219; People v. Truckee Lumber Co., 116 Cal. 397, 48 P. 374, 39 L.R.A. 581, 58 Am.St.Rep. 183; Winans v. Willetts, 197 Mich. 512, 163 N.W. 993.

Where there is no separation in ownership of soil and water, "the right to hunt and trap from boats on rivers, lakes, streams, etc., is analogous to the right to take fish from the water. As a general rule, the test as to the public right of fowling, hunting, and trapping is the public or private ownership of the soil beneath the waters." 24 Am.Jur. 378.

As to non-navigable streams, argues appellee, our constitutional provision relating to public waters, Art. 16, Sec. 2, to be hereinafter noticed, affords a basis for the exercise of no further rights on the part of the public to use the waters of such streams for fishing and recreational purposes than is the case in other states where the common law rule controls. And, says appellee, the fact that in this jurisdiction riparian ownership does not determine right to beneficial use of the waters of streams, in the conventional sense and as beneficial use is commonly understood, does not compel a different result. But, contends appellant, the common law rule is not here to be applied to use of *public waters.*

The question of right of use, or trespass upon, the lands of appellee bordering upon the lake area in question is not involved. It is not contended by appellant that such right to use any of the lands of appellee would attend the right to go upon the waters. In fact, appellant disclaims any right, or purpose to so trespass. Access to the waters in question can be had by entry at points on the lake area not owned or controlled by appellee.

If it may be said that the waters in which the right to fish is here in question, are in fact public waters, yet unappropriated, applied to beneficial use by others, it is unimportant whether that is because these waters may now be considered navigable, or for whatever reason the character of public ownership attaches. If they be public, as distinguished from private, or prior appropriated, waters, the contention of appellant must be sustained, and only in this circumstance may it be.

Unless it may be said that appellee had a vested right in the waters so impounded behind the dam, or could, by contract, control their use, the use of the waters, as distinguished from the land up to and under the bed of the streams, or reservoir, no other questions excepting those touching upon the character of the waters as being public or private, and whether use for boating and fishing constitute "beneficial use," i.e. whether such uses properly appertain to unappropriated public waters, need be noticed. We will therefore first determine whether the waters in question are public waters, and, if so, whether the right to use for such recreational and fishing purposes is one of the beneficial uses which appertains to public waters and

which cannot, under the circumstances, be reserved as against the state, or the public, as appellee has attempted. Whether the language employed in the document was sufficient to reserve such use even if such reservation could have been made, is another question presented and vigorously argued by appellant. A decision upon such point is not required, however, if it can be said that the waters are public in any event and no exclusive right to use could therefore be retained.

Section 2, Art. 16, of the New Mexico Constitution provides:

"The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right."

Since appellee's title is derived from a congressional act of confirmation, based upon an early Mexican grant, the New Mexico constitutional declaration above noticed could not of course operate to deprive it of any right which may have vested prior to 1911, the date of the adoption and approval of the constitution. But the Attorney General contends, and correctly, we hold, that this constitutional provision is only "declaratory of prior existing law," always the rule and practice under Spanish and Mexican dominion. See Yeo v. Tweedy, 34 N.M. 611, 286 P. 970; Snow v. Abalos, 18 N.M. 681, 140 P. 1044; and as to this prior existing law, see Las Siete Partidas (C.C.H. 1931), part III, Title XXVIII, Law VI, p. 821; Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W. 2d 441; Grubstake Investment Ass'n v. State, 272 S.W. 527, affirmed 117 Tex. 53, 297 S.W. 202; 6 Texas Law Review, p. 524; 7 Texas Law Review 496; 12 Texas Law Review 490; Clough v. Wing, 2 Ariz. 371, 17 P. 453, 456; Maricopa County Municipal Water Conservation Dist. No. 1 v. Southwestern Cotton Co., 39 Ariz. 65, 4 P. 2d 369.

The doctrine of prior appropriation, based upon the theory that all waters subject to appropriation are *public,* "obtained under Mexican sovereignty, continued after the American acquisition, and * * * the sweeping statute adopting the common law, thirty years later (1876), as the rule of practice and decision, did not result in the adoption of rules inapplicable to our conditions, circumstances, and necessities, and subversive of rights long since vested and recognized. United States v. [Rio Grande] Dam & Irrigation Co., 9 N.M. 292, 51 P. 674; * * * Albuquerque Land & Cattle [Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357]; affirmed Gutierres v. [Albuquerque] Land & Irrigation Co., 188 U.S. 545, 23 S.Ct. 338, 47 L.Ed. 588." Yeo v. Tweedy, supra [34 N.M. 611, 286 P. 972].

Unless it may be said that riparian rights obtain in New Mexico as such rights relate to these water courses, appellee must yield its claim of right to so reserve as against use by the public, and much of the authority in appellee's able and well rea-

soned brief must be said to be without application. Our courts have more than once spoken clearly upon the subject. Yeo v. Tweedy, supra. And, we are unable to find authority, or justification in reason, to support the claim that the "beneficial use" to which public waters, as defined in this and other jurisdictions, may be put, does not include uses for recreation and fishing.

We have said many times that the Common law doctrine of riparian right was not suited to the region, was never recognized, and did not obtain in this jurisdiction. Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357. See cases last above cited and Snow v. Abalos, supra. And, the judicial declaration "did not make the law; it only recognized the law as it had been established and applied by the people, and as it had always existed from the first settlement of this portion of the country." Snow v. Abalos, supra [18 N.M. 681, 140 P. 1048]. The Arizona courts have held to the same effect. Clough v. Wing, supra. And the United States government, as reflected by acts of the Congress pertaining to waters on public lands, has always recognized the validity of local customs and decisions in respect to the appropriation of public waters. Gutierrez v. Albuquerque Land & Irrigation Co., 188 U.S. 545, 23 S.Ct. 338, 47 L.Ed. 588. It was said by the United States Supreme Court in Broder v. Natoma Water Co., 1879, 101 U.S. 274, 276, 25 L.Ed. 790:

"It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one. This subject has so recently received our attention, and the grounds on which this construction rests are so well set forth in the following cases, that they will be relied on without further argument: Atchison v. Peterson, 20 Wall. 507 [22 L.Ed. 414]; Basey v. Gallagher, 20 Wall. 670 [22 L.Ed. 452]; Forbes v. Gracey, 94 U.S. 762 [24 L.Ed. 313]; Jennison v. Kirk, 98 U.S. 453 [25 L.Ed. 240]."

"Under the civil law of Spain all those owing allegiance to the crown were equally entitled to the right to fish in the public waters of the kingdom. Such rights were denominated res communes, and considered as res omnium, in respect to their use and benefit but in respect to property as res nullius. * * * Under the laws of this state, the public waters and the fish therein are held by the state for the benefit of the people of the state, subject to such regulation of the use thereof as the lawmaking power may

provide. * * *" Ex parte Powell, 70 Fla. 363, 70 So. 392, 396.

"It is quite certain, we think, that the mere fact that the jus privatum, or right of soil, was vested in an individual owner does not necessarily exclude the existence of a jus publicum, or right of fishery in the public." Weston v. Sampson, 8 Cush., Mass., 347, 54 Am.Dec. 764, cited in Moulton v. Libbey, 37 Me. 472, 59 Am.Dec. 57.

"If the title vested in the owner does not necessarily exclude the common right of fishery, that cannot be affected by a title to the soil merely; and the ordinance does not attempt to impart any exclusive right of fishery to such owner." Moulton v. Libbey, supra.

Again we find the Moulton case approving language used by Mr. Justice Thompson, dissenting in Martin v. Waddell's Lessee, 16 Pet. 367, 10 L.Ed. 997, where it is said:

" 'The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a true and absolute grant of the waters of the State divesting all the citizens of a common right. It would be a grievance, which never could be long borne by a free people.' * * * no grant of the sovereign power capable of any other should receive a construction that would destroy or impair any right held in trust for the common benefit of the people."

Once we concede that the constitution is merely declaratory of the prior existing law obtaining before New Mexico came under American sovereignty and continuing thereafter, as we have held in the Yeo case, and other cases, and as courts of other states likewise recognize the rule to be, we will have determined that the waters in question are public waters; and we have then narrowed the inquiry to the simple one of whether use for recreation and fishing may be considered as among the uses which usually pertain to public waters. See Siete Partidas, a Spanish Code sanctioned as early as A.D. 1505; Vol. 6 Texas Law Review, p. 524; Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441, 447; Vol. 7 Texas Law Review 496.

Upon the question of the general use and right to fish upon and in the public waters under the laws of the Partidas, we take the following language from Farnham's Water and Water Rights, Vol. 1, p. 662, as quoted in the Diversion Lake Club case, supra:

" 'By the civil law the public use of the banks of a river was part of the law of nations, just as that of the river itself.' Farnham's Water and Water Rights, Vol. 1, p. 662. One of the laws of the Partidas provides: 'And although the banks of rivers are, so far as their ownership is concerned, the property of those whose lands include them, nevertheless, every man has a right to use them, by mooring his vessels to the trees, by repairing his ships and his sails upon them, and by landing his merchandise there; and fishermen have the right to de-

posit their fish and sell them, and dry their nets there, and to use said banks for every other purpose like those which appertain to the calling and the trade by which they live.' Las Siete Partidas (C.C.H. 1931), Part III, Title XXVIII, Law VI, p. 821."

Counsel for appellee would distinguish the Diversion Lake Club case. But we are not persuaded that the distinction which they would draw bears the interpretation contended for.

The opinion holds that such waters, being public, and having been impounded from a navigable stream and which overflow upon private lands are, nevertheless, and remain, public waters, and, being such, the right of the public to fish therein without disturbing the terrain in private ownership cannot be denied.

To quote from the opinion:

"When the irrigation company, plaintiff in error's predecessor in title, constructed the dam across the river, it caused by its voluntary act the flood waters of the river, *public waters,* to spread over the land which it had acquired, submerging and in effect destroying a portion of the river bed, and giving to the *public waters* a new bed. This artificial change in the river and its bed did not affect the public nature of the waters and did not take away the right of the public to use them for fishing." (Emphasis ours.)

To quote further from the Diversion Lake Club case:

"In general it is held that all members of the public have a common right of fishing in navigable streams and all other public waters. The rule is thus stated by Kinney: 'The general rule in this country is that the right of hunting and fishing by all members of the public is not confined to tidal waters, but has been extended to all of the *public waters* of the country which, as we have seen, are those waters that are navigable in fact.' Kinney on Irrigation and Water Rights (2d Ed.) vol. 1, p. 606. Farnham says: 'The right of fishing in all waters, the title to which is in the public, belongs to all the people in common.' Farnham's Water and Water Rights, vol. 2, p. 1363. * * *

"But it is said that Texas adopted the common law and with it the rule giving to landowners the exclusive right to fish in all nontidal rivers. As has been shown, the rule has no proper application, because of the absence here of the reason for the rule; * * *. However, even if the reason for the rule is disregarded, still it has not been adopted in Texas, because only so much of the common law of England has been adopted as is not inappropriate to the conditions and circumstances of the people and not in conflict with our Constitution and laws." (Emphasis ours.)

The Texas court there held that it was not necessary to decide, and that it did not decide, "whether the rights of the public to use the banks of streams in this state where they are bordered by grants made under

Spanish or Mexican sovereignty are in any respect different from the rights of the public herein determined. * * * And no opinion is intended to be expressed as to what use may be made in emergency, or in any other circumstance, of the banks of navigable streams by persons engaged in commercial navigation." And here we do not have before us any question of trespass, and it is not contended that trespass would be permissible upon privately owned lands, or is contemplated. Access to this public water can be, and must be, reached without such trespass.

We likewise recognized the applicability of the ancient law of the Indian as well as the Mexican law in regard to the character and uses to which public waters could be put in this territory, in Hagerman Irr. Co. v. McMurray, 16 N.M. 172, 181, 182, 113 P. 823, 824. We there said that "the statute was merely declaratory of the law as it had already been established in this jurisdiction * * *."

To quote further from the opinion as it deals with the doctrine of prior appropriation of public water as this doctrine has been superseded by that of the common law:

"The claim of the appellant that he was entitled, as riparian owner on the Rio Hondo, to have the water, which the appellee was diverting for purposes of irrigation, flow to his land in the channel of the stream is untenable. The doctrine of prior appropriation with application to beneficial use has definitely and wholly superseded the common-law doctrine of riparian rights in many of the jurisdictions in which irrigation is necessary to the growth of crops, and among them is New Mexico. The 'Colorado doctrine', as it is termed, first appears as a dictum in Coffin v. Left Hand Ditch Co., 1882, 6 Colo. 443. It declared that, on the ground of imperative necessity, no settler can claim any right aside from appropriation. The decisions of our courts, which had established that doctrine long before it was adopted by statute, have been approved by repeated decisions of the Supreme Court of the United States. Wiel's Water Rights in the Western States, §§ 23, 24, and cases cited; Keeney et al. v. Carillo, 1883, 2 N.M. 480, 492. * * * Indeed, riparian ownership, as known to the common law, has never, it would seem, been recognized in New Mexico. As pointed out in Gutierres v. Albuquerque Land & Irrigation Co., 188 U.S. 545, 23 S.Ct. 338, 47 L.Ed. 588, by the Mexican law in force here at the time the United States acquired the territory, the use of the water of the streams was not limited to riparian lands, but extended to others, subject to regulation and control by the public authorities. And the Mexican law, as well as the law of Indian tillers of the soil, who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems, did but recognize the law of things as they are, declaring that such must of necessity be the use of the waters of streams in this arid region."

Navigability, perhaps the earliest test by which the public character of water was fixed, is not the only test to be applied. We do not pause to detail the historical incidents of growing navigation, inland commerce, fishery, and recreation, etc. from which has developed our present law of public waters. At one time, public waters were thought of only as they afforded rights of navigation to the height of tide water; later they were extended to include all clearly navigable streams, and later still, to streams which would be used, not for boats of commerce, but only for the floating of logs and other items of commerce; and, later has come the recreational use where the strict test of navigability earlier applied is less rigidly adhered to. See the following cases and authority on the right of fishery and public waters generally. Nekoosa-Edwards Paper Co. v. Railroad Commission, 201 Wis. 40, 228 N.W. 144, 229 N.W. 631, affirmed 283 U.S. 787, 51 S.Ct. 352, 75 L.Ed. 1415; Lamphrey v. State, 52 Minn. 181, 53 N.W. 1139, 18 L.R.A. 670, 38 Am.St.Rep. 541; People v. Horling, 137 Mich. 406, 100 N.W. 691; 22 Am.Jur. "Fish and Fisheries", Secs. 8 and 9; Dissenting opinion in Hartman v. Tresise, infra.

Even under the general rule, resting upon the Common law, not here controlling, but which would, likewise, support appellant's position when we can say these are public waters, uses of public water are not to be confined to the conventional ones first known and enjoyed. And, the power of reasonable regulation rests in the state so that not only navigation may be "free to the public" but as well "such other uses as usually pertain to public waters. * * * In fact, navigable waters, in contrast with non-navigable waters, is but one way of expressing the idea of public waters, in contrast with private waters." Nekoosa Edwards Paper Co. v. Railroad Commission, supra [201 Wis. 40, 228 N.W. 147.]

But, we need not here be concerned with the tests required in many of the decisions, the test of navigability. All of our unappropriated waters from "every natural stream, perennial or torrential, within the state of New Mexico" Art. 16, Sec. 2, Const., are public waters. These waters belong to the public until beneficially appropriated. And, since the right to fish in *public waters,* by the test of any rule, is universally recognized it cannot be said that the right to fish and to use these unappropriated public waters in question is less secure in the public because we determine their character as public by immemorial custom, and Spanish or Mexican law which we have adopted and follow in this respect, and under which appellee's predecessors in title to the Pablo Montoya Grant necessarily took.

The case of Hartman v. Tresise, 36 Colo. 146, 84 P. 685, 687, 4 L.R.A.,N.S., 872, so much relied upon by appellee, if not to be distinguished as a case in which the narrower issue actually presented should have been decided without a holding on the ap-

plication of the rule of riparian ownership as to the right of the public to use the water of a stream, the ownership of the bed of which was private, is contrary to what we believe to be the better reason and the great weight of authority. It is to be noticed that in this case there was a special concurring opinion which refused to go along with what was said about the common law of fishery being applicable in Colorado, contending that the simple question of trespass upon enclosed lands was the issue, and upon that issue only need a decision be reached. And, moreover, there is a strong and able dissenting opinion by two members of the court supporting the view we here favor and expressly holding the common law cases which do not recognize separation in ownership as to soil and water to be inapplicable, and showing the general expansion of the public water doctrine. And, as indicative of the doubt which the majority itself might have entertained, we find the opinion placing substantial, if not final, reliance upon the single issue of trespass, where it is said:

"But, if he does, he certainly has no easement over any portion of plaintiff's property, either in the beds of the streams or the adjacent soil, for the purpose of reaching the streams. In the enjoyment of his private property plaintiff is protected, both by federal law and the state Constitution, against encroachment by defendant."

Trespass upon the private land was the issue and the majority, it seems to us, need not have ventured so far afield in its effort to bring support to the holding that such trespass was unlawful. It is important that we read this early Colorado case, the principal one upon which appellee relies, restrained by a clear understanding that it was decided by a divided court, upon an issue much more restricted than the one here involved, and in the light, obviously, of an entire misconception of the true nature of public waters as inherited by us from the early, and continued, Spanish and Mexican law and custom. No notice whatever is taken by the majority in that case of this controlling rule of public water.

But, to quote from the dissenting opinion in the Hartman case, supra, by Bailey and Steele, JJ.:

"It is well settled in this country, as well as in England, that where the title to the bed of a river is in one owner and the title to the water is in another, the right of fishery follows the title to the water. Washburn on Eas. & Serv. 566; Jackson v. Halstead, 5 Cow., N.Y., 216; Halford v. Bailey, 8 Q.B. 1000; Malcombson v. O'Dea, 10 H.L. Cases 593; Lee v. Mallard, 116 Ga. 18, 42 S.E. 372. While we have not gone to great length in reviewing the many cases bearing upon the right of fishery, a careful study of them will demonstrate two things; that where the land belongs to one party and the water to another, the right of fishery follows the ownership of the water; * * *."

[redacted] So, if waters flowing in these two perennial streams, the rios Canadian

and Conchas, can be said to be public water prior to the construction of the dam, they are no less so after the construction and when a large volume of water from the two streams has been so artificially impounded. Diversion Lake Club case, supra. There must be a diversion and application to beneficial use to constitute an appropriation. And, it cannot be said that these waters have already been appropriated because so impounded, if that would make a difference in the present circumstance. If they had been appropriated by others than itself, then, clearly, appellee would in any event, have no standing to deny appellant's claim to right of use. These waters are not appropriated until application to use has been effected. Millheiser v. Long, 10 N.M. 99, 61 P. 111; Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357; Snow v. Abalos, 18 N.M. 681, 140 P. 1044; Carlsbad Irrigation Dist. v. Ford, 46 N.M. 335, 128 P.2d 1047.

Behind the dam will rest, normally, some 600,000 acre feet of water. Some of this is designed for irrigation below the structure, some 100,000 acre feet is classified as dead storage, and some is impounded for flood control, to be released as waste water as the occasion demands. It is all yet public water until it is beneficially applied to the purposes for which its presence affords a potential use; and as to some of it, as we have said, it is not contemplated that application to beneficial use in New Mexico is to be made at all. "The water in the public stream belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose." Snow v. Abalos, 18 N.M. 681, 693, 140 P. 1044.

If the rule contended for by appellee were to obtain we could enjoy no fishing or recreational rights upon much of the public water of this state, although access thereto could be reached without trespass on the privately owned lands of another.

This is not to say that the courts may go back of the congressional act of confirmation and employ Spanish or Mexican law in force at the time to qualify or limit the title to the land which passes to a grantee by the act confirming and patent. H. N. D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744. But we are here dealing with public waters which are constantly flowing through and upon this as upon other privately owned land the title to the fee in which may be as finally and fully established. We must not confuse title to the land with that to water, certainly not to water which was not upon the land when the grant was made or when the confirmation by the Congress was effected; these are waters which have no relation to the land as it is affected by title to the latter. They are waters, which, for the most part, have their source on lands of others, or public lands far away, and are certainly waters "of" a "natural stream, perennial or torrential, within the state of New Mexico." Art. 16, Sec. 2, Const.

It accords with justice and common sense to say that when the United States in 1869 confirmed title to the lands of the grant in question, and when in 1873 it issued its patent thereto, it was not intended that it should, nor did the patent purport to, destroy, or in any manner limit, the right of the general public to enjoy the uses of public waters. Hagerman Irrigation Co. v. McMurray, supra; State v. Tularosa Community Ditch, 19 N.M. 352, 376, 143 P. 207; Diversion Lake Club case, supra.

"The doctrine of the Common Law as to the private ownership of the water of public streams no longer exists in this Territory or the mountain states * * * *and no longer can there be such a thing as private ownership of the water of public streams in this Territory.*" (Emphasis ours.) Albuquerque Land & Irrigation Co. v. Gutierrez, 10 N.M. 177, 61 P. 357.

There is no room here left for the operation of the common law. Riparian rights do not obtain. See Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 29 S.Ct. 493, 53 L.Ed. 822; Yeo v. Tweedy, supra, 34 N.M. at page 616, 617, 286 P. 970.

Nor can we approve the theory that, even though these be public waters, subject to such appropriation, nevertheless, they cannot be *used* by the public until *appropriated* by the public *for* such use. That would be saying that the public must first appropriate its own property, the very waters reserved to it and which have always "belonged" to it, subject, of course, to being specifically appropriated for *private* beneficial use.

Opportunities for enjoying general outside recreation, sports, and fishing, are recognized as one of the outstanding attractions of our state, as indeed they are of many of the states. The invitation to enjoy these activities is urgently and constantly extended by this and other states similarly situated, and millions of dollars are spent by tourists from less attractive areas who have come to enjoy them. "Indeed, courts have recognized, and now more than ever before recognize, the public's interest in pleasure and sports as a measure of public health. * * * While the public right may have originated in the older use or capacity of the waters for navigation, such public right having once accrued, it is not lost by the failure of pecuniary profitable navigation, but resort may be had thereto for *any other public purpose.* * * * The small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks." (Emphasis ours.) Nekoosa-Edwards Paper Co. v. Railroad Comm., 201 Wis. 40, 228 N.W. 144, 147, 229 N.W. 631. And, under the Civil law, as it pertains to public waters, inherited by us from Mexico with the acquisition of the territory in question, fishing rights of the public always appertained to all public waters. Ex parte Powell, 70 Fla. 363, 70 So. 392; Las Siete Partidas, supra. And, the right of public fishery obtains even under the

common law as modified and employed generally in this country, where the ownership of the water is, for any reason, in the public. "Broadly speaking, the rule in this country has been that the right of fishing in all waters, the title to which is in the public, belongs to all the people in common. Farnham on Waters, § 368a." Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 331, 42 A.L.R. 937.

See also 1 Farnham on Waters and Water Rights, 605-7, sec. 136. Our construction of public water uses "was an application not only of the former rule which had obtained under the Mexican law, but was the rule which must, of necessity, be applied by settlers of a country where there were no private titles and each one was at liberty to take possession of what he could find unoccupied." 3 Farnham on Waters and Water Rights, p. 2018, sec. 649.

The doctrine which made all such waters public, and available to the general public until in some manner specifically appropriated to beneficial use, and likewise available for specific appropriation to private use under some system of priority of right, perhaps crude enough at first, has obtained in the Southwest, certainly in the area now comprising this state, for some two or three centuries. And, we would not, without the most compelling reason, now hold that any grant emanating either from the Mexican government when it had authority to grant these lands, or by patent from the government of the United States based upon prior confirmation of a perfect, or imperfect, title from the Republic of Mexico, was intended to effect so complete a deprivation of right of public water use as is here proposed.

Although not raised by counsel for either appellant or appellee, our able associates, in dissenting from the majority holding, themselves suggest the point and argue that since under the statute authorizing the issuance of licenses for hunting and fishing, 1941 Comp., Sec. 43-301(9), it is provided no such holder of licenses shall hunt or fish "upon any park or enclosure licensed or posted as provided by law, *or within or upon any privately owned* enclosure without the consent of the owner * * *" (emphasis ours) the legislative intention is thus made clear that hunting and fishing on these public waters is not authorized if such waters be enclosed.

In answer to this argument, all that need be said is that, in the first place, there is no showing whatsoever that these waters in question, covering hundreds of acres in area at, and above, the site of the dam, are enclosed, if, indeed it would be physically possible to enclose them; and, moreover, one does not make of a fenced-in area "a privately owned enclosure" merely by extending the physical markings to cover property not one's own. For example, a public park, a highway, another's land, or the waters which "belong to the public" would not become a part of a "privately owned enclosure" simply because they were enclosed by an adjoining owner. The prop-

erty of the public is not converted into private property by any such simple method. This licensing provision is nothing more than the ordinary regulatory statute for fishing and hunting, exercised under the conventional police power and common to all the states.

In view of this newly injected issue, one neither submitted to the lower court nor in any way relied upon by appellee there, or here, if we were permitted under such circumstances to examine the question at all, we would inquire: How is the minority to overcome the constitutional barrier presented by Art. 4, Sec. 26? This section reads:

"The legislature shall not grant to any corporation or person, any rights, franchises, privileges, immunities or exemptions, which shall not, upon the same terms and under like conditions, inure equally to all persons or corporations; no exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality in this state."

Would not this involve the granting of a special "right" or "privilege" contrary to this provision of the Constitution?

As is pointed out by the text writers upon Fish and Fisheries, grants for exclusive fishery may be permitted only in states where the legislature is not faced with such constitutional prohibitions. See 22 Am.Jur. "Fish and Fisheries," pp. 674, 675, Sections 11 and 12, and cases therein cited. The case of Hume v. Rogue River Packing Co., 51 Or. 237, 83 P. 931, 92 P. 1065, 96 P. 865, 31 L.R.A.,N.S., 396, 131 Am.St.Rep. 732, is a well reasoned case in support of this proposition.

"A construction of a grant which would allow the Crown to destroy or diminish a common right of that nature is to be rejected, unless such intention is so clearly and fully expressed that the grant is incapable of any other reasonable construction. In the same way, assuming the power of a state legislature to grant a several right of fishery, a statute will not be construed to grant a privilege so repugnant to the common rights of the people unless its language clearly required such a construction, and the intent to convey such rights is clearly expressed. In the United States, the right of ownership of the soil and the right of fishing in the waters thereover are not necessarily coextensive. * * *". 22 Am.Jur. 675, sec. 11.

And, even under circumstances where there is no such constitutional restriction against the grant of special rights and privileges, i.e. in the few states where the legislature might constitutionally make such exclusive grant, even then such grants are not "looked upon with favor," and the burden is on the one claiming the exclusive right of fishery to show compliance with the statute. See sec. 11 of 22 Am.Jur., supra; Tinicum Fishing Co. v. Carter, 61 Pa. 21, 100 Am.Dec. 597.

Much of the reasoning supporting the minority's view as expressed by the dissents must rest upon the thoroughly un-

sound idea that the majority holding opens wide the opportunity for trespass upon the lands of all riparian owners, in every class of stream; that with every such perennial or torrential stream carrying unappropriated public waters would go a right to trespass as against the owner over whose lands such water flowed, if that be necessary to reach such public waters. Of course, no such result follows from the majority holding, which deals specifically, and only, with these impounded public waters, easily accessible without trespass upon riparian lands.

If it were the intention that these waters should have been public only in the sense that they could be diverted from the natural channel through specific appropriation for irrigation, mining, and other beneficial uses, apt language could have been employed in the early, and successive, legislative enactments as well as in the constitutional declaration upon the subject. We find no place for a narrow construction of the language whereby waters are declared "to belong to the public" and to say: "The waters belong to the public only so far as they are subject to diversion from their natural course."

"The water in the public stream *belongs to the public*. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to take therefrom a given quantity of water, for a specified purpose." (Emphasis ours.) Snow v. Abalos, supra.

We are asked to strike down the long established rules pertaining to public water ownership and uses because we have not yet been called upon to apply it to this particular beneficial use. "If the same principles justify * * *," we said in Yeo v. Tweedy in applying the Mexican, or Civil law as distinguished from that of the Common law, to subterranean waters, "it does not matter that earlier occasion has not arisen to apply them."

It may be said that courts have sometimes given a forced construction to laws, or long standing customs, in order to maintain them; but they will not do this in order to destroy them. We know of no reason why we should restrict the use of waters which belong to the public only to the uses which have, up to this time, been adjudicated by our court as "beneficial." See Empire Water & Power Co. v. Cascade Town Co., 8 Cir., 205 F. 123, 128.

We hold that the waters in question were, and are, public waters; and that appellee has no right of recreation or fishery distinct from the right of the general public. And, no element of estoppel, urged by appellee, is presented by the record. The right of the public, the state, to enjoy the use of the public waters in question cannot be foreclosed by any circumstances relied upon. It cannot be said that such fundamental public rights may be forfeited simply by failure of some public official, at some particular time, to recognize that such rights exist and to insist

upon their observance; or, even by his assumption that no such rights exist. We attach no importance to the failure of certain state officials, members of the State Game Commission, to press for recognition of the public right of fishery in the waters in question at the time they were negotiating in respect to this, and to other areas.

All other questions raised become unimportant in view of our holding that the water area in question constitutes public waters of the State of New Mexico and is subject to the jurisdiction of the State Game Commission so far as the uses here involved are concerned.

For the reasons stated the trial court was in error in holding that appellee was entitled to enforce the restrictions complained of, it having no such exclusive privilege to the use of the public waters as claimed. The judgment is therefore reversed with direction to enter judgment for appellant, all in conformity with this opinion; and it is so ordered.

BRICE and LUJAN, JJ., concur.

BICKLEY, Justice (dissenting).

According to plaintiff's complaint and the defensive pleadings, this law suit started out seeking a declaratory judgment "to have the various contracts herein involved construed in order to prevent any possible violation of any of the provisions of such instruments."

Briefly, the effect of such instruments and the circumstances surrounding their execution, delivery and acceptance, as drawn from the court's findings of fact, was that the plaintiff and its predecessors in interest acquired the right to construct a Reservoir and the fee simple title to 640 acres of land on the banks of the Reservoir, and in the same conveyance "the right to use for fishing, boating, bathing and any other recreational purposes, the water area of the Conchas Reservoir within the exterior boundaries of the Pablo Montoya Grant, except that portion thereof lying in the valley of the south Canadian River north of a line" described in said conveyance.

This conveyance of January 25, 1940 was expressly made subject to the reservations and conditions attached to the grant of flowage easement contained in other deeds and was on the express condition that the area would be adequately patrolled so as to insure protection to private property.

The findings of the court relative to these contracts and conveyances and the circumstances of their execution are thus correctly summarized in appellee's brief as follows:

"At the time of the execution of the deed of January 25th, 1940, it was understood that certain recreational facilities would be erected by the Civilian Conservation Corps of the United States on the area conveyed to the United States in fee simple by Appellee, and that this area, together with the

water area conveyed by said deed of January 25th, 1940, would be turned over to the State of New Mexico for its operation (Tr. 78).

"At the various conferences leading up to the execution by Appellee of the deed dated January 25th, 1940, it was pointed out that Defendant was engaged in the breeding and raising of cattle on its lands adjoining the Conchas Reservoir on both sides; that this Reservoir extended for many miles on lands of Appellee, and that if the entire area of the Conchas Reservoir was opened to the public, Appellee would be under heavy expense in protecting its lands against trespass and fire; and as a part of the consideration of the conveyance of January 25th, 1940, it was agreed that *no part* of the Conchas Reservoir lying in the valley of the South Canadian River, *north* of the line described in Appellee's deed of January 25th, 1940, would be open to the public. Representatives of the State of New Mexico participated in these conferences and were fully aware of all the foregoing matters. (Tr. 78). (Emphasis supplied.)

"Shortly after the execution of the deed of January 25th, 1940 the War Department constructed a boom across the Conchas Reservoir on the line described in Appellee's deed of January 25th, 1940, for the purpose of preventing the public from going above said line, and thereafter, said boom was reconstructed, and has since been maintained by said Game Commission, all of which has been done for the purpose of carrying out the understanding in connection with said deed of January 25th, 1940, (Tr. 78, 79).

"Subsequent to Appellee's deed of January 25th, 1940, and on May 1st, 1940, Congress enacted Public Law No. 504, 76th Congress, authorizing the Secretary of War to grant to the State of New Mexico for public recreational purposes, an easement for the use and occupation of such lands and water areas owned or controlled by the United States in connection with the Conchas Dam and Reservoir, as the Secretary of War might deem advisable, and under such terms and conditions as he deemed advisable.

"Apparently pursuant to said Act of Congress, there has been prepared an easement deed, authorizing the State of New Mexico to use for recreational purposes the area conveyed by Appellee to the United States in fee simple by the deed dated January 25th, 1940, and also the water area covered by said deed. This so-called easement deed, without its exhibits, is set out in Appellant's More Definite Statement, beginning at Page 36 of the transcript, and appears in full, including its exhibits, as Appellee's Exhibit 3, beginning at page 208 of the transcript.

"This so-called easement deed has never been executed by the Secretary of War (Tr. 80), but Appellant claims that it has entered into possession of the areas described in said deed under a verbal understanding with some subordinate official of the War Department, and that there is incorporated

in such verbal understanding all the provisions set out in said easement deed (Tr. 80).

"Said easement deed is expressly made subject to the reservations and conditions contained in Appellee's deed to Chavez and others, as Trustees, dated May 8th, 1936, and in the conveyance of Chavez and others, as Trustees, to the United States, dated May 13th, 1936, and to the provisions, reservations, and conditions contained in Appellee's deed of January 25th, 1940, to the United States, and by its terms, limits any right of the State to the areas of land and water described in Appellee's deed of January 25th, 1940, and excludes the area involved in this appeal, that is, the area between the Lines A and B on Exhibit A–4 of Plaintiff's complaint."

Among the conclusions of law of the district court are the following:

"That the State, by holding possession subject to the so-called Easement Deed, and to the provisions and conditions contained in the deeds referred to in said Easement Deed, is estopped from claiming any right in that part of the Conchas Reservoir lying north of Line A as shown on Exhibit A–4 to the Complaint.

"That the State is further estopped from claiming any rights in that part of the Conchas Reservoir lying north of Line A on Exhibit A–4 to the Complaint by its participation in the negotiations leading up to the execution of defendant's deed of January 25, 1940, (Exhibit A–3 to the Complaint) and by the knowledge that a part of the consideration for such deed was that the area north of said Line A would not be opened to the public."

The plaintiff, thus confronted with the court's construction of "the various contracts and conveyances" of the parties to this law suit seems to have been obliged to claim something not set forth in the complaint.

The public authorities having assumed to represent the public for the purpose of making the contracts, and the plaintiff having become the successor in interest under said contracts and conveyances and having assumed to represent the public for the purpose of securing a declaratory judgment as to the meaning of such contracts and conveyances, the plaintiff when it had lost the decision, requested the trial court to conclude as a matter of law as follows:

"No statute or law of the State of New Mexico authorizes any public official or group of public officials to enter into a contract, whether oral or written, whereby the recreational rights of the people of the State of New Mexico in the public waters of the State of New Mexico and/or the rights of the State of New Mexico in its public waters may be conveyed, or the State, or the people of the State of New Mexico prevented from claiming the right to use the public waters for recreational purposes. Therefore, any oral or written contract entered into by and between The Red River Valley Company, or the United States of America, or any other person or party, and any public official or officials of

the State of New Mexico, whether such official or officials purported to act for the State of New Mexico, or in any official capacity, which would purport to convey recreational rights, * * * or purport to estop the State of New Mexico and/or the people of the State of New Mexico from claiming recreational rights on the public waters of the State of New Mexico, is null and void, and no such contract can or did take away any of the rights of the state and/or the people of the state in and to any recreational rights or uses they may otherwise have in the Conchas Reservoir and/or Lake.

"No statute or law of the State of New Mexico authorizes any public official or group of public officials to enter into a contract, whether oral or written, whereby the recreational rights of the people of the State of New Mexico in the public waters of the State of New Mexico and/or the rights of the State of New Mexico in its public waters may be conveyed, or the State, or the people of the State of New Mexico prevented from claiming the right to use the public waters for recreational purposes.

"No state official or officials can convey, release, relinquish, or enter into a contract, or perform any acts which can estop the state from claiming any interest or right of the State of New Mexico and/or the people of the State of New Mexico, except pursuant to authority contained in some specific statute or constitutional provision."

I have deemed it worthwhile to indulge the foregoing quotations because it seems essential to me to inform the reader of the scope of the decision in the foregoing opinion and to show how far afield the argument of the prevailing opinion has gone from the "actual controversy" as it was first submitted.

Since the prevailing opinion does not discuss the matter of estoppel of the public authorities, and touches but lightly, if at all, on the question of construction of the "various contracts and conveyances," I take it that the majority feel that it is appropriate to declare that each individual member of the public has an inherent and uncontrollable right to fish in the "unappropriated waters from 'every natural stream * * * within the state of New Mexico'" without the consent of the owners of the lands through which such streams flow and of the banks and beds of such streams because they say that the fact that such waters "belong to the public" is sufficient answer to the protests of such property owners.

This is the question which the majority have made and answered incorrectly, as I believe.

The importance of this decision to the thousands of owners of lands along the natural streams within the state justifies a full statement of the reasons for an opposing view to the end that property owners, members of the bar, and the legislature may be stimulated to corrective measures

if not satisfied that the majority have correctly declared what the state's policy is.

Since the proposed opinion does not assert that the streams were originally navigable, and navigability of the waters impounded is not relied upon for the decision, navigability is out of the case.

It is a well settled rule that the right to fish in certain waters depends upon the ownership of the soil beneath such waters. So far as nonnavigable streams are concerned, the rule is without exception that the landowner owning both banks of the streams owns the bed and has the exclusive right to fish therein.

The following are a few of the statements made by the law writers:

"The right to fish in, or to hunt on certain waters, in the absence of grants or prescription, is in harmony with the ownership of the soil under those waters; if the title to the soil is in the State, the right to fish or hunt is in the public; but, upon the other hand, if the title to the soil is in the riparian owner, he has this right. Kinney on Irrigation and Water Rights (2d Ed.) vol. 1, p. 605."

In 36 C.J.S., Fish, § 4, p. 833, the rule is stated:

"As a general rule the right of fishing in waters on land owned by a private individual is exclusively in such owner, and, where such ownership is established, the right may attach to an arm of the sea, where the tide ebbs and flows. In accordance with this rule, the owners of land on the banks of a nonnavigable stream ordinarily have the exclusive right of fishing opposite their respective lands to the middle of the stream, and, if the lands on both sides of the stream belong to the same person, he has the same exclusive right of fishing in the whole stream, as far as his lands extend along it."

In 22 Am.Jur., page 682, the following appears:

"Each riparian owner along a non-navigable stream, whose title carries to the center of the stream, has the right to an exclusive fishery on his own side, extending to the center of the stream; and so far as he owns the land on both sides of the stream, he has the sole privilege of fishing in that portion of the stream within his lands. A stranger becomes a trespasser in wading along the bed of such stream for the purpose of taking fish; and the fact that he gains entrance to it from a navigable one is immaterial. The fact that a private stream has been stocked by the state has been held to give no one other than riparian proprietors any right to take fish from the water."

Cooley on Torts, 3rd Ed., 673, states:

"The right to take fish in the fresh water streams of the country belongs to the owners of the soil under them, to the exclusion of the public."

Angell on Water Courses, 7th Ed., Sec. 61, states:

"Concommitant with this interest in the soil of the beds of water courses, is an ex-

clusive right of fishery; so that the riparian proprietor, and he alone, is authorized to take fish from any part of the stream included within his territorial limits."

Tiffany on Real Property, 2d Ed., p. 1544, states:

"While the individual members of the public have rights of fishing in waters, the soil below which is the property of the State, except in those cases in which an exclusive right to fish there has been granted by the State legislature or other sovereign authority, they have, as a general rule, no such right in water which covers land belonging to a private individual."

In Holyoke Co. v. Lyman, 15 Wall. 500, 82 U.S. 500, 512, 21 L.Ed. 133, the Supreme Court of the United States said:

"Ownership of the banks and bed of the stream, as before remarked, gives to the proprietor the exclusive right of fishery, opposite his land. * * *

"Undoubtedly each proprietor of the land adjoining such a river or stream has in that State (Massachusetts) a several or exclusive right of fishery in the river immediately before his land, to the middle of the river, and may prevent all others from participating in it, and will have a right of action against any who shall usurp the exercise of it without his consent."

It is not asserted in the prevailing opinion that the bed of the stream does not belong to the defendant. And in fact it is so reluctantly conceded "for the purpose of this case only" as to give promise of a contrary assertion. I think it proper to quote from the opinion given by Mr. A. M. Fernandez, Assistant Attorney General, rendered May 27, 1939 because of the cogency of the argument and the value of the supporting authorities cited, and other values. The question propounded to Mr. Fernandez was as to whether lands within the beds of nonnavigable streams in New Mexico belong to the riparian owners or to the State of New Mexico. The answer, in part, was as follows:

"In Hanlon v. Hobson, 24 Colo. 284, 51 P. 433, 42 L.R.A. 502, a contention that 'by analogy to the doctrine prevailing in Colorado respecting the right of the people to the waters of public streams, and to divert the same, which is contrary to the common law doctrine of riparian ownership, the rule should be that the beds of the streams, as well as the waters, belong to the public,' was rejected.

"And in Johnson v. Johnson, 14 Idaho 561, 95 P. 499, 24 L.R.A.,N.S., 1240, ownership of the bed of nonnavigable as well as navigable streams was recognized, notwithstanding the fact that navigable rivers are reserved as public highways.

"California, like New Mexico, acquired its territory from Mexico together with the law then existing under the republic with respect to ownership of the bed of all streams, and prior appropriation of water. By the adoption of the common law as the rule of practice and decision, however, it was decided in Lux v. Haggin, 10 P. 674,

that the Mexican rule had been abandoned, and the Supreme Court of the United States held that the Federal Government as a riparian owner had title to the river bed in a nonnavigable stream in California on the authority of Lux v. Haggin, saying this case held that the adoption of the common law as the rule of decision in the state operated, at least from the admission of the state to the union, as a transfer to all riparian proprietors of the property of the state, if any she had, in the nonnavigable streams and the soil beneath them. Donnelly v. United States, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 at page 829, Ann. Cas.1913E, 710.

"Of course, California recognizes riparian rights to water and we do not. We say that all unappropriated waters, whether perennial or torrential, are public and subject to appropriation. Article XVI, Section 2, of the Constitution; Section 151-101, 1929 Compilation. But the right to the flow of water is quite distinct from the ownership of the bed of the stream, and there is no reason why the rule as to either could not be displaced without affecting the other. State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S.Ct. 406, 66 L.Ed. 771, at page 780. See also Kinney on Irrigation, Vol. 1, Sec. 334. And it is significant that neither in the constitution nor in the statute is anything said about the soil under the water.

"Beals v. Ares, 25 N.M. 459, 185 P. 780, states that 'the effect of the act of adoption of the common law (in New Mexico) may well be described by the application of the language of Lux v. Haggin,' 25 N.M. at page 485, 185 P. at page 787. It then proceeds at page 486 of 25 N.M., at page 788 of 185 P., to state that where there is a statute copied after the civil law, the common law occupied all the field of jurisprudence outside such statute.

"It is my opinion that the doctrine of Lux v. Haggin, as interpreted in State v. Donnelly, supra, is applicable to the question of ownership in the soil of nonnavigable streams, and since the Constitutional provision and statute above cited are limited to the waters only, and that the state does not own the bed of any of our streams, except as riparian owner. I find no authority to the contrary, other than the above statements in Kinney on Irrigation.

"Texas also adopted the common law, but it had a statute placing the ownership of all streams more than thirty feet wide in the state. State v. Grubstake Inv. Ass'n, supra; Manry v. Robison, 56 S.W.2d 438."

The foregoing principles which the majority do not refute are controlling and call for an answer to the question the majority have made contrary to the one they have given. But I think there is so much fallacious reasoning in their opinion that it would be unfortunate if it went unchallenged.

They say that since Sec. 2 of Art. 16 of the constitution declares unappropriated waters of every natural stream within this state to "belong to the public" that means

that each individual member of the public has an uncontrollable right to go upon such waters and fish therein without the consent of the owner of the land through which the stream flows. The error in that assertion is, I think, readily demonstrated.

Sec. 2 of Art. 16 of the constitution says: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State."

Our first concern should be as to the meaning of the words and phrases employed in this Section.

Undoubtedly "belong" may be employed and understood as an expression of ownership.

Also, the word "belongs" is used in the sense that the thing is to be in the power of or at the disposal of the public. See In re Hitchens Estate, 43 Misc. 485, 89 N.Y.S. 472, 476.

We now come to the word "public." Definitions taken from Words and Phrases indicate that there are a variety of meanings to be given to the word "public." Therefore it is important to consider the context and to ascertain the intent of the framers of the Constitution. In Bennetts, Inc., v. Carpenter, 111 Colo. 63, 137 P.2d 780, 781, it was decided: "The word 'public' does not mean everybody all the time but the word must be interpreted in each case according to use and intent."

Also, it is important to keep in mind the subject matter of what is declared to "belong to the public." Unquestionably if the law makers were speaking of highways as public highways, the inference would follow that such public highways are open to common use of all the individuals who may be said in a sense to constitute the public.

In City of Clayton v. Nemours, 237 Mo. App. 167, 164 S.W.2d 935, 936, 940, it was decided: " 'Public' has a dual meaning in that it may be employed to describe the character in which a thing is held, or to denote the use to which the thing is put."

The word "public" is frequently used as synonymous with a state or government. In People v. Powell, 280 Mich. 699, 274 N. W. 372, 373, 111 A.L.R. 721, the word is defined as follows:

" 'Public' [means] of or pertaining to the people; relating to * * * or affecting, a nation, state, or community at large."

Again, in Ex parte Horn, D. C. Wash., 292 F. 455, 457, is the following definition:

" 'Public' " is " 'the whole body politic, or all the citizens of the state' ", and the "public" referred to in Immigration Act, 1917, Sec. 3, 8 U.S.C.A. Sec. 136, excluding aliens likely to become a public charge, means the people, the government of the United States.

In Areal v. Home Owners Loan Corporation, 43 N.Y.S.2d 538, 540, it was said

in effect: "Public" referred to community generally, not to different individual members thereof.

In State ex rel. Louisiana Imp. Co. v. Board of Assessors, 111 La. 982, 36 So. 91, 97, it was decided: "Public property is what belongs to the government—federal, state, or municipal."

In Hartman v. Tresise, 36 Colo. 146, 84 P. 685, 690, 4 L.R.A.,N.S., 872, it was decided: "'Public property' may be defined as that which is dedicated to the public use and over which the state exercises control and dominion."

From a study of this Sec., particularly in view of what was held in Hartman v. Tresise, 84 P. 685, etc., and more especially in view of the holding of the court that the words in the constitution of Colorado providing that, "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided," did not mean that each individual member of the public had a right to fish in such natural streams, my conclusion is that the language of our constitution which is very similar to that of Colorado, that "belong[s] to the public" means that it belongs to the state and is subject to state control, and is meant to be reserved in trust, for those who shall desire and who may be able to appropriate such water for beneficial use in accordance with the laws of the state.

I turn now to another glance at this Sec. 2 of Art. 16. The section says: "The unappropriated *water of* every natural stream * * * is hereby declared to belong to the public and to be subject to appropriation for beneficial use." (Emphasis supplied.) It does not say that the streams as such are public or belong to the public. This distinction is a substantial one.

In Ballentine's Law Dictionary, what is a private stream and a public stream is sharply defined and contra-distinguished in the following which was taken from Webb v. Board of Commissioners of Neosho County, 124 Kan. 38, 250 P. 966. Ballentine says:

"Private stream—A stream to the bed of which a riparian owner can show title deraigned from the United States or from the state. If he cannot show that the federal or state government has parted with title to the bed, the stream is a public stream and the bed of the stream is public property."

I think that since in New Mexico it is conceded that the beds of nonnavigable, fresh water natural streams contiguous to lands in private ownership belong to the owner of the contiguous lands, the streams which wash such lands *as streams* are private streams even though the waters thereof are public in the sense that they are impressed with a trust in favor of the public awaiting such time as one entitled to do so in accordance with the laws of the state has effectuated an appropriation of the waters of such streams.

The particles of waters in a natural stream, since they are migratory are not the subject of private ownership until they are captured and diverted from the stream and applied to a beneficial use and thus reduced to the exclusive private control of the appropriator. Even then it is *"right to use"* and not ownership.

That "the unappropriated water of every natural stream" is declared to belong to the public does not mean that the stream itself is public.

Until waters of natural streams are appropriated "in accordance with the laws of this state" some one must have the control, custody and possession of such water even though the custody and possession may be for a very short space of time because the water is running down the stream. We know that the public officials charged with the duty of administering the waters of the state cannot have the unappropriated waters of the natural streams in their official custody—at least not in their actual custody. The only custody which the public officials will have of these unappropriated waters is constructive. The actual possession and custody must necessarily be in the various owners of the bed and banks of the stream. The stream of water is joined to the bed of the stream and rests upon it, and so the water of the stream is in the custody of the collective number of the owners of various portions of the bed of the stream up and down its length. This custody is not ownership. The situation is thus stated by Mr. Pomeroy in his book on Riparian Rights at Sec. 9:

"Although, as above stated, the riparian owner has no property in the water itself, but only a usufructory enjoyment of it as it passes through or along his lands, yet it is not to be inferred that his right to have the stream flow in its natural channel, without diminution or alteration, is merely appurtenant to the estate, or conditioned upon his actual application of it to some beneficial use. 'By the common law', say the court in California, 'the right of the riparian proprietor to the flow of the stream is inseparably annexed to the soil, and passes with it, not as an easement or appurtenance, but as part and parcel of it. Use does create the right, and disuse cannot destroy or suspend it.'"

I shall show later on, and to what extent, the doctrine of appropriation has modified that rule.

Support to this view, announced by Mr. Pomeroy, if any is needed, is found in the recent case of Akron Canal & Hydraulic Co. v. Fontaine, 72 Ohio App. 93, 50 N.E. 2d 897, 901, decided May 11, 1943. The court said:

"It is ancient learning that the right to flowing water is incident to the title to land, and that there is no right of property in such water in the sense that it is the subject of exclusive appropriation and dominion. The property interest is usufructuary. And each riparian owner has the right to have the natural flow of the stream

come to his land and to make a reasonable use thereof, subject, however, to a like right of each upper proprietor, and further to an obligation to lower proprietors to permit the water to pass on from his estate unaffected except by such consequences as follow from a reasonable and just use of the water.

* * * * * *

"The impounding of water by means of a dam on a stream is not a reducing of the water to possession in such a sense as to change its legal character and make it property. The principles have been so well established that it requires no borrowed light to determine that water in a nonnavigable stream, or water from such a stream impounded in a lake by a dam, or water impounded from springs or surface drainage, is an incident to the land which gives to such owners of the land certain rights and privileges *in the use of the* water. If it flows over one's own land it is identified with the realty in such a way as to be a corporeal hereditament, and if the right is to use it as it flows over the land of another it is an incorporeal hereditament. Under either circumstance the right of property is *usufructuary* only. *It is not an ownership in the water* but a right to its flow for the various lawful uses to which it may be subjected. This hereditament is incident to the land and therefore passes with it by conveyance, and, for the same reason, it is not severable from the land, although the rights to the use of such water may be conveyed by a proper instrument. (Emphasis supplied.)

"It follows, therefore, that a grant of the right to impound water is a grant of but one of the several usufructuary rights that the owners of the underlying lands possess; and under no circumstances can it be a grant of *property* in the corpus of the water as a chattel."

The foregoing demonstrates that since there never was any ownership by the owner of the soil of the *corpus* of the water as property, but merely the right of the owner of the bed of the stream to its flow for the various lawful uses to which it may be subjected, (including fishing), all the Constitution, Art. 16, Sec. 2, did was to serve notice that these various lawful uses known to the common law could lawfully be interrupted by another who should "in accordance with the laws of the state" appropriate the water so lawfully used (up to the time of the appropriation) to some beneficial use inconsistent with its former use.

In Millheiser v. Long, 10 N.M. 99, 61 P. 111, 113, is quoted a territorial enactment of 1876 as follows:

"All currents and sources of water, such as springs, rivers, ditches and currents of water flowing from natural sources in the territory of New Mexico, shall be and they are by this act declared free." Comp.Laws 1897, § 52.

This was followed the next year (1877) by an act passed by Congress, 19 Stat. 377, for the sale of desert lands which contains in its first section this proviso:

"Provided, however, that the right to the use of water by the persons so conducting the same on or to any tract of desert land of 640 acres shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held *free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.*" (Emphasis supplied.) See Millheiser v. Long, supra.

This discriminating use of language by the Congress: "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights," following so soon after the territorial legislation which was subject to the approval of Congress, I think shows exactly what was meant by the use of the word "free." It did not mean that natural streams as such, or the waters thereof, could be freely used by each individual member of the public in common for any purposes whatever, but meant as the Congress phrased it, "free for the appropriation and use of the public for irrigation," etc. Thus understood, the legislation was one of the stones in the foundation for the law of appropriation as contrasted with the law of riparian rights and did not go further.

Likewise, the language in Sec. 2 of Art. 16 of the constitution that the unappropriated water of every natural stream is declared to belong to the public and to be subject to appropriation for beneficial use in accordance with the laws of this state, means that such waters belong to the public for appropriation for beneficial use in accordance with the laws of the state and nothing more.

The prevailing opinion says:

"So far as non-navigable streams are concerned, the common law rule, seemingly without exception, is that the one owning both banks of a stream likewise owns the entire bed thereof, the waters are private waters, and the owner has exclusive right to fish therein."

That is a correct statement unless the majority mean by "private waters" that the waters belong to the owner of the land. That would be incorrect. Neither Mr. Justice Sadler, in whose dissenting opinion I heartily concur, nor I contend that waters flowing in natural streams at some time or other prior to the adoption of Art. 16, Sec. 2 of the constitution were in private ownership, then their assumption that the constitutional declaration that such waters were public waters loses the force of contrast and reversal of concept sought to be applied.

I will have more to say about the interest which the adjacent land owner has in the *use* of water in natural streams flowing through his land later on.

The majority having repudiated the common law seek to justify their concession by a reliance upon Spanish and Mexican law. They base their decision upon their conception "of the true nature of public waters as inherited by us from the early, and continued, Spanish and Mexican law and custom," and repudiate the common law of waters in toto. This would seem to be the point at which a parting of the ways began, although I do not concede all that the majority claim for the effect of the Spanish and Mexican law. My reading causes me to conclude that the law under Mexican regime was not essentially different from the common law doctrine of riparian rights as modified by the rival doctrine of appropriation. The Texas Supreme Court has held that the riparian doctrine was in force in that jurisdiction even under the Mexican and independent regimes prior to American statehood. Motl v. Boyd, 1926, 116 Tex. 82, 286 S.W. 458, 465. The court quoted in support of its conclusion, Hall's Mexican Law as follows:

" 'Waters which are not nor cannot be private property belong to the public. Such were the waters of the rivers which by themselves or by accession with others follow their course to the sea. These may be navigable or not navigable. If they are navigable, nobody can avail himself of them so as to hinder or embarrass navigation; but if they are not, the owners of the land through which they pass may use the waters thereof for the utility of their farms or their industry,' etc.

"In article 1301 the writer says:

" 'If running water passes between estates of different owners, each one of these can use it for the irrigation of his estate or for any other object, but not the whole of it, but only the part which corresponds to him, because both have equal rights, and the one can consequently oppose the use of it all by the other, or even a part considerably more than his own.' "

Pomeroy on Riparian Rights, says at Sec. 114:

"But, on the contrary, the Mexican law, as it existed at the time of the cession of California, did not confer nor recognize any inherent vested right, enforceable in the courts, *in others than riparian proprietors,* to the use of any portion of the waters of a stream, nor any right, *except* as to those who actually appropriated waters in the manner and on the conditions prescribed by the laws." (Emphasis supplied.)

Therefore, I shall attempt to persuade the reader that the common law which was specifically adopted here in 1876, and which is not in conflict with the Constitution of the United States nor of this territory or state, nor inapplicable to our conditions and circumstances is the controlling law in the case at bar.

The right of fishery in fresh water streams sometimes turns upon the question as to whether the stream is navigable or not, it sometimes being asserted that since no one has the right to fish except in a

place where he has a right to be, it follows in reverse that since navigable streams are public highways, a person traveling such a highway has a right to fish in and upon it although this view is vigorously challenged. The confusion which I find in the expression of views by the majority arises from the fact of their erroneous assumption that since the adoption of the "Colorado doctrine" of appropriation, there is no common law of waters existing in this state. In Crawford v. Hathaway, 67 Neb. 325, 93 N.W. 781, 791, 60 L.R.A. 889, 108 Am.St. Rep. 647, the Supreme Court of Nebraska said:

"The two doctrines are not necessarily so in conflict with each other as that one must give way when the other comes into existence. The common-law rule of riparian rights is underlying and fundamental, and takes precedence of appropriations of water if prior in time. The two doctrines stand side by side. They do not necessarily overthrow each other, but one supplements the other."

I would say there is room for both doctrines but that they cannot both work at the same moment of time if they are in conflict. It might be difficult to resolve the conflicts where an appropriation has been made. But before an appropriation has been made I think that the common law is the only law that can apply. When the appropriation is made the law of appropriation steps in to the extent and only to the extent necessary to make the appropriation fully effective.

We are not concerned in the case at bar with just what the rules are which control appropriations of waters "in accordance with the laws of the state," since no appropriation has been made.

"Unappropriated waters" of streams cannot in the nature of things be completely idle and inert. Until it is appropriated and awaiting the touch of the hand of the appropriator "in accordance with the laws of the state," the laws of nature will operate upon it, through it and upon the land to which it is contiguous and which will inevitably impart fertility to the soil through which it flows and afford its beneficences to man and beast, bird and fish.

Are we to assume that since the law of appropriation has not yet taken hold because there has been no appropriation, that there is no law which will aid society while the water is waiting to be appropriated?

I think not, and I know of no other law than the common law which will fill these nooks and corners until the time comes for the common law to move out to some extent in favor of the law of appropriation. In a government publication entitled "Selected Problems in the Law of Water Rights in the West," at p. 32 is a head note as follows:

"Riparian and Appropriative Rights are Equally Entitled to Protection of Law. While the Doctrines Are in Conflict, Adjustments are Made in Specific Instances by the Courts."

And the text says:

"The common-law riparian right vests at the time the land, of which it is a part, passed to private ownership. The appropriative right vests when the appropriation is made."

These views are supported in the opinion of Mr. Assistant Attorney General Fernandez, quoted supra, and find support also in an opinion of Attorney General Clancy given to State Engineer French August 17, 1916. The material portions of this opinion of Attorney General Clancy are as follows:

"I have had on my desk for several days your letter relative to the protest by J. L. Johnson against the granting of Application No. 973 made by M. H. Waller and Lewis Kennedy to appropriate the flood waters of the Tularosa Creek, together with a copy of the application, the transcript of testimony taken and a map. From what you say in your letter, which is confirmed by the testimony, the protestant's claim is based upon his alleged right to the flood waters of the stream which overflow his land and thereby increases the growth of grass thereon, the land being used for grazing purposes, and that his rights will be injured by the construction of the ditch proposed by the applicants, as it will decrease materially the flow over his land. It seems that the water flows naturally over Johnson's land without any effort on his part, needing no ditches or diversions, although the testimony indicates that in 1898 he did some work by filling up the channel so that the floods would spread over more of his land. Whether that which he then did and the subsequent use of the flood waters can be considered as amounting to an appropriation and application to beneficial use, does not seem entirely clear, but whether so or not, I am of opinion that he has *some rights* which your office will not be justified in disregarding in any action taken on the application No. 973.

"It clearly appears, as you state in your letter, that it is evident that there are flood waters running to waste and the applicants are entitled to appropriate them under our general irrigation system, but I cannot see that it would be proper to permit the construction of any irrigation works by those applicants which would interfere with the use of the flood waters by Johnson to the extent to which he has actually used them, and I think this is equally clear whether it is put upon the ground of prior appropriation on his part or upon his rights as a riparian owner.

"At the common law a riparian owner had the right to the undisturbed flow of a stream upon the banks of which his land lay, and such riparian rights are recognized even in the arid states of the Union, although with *some necessary modifications* on account of the paramount importance of the use of water for irrigation, which is clearly recognized in our legislation and also in Article XVI of the State Constitution. It necessarily follows that riparian rights cannot be said to exist in such a country as New Mexico *to the full extent* of

their recognition and existence at the common law. The riparian owner, however, so far as he has any use for the water flowing in his stream, *must not have that right impaired by appropriations of water made subsequent to his beginning the use of the water so that what he requires will be materially diminished.*" (Emphasis supplied.)

I express no opinion as to Attorney General Clancy's interesting conclusion, but I call attention to the fact that an early legislative enactment (January 7, 1852) shows that the legislature recognized the impracticability of attempting to repeal the laws of nature. After declaring that "All rivers and streams of water in this Territory, formerly known as public ditches or acequias, are hereby established and declared to be public ditches or acequias", Comp.L.1884, Sec. 6, they said: "All plants of any description growing on the banks of said ditches, or acequias, shall belong to the owners of the land through which said ditches or acequias run." Sec. 11, Comp. L.1884. Thus, even the appropriator of water was compelled, whether he liked it or not, to surrender such benefits as even *his* water had imparted to the banks of said ditches and acequias as the waters washed them.

This view finds further support in the opinion of the Territorial Supreme Court in Trambley v. Luterman, 6 N.M. 15, 27 P. 312, 315, where it was said:

"When the law declares that a riparian proprietor is entitled to have the water of a stream flow in its natural channel, ubi currere solebat, without diminution or alteration, it does so because its flow imparts fertility to his land, and because water in its pure state is indispensable for domestic uses; but this rule is not applicable to miners and ditch-owners, simply because the conditions upon which it is founded do not exist in their case."

When it is said, as it frequently has been, that the common law of riparian rights has been abrogated by the "Colorado doctrine" or the law of appropriation, what is meant is that so much of the riparian rights doctrine has been abrogated as is necessary to be abrogated in order to make the paramount doctrine of appropriation work successfully. Any residue of the common law of waters which it is not necessary to disturb in order to make the superseding doctrine of appropriation work to the full extent of its scope and implication remains. Let me illustrate: Let us visualize a natural stream, the waters of which have not been appropriated to a beneficial use by artificial means (it must be kept in mind that appropriation means diversion from the stream followed by beneficial use); and settlers have acquired land along the river and erected habitations and acquired livestock. As the water runs along, it adds to the fertility of the soil and provides water for domestic use without any appropriation in a legal sense by the riparian proprietor. These advantages the riparian owner enjoys because nature has planned it that way and because of the contiguity of the soil and water. All riparian owners along the stream possess the same right

with the exception of the natural advantage that the upper riparian proprietor may have in his location. Law, says Cicero, arises out of the nature of things. It is surely in the nature of things that riparian proprietors enjoy and are entitled to enjoy the natural advantages of the contiguity of soil and water. So the matter stands until the Appropriator comes, asserting a right arising under the law of appropriation. The appropriator makes a diversion of the water and applies it to his beneficial use. This may be done upon lands contiguous to the river or upon non-contiguous lands. This beneficial use may be irrigation, power to run a mill, for mining, domestic or other beneficial purposes. But there must be a point of diversion and a diversion of the water. If the appropriator appropriates all of the water of the stream, it is in the nature of things that riparian proprietors *above* the point of diversion will be unaffected as to the natural advantages of conjunction of water and soil because common sense tells us that the laws of nature will continue to operate as before. But below the point of diversion the case is different. Riparian owners below the point of diversion will find their natural benefits and advantages gone as well as the water which is gone. That is the situation which caused concern to Mr. Attorney General Clancy and he expressed the view that even the rights of those below the point of diversion which had arisen merely from the nature of things must be taken into account by the appropriator and those administering the law of appropriation. It is said that the doctrine of appropriation arises out of necessity. At some times and places the necessity was to have water for mining operations. At other times and places it was the necessity for the raising of crops. That is what gave rise to the "Colorado doctrine" in our jurisdiction.

The prevailing opinion quotes from Hagerman Irrigation Co. v. McMurry, 16 N.M. 172, 181, 182, 113 P. 823, as follows:

"The doctrine of prior appropriation with application to beneficial use has definitely and wholly superseded the common-law doctrine of riparian rights in many of the jurisdictions in which irrigation is necessary to the growth of crops, and among them is New Mexico."

The implication is that the common law was at some time in effect in those jurisdictions; otherwise it could not have been superseded. The quotation employed goes on to say:

"The 'Colorado doctrine,' as it is termed, first appears as a dictum in Coffin v. Left Hand Ditch Co., 1882, 6 Colo. 443. It is declared that, on the ground of imperative necessity, no settler can claim any right aside from appropriation. The decisions of our courts, which had established that doctrine long before it was adopted by statute, have been approved by repeated decisions of the Supreme Court of the United States. * * * Indeed, riparian ownership, as known to the common law, has never, it would seem, been recognized in New Mexico. * * * And the Mexican law, as well as the law of Indian tillers of the

soil, who preceded the Spaniards here, as it may be gathered from the ruins of their irrigation systems, did but recognize the law of things as they are, *declaring that such must, of necessity, be the use of the waters of streams in this arid region.*" (Emphasis supplied.)

It is important to note that what our Court was talking about was the doctrine of prior appropriation known as the Colorado doctrine as applied to *arid regions.*

It must be apparent upon a little reflection that whether fish are to be caught from natural streams by the owners of the soil through which the streams run, and where the fish may be at the time of capture or when they are sought to be captured, is not determined by whether the region where they may be is arid or not.

I have not discovered in any of my reading on this subject, which has been rather extensive, that the rules as to the right of fishery are controlled by the conditions of aridity or humidity.

My argument is that whatever its origin, the appropriation doctrine has been superimposed upon an underlying riparian doctrine and that the basic riparian doctrine has been modified to the extent and only to the extent which is necessary to give full force, application and effect to this superimposed appropriation doctrine. I assert that the presence of fish in the water appropriated for mining, agriculture, industrial, domestic and other beneficial purposes is not essential to the beneficial use of the water appropriated for such purposes. We do not have far to look to find legislative and official support for this view. Sec. 30 of Ch. 85, L. 1912, which was a comprehensive code designed for the protection of game and fish states:

"It shall be the duty of the owner or owners of any canal or ditch into which any portion of the waters of any stream containing game food fish as defined by this Act are diverted for the purpose of irrigation or any other purposes which consumes such waters or any user of such waters so diverted, to construct and maintain at the head of such canal or ditch a paddle wheel or wheels, or other device, as may be directed by the State Warden, which shall be maintained during such portion of each year as such waters are diverted for irrigation or other purposes."

This section along with many other regulatory measures was repealed by Ch. 117, L. 1931 which authorized the Fish and Game Commission to make rules and regulations that it might deem necessary to carry out the purpose of protecting game and fish, and I am advised that experiments are now being conducted by the Game and Fish Department to accomplish the purposes contemplated by the statute last above quoted.

It is familiar law that when any portion of the common law is repealed or abrogated, any such alteration will not be considered effective to a greater extent than the unmistakable import of the language used. 15 C.J.S., Common Law, § 12.

In Goldenberg v. Federal Finance & Credit Co., 150 Md. 298, 133 A. 59, it was decided that a statute repeals common law only to the extent of inconsistency therewith. And in Greene County v. Southern Surety Co., 292 Pa. 304, 141 A. 27, it was decided that it is not to be presumed that the legislature intended to make any innovation upon the common law further than the case absolutely required. Substantially the same thing was decided in Beals v. Ares, 25 N.M. 459, 185 P. 780, 788, where it was said: "In so far as was possible it (common law) operated in conjunction and harmony with the statutes." So, I say that the appropriation doctrine displaces the common law only in so far as it is an innovation upon and inconsistent therewith, and that since it is not essential to the beneficial use of water for any of the historic purposes for which it may be appropriated that fish go with the appropriated water, such fish must remain in the stream and the pursuit and taking thereof is governed by common law principles and by state legislative policy and regulations.

The vital and underlying principle of the riparian rights doctrine is that the riparian proprietor, as an incident to his estate, is entitled to the natural flow of the water of the running streams through his land in their accustomed channels, undiminished and unimpaired in quality. It is this right which the law of appropriation has taken away. The appropriator may change the natural flow of the water into new and artificial channels to non-contiguous lands and diminish the quantity. The rivalry between the two doctrines does not extend further. The appropriator appropriates water but not the fish that have their habitation in it. The appropriator acquires no ownership in the beds of the stream and the statute provides that if the approriator in effecting his appropriation takes any of the lands of the owner he must acquire it by conveyance upon an agreed basis of compensation or acquire it by eminent domain proceedings. The only thing changed by the appropriation is the right of the owner of the banks and beds of the stream to have the water flow as it has been accustomed to flow, uninterrupted and undiminished.

The majority concede that a reasoning by analogy will not carry the ownership of the beds of the stream out of the owner thereof and into the appropriator of the water, or even into the public, so how they are able through invoking the doctrine of appropriation to transfer the right of fishery which is incident to the ownership of the beds of the stream into the individual members of the public to be exercised without the consent of the owner and contrary to the declared policy of the legislature eludes me entirely.

The relation and privileges of the owner of the beds of the stream, as they pertain to the fish, have not been physically or legally changed in any wise whatsoever by the appropriation at the places along the river at the point of diversion.

So far as precedents illuminating the exact point is concerned, the most valuable

is Hartman v. Tresise, 84 P. 685, 4 L.R.A., N.S., 872.

In that case the Supreme Court of Colorado had the precise question before it which we have here under a constitutional provision substantially the same as Sec. 2 of Art. 16 of our constitution. That court held that the constitution has no application to fishing rights and applied the general rule that the owner of the land under a nonnavigable stream had the exclusive right of fishery therein. The court states:

"As between those claiming a right of the same character, that is, a public right of fishery and a private right of fishery, this doctrine of the common law, being of a general nature, is just as applicable in Colorado as elsewhere. Necessity does not furnish a basis for the right of public fishery upon which, it is said in Yunker v. Nichols, 1 Colo. 551, rests the dominant right of one landowner in this state to build a conduit over the lands of another in order to get water from the stream to irrigate agricultural lands. Of course, as between those claiming either a public or private right of fishery in our natural streams, and those asserting the superior constitutional right of appropriation, the latter, in case of conflict, must prevail. But the rights here in controversy are both of the same character and subject to the common-law rule of decision. Gen.St. 1883, § 197. Plaintiff owns lands bordering on both banks of natural streams. As between him and the defendant, he owns the right of fishery in their waters within his outer boundaries. As between them, plaintiff also owns the beds of the streams just as much as he owns the adjacent banks or the soil anywhere within his surface lines. It necessarily follows that defendant has no right of fishery within plaintiff's enclosure."

There are several circumstances which give this opinion of the Colorado Supreme Court a peculiarly persuasive value.

The same physical conditions affecting the use of water exist in both Colorado and New Mexico, and in both the common law doctrine concerning the rights of private riparian proprietors is recognized as substantially controlling except as modified by the doctrine of prior appropriation known as the Colorado doctrine.

It has stood for over 40 years undiminished in potency by subsequent court decisions or law making bodies. It had stood for 5 or 6 years before our constitution makers framed the language of Art. 16, Sec. 2 of our constitution. It is to be presumed that our constitution makers during their labors consulted constitutional provisions of neighboring states dealing with questions and rules of conduct affecting conditions and circumstances similar to those existing here, together with court decisions construing such constitutional provisions. We have here the Colorado doctrine of appropriation as in Colorado and the court in Hartman v. Tresise, supra, found that the adoption and existence of such doctrine did not impinge upon the

common law principles which control the rights of fishery. Counsel for appellee asserts that the decision has frequently been cited approvingly by many other courts and has not been criticized in any decision of other courts. This statement is not challenged by appellant.

It is not too much to claim that in adopting as a part of our constitution the companion provision of the Colorado constitution touching public waters, we at the same time also adopted the construction that had been given such provision by the Supreme Court of Colorado in the very respect here involved in the case of Hartman v. Tresise, supra, decided only seven years prior to the adoption of our constitution. We need cite no authority in support of the proposition that in adopting a statute or constitutional provision of another state, we adopt the construction previously given it by the highest court of record in such state.

My argument is further emphasized and the Colorado court in the Hartman v. Tresise case, supra, is sustained by the Supreme Court of Alabama in City of Birmingham v. Lake, 1942, 10 So.2d 24, where the court held:

"Statute vesting in state title to all fish in public fresh waters of the state and declaring all waters of the state bounding or flowing through land, title to which is held by more than one person to be public waters, must be limited to *conservation* in keeping with the property rights of riparian owners." (Emphasis supplied.)

In other words they said the waters could be *public* for certain purposes including conservation, and yet this was not inconsistent with the common law right of the owner of the bed of the stream to have the exclusive right of fishing therein. From the opinion I quote the following:

"What of the right of the citizen to fish in Blackburn Lake?

"The Act 'To define the status of fish life in the public fresh waters of Alabama,' &c., Gen. Acts Extra Session 1933, p. 67, Section 1, reads:

" 'The title ownership to all fish in the public fresh waters of the State of Alabama are vested in the State for the purpose of regulating the use and disposition of the same in accordance with the provisions of the laws of this State and regulations based thereon.'

"Section 4 reads in part: 'All waters of this State are hereby declared to be public waters if such waters of any river, creek, lake, brook, bayou, bay, channel, canal, lagoon or other body, traverses, bounds, flows upon or through, or touches lands title to which is held by more than one person, firm or corporation. Any water impounded by the construction of any lock, dam or other devices used for impounding water, and placed across the channel of any public waters, as defined in this section are hereby declared to be public waters.'

"Blackburn Creek comes within this definition, and has at normal stage sufficient

water to maintain fish, as further provided in the act. The waters are impounded by a dam.

"This statute was construed in Hood v. Murphy, 231 Ala. 408, 165 So. 219. We there held, on ample authority, that the bed of a nonnavigable stream is the property of the riparian owner; that he has the exclusive fishing rights in such stream on his own lands. This is incident to ownership of the land.

"Such ownership cannot be divested and granted to the public by legislative fiat. Legislation to such effect is unconstitutional. See, also, Jones et al. v. Nashville, C. & St. L. Ry., 141 Ala. 388, 37 So. 677. The act above quoted must be construed as limited to purposes of conservation in keeping with the property rights of the owner of the lands."

So, I say it is entirely consistent to construe our constitution as the Colorado Supreme Court in Hartman v. Tresise construed substantially the same language in theirs to mean that the water in natural streams is public only in the sense that it is to be conserved. That is, saved, preserved and protected and dedicated to the use of the public for the purposes mentioned in the same section, to wit, for appropriation to beneficial uses and until they have been so appropriated in accordance with the laws of New Mexico they remain subject to the same common law rights always appertaining to them.

Whatever else may be said and whatever the rights of fishery of our inhabitants are, it cannot be doubted that such rights are subject to regulation by the legislature and the Game and Fish Department within the exercise of authority properly delegated to it.

1941 Comp. Sec. 43-405 treats of the protection of game and fish on private property and provides that, "After the publication and posting of such notices it shall be unlawful for any person to enter upon said premises or enclosure for the purpose of hunting or fishing, or to kill or injure any birds, animals or fish within such enclosure or pasture at any time without the permission of such owner," and makes the violation of the provisions of the Section a misdemeanor.

And 1941 Comp. Sec. 43-301 provides in the first paragraph thereof:

"No person shall at any time shoot, hunt, kill, injure, or take in any manner, any game animal, game bird or game fish without paying for and having in possession a license as herein provided for the year in which such shooting, hunting, fishing or taking is done."

The second paragraph provides how and to whom hunting and fishing licenses may be issued.

Paragraph 9 of said Sec. provides:

"No hunting or fishing license shall entitle the holder therefor to hunt, kill or take game animals or birds or fish within or upon any park or enclosure licensed or posted as provided by law, *or within or upon any privately owned enclosure with-*

out consent of the owner or within or upon any game refuge. (Laws 1912, ch. 85, § 12; Code 1915, § 2435; Laws 1915, ch. 101, § 7, p. 152; 1919, ch. 133, § 3, p. 285; 1927, ch. 34, § 1, p. 43; C.S.1929, § 57-217; Laws 1935, ch. 123, § 1, p. 303.)" (Emphasis supplied.)

Sec. 43-510 provides:

"Any person who shall violate any provision of this act * * * shall be guilty of a misdemeanor."

This is a legislative recognition of the law as contended for by appellee, and furthermore it is a declaration of the policy of the state.

No one can lawfully hunt or fish for game animals or fish without a license. Anyone who accepts a license accepts the terms under which it is granted.

Hence, the real question is, has one desiring to hunt and fish "within or upon a privately owned enclosure without the consent of the owner" a constitutional right to do so notwithstanding the statute and the acceptance of a license issued pursuant thereto? In other words, is the statute constitutional?

The legislature, and not the courts, are the public policy makers for the state.

The public policy proclaimed by 1941 Comp. Sec. 43-301 is that even licensed hunters and fishermen shall not "hunt, kill or take game * * * birds or fish within or upon any park or enclosure licensed or posted as provided by law, *or within or upon any privately* owned enclosure without the consent of the owner."

Until the power of the legislature to proclaim such a public policy is directly attacked, I see no reason to anticipate such an attack and provide answers thereto which, as I feel, would be several fold and substantial.

It is to be noted that the offenses inveighed against in these statutes are not made to hinge on whether the violater committed any actual damage or not. The effect of the majority opinion is to nullify these statutes because it cannot be said to be a misdemeanor for a person to do what the Supreme Court says he has a right to do.

The Department of Game and Fish have published a booklet which is widely distributed advising the public of Game and Fish Laws and Regulations. A copy of this pamphlet before me admonishes: "Posted Property Does Not Furnish Hunting or Fishing," and declares to be among the sportsman's duties: "The first duty of every sportsman is to observe the letter of the law" and also quotes Sec. 43-301(9), heretofore quoted. Here we have a departmental construction that the law is as claimed by appellee. It is my opinion that the public policy of the state manifested by the foregoing acts of the legislature and as heretofore accepted and fostered by the Department of Game and Fish, is the best policy as tending to promote the greatest good to the greatest number, and that none more just and reasonable can be adopted

for this state, and that even if there were a better one it should await the action of the legislature since the courts have no power to make or change public policy.

The experiment proposed and supported with great industry and zeal arises, I believe, from a desire to cater to the tourists who are said, in the language of the street, to be "our best crop". This is reflected in the language of the opinion as follows:

"Opportunities for enjoying general outside recreation, sports, and fishing, are recognized as one of the outstanding attractions of our state, as indeed they are of many of the states. The invitation to enjoy these activities is urgently and constantly extended by this and other states similarly situated, and millions of dollars are spent by tourists from less attractive areas who have come to enjoy them."

That consideration, if it is a sound one, should be addressed to the legislature and not to the courts. There are several objections to this reasoning of the majority. One is that it is not relevant. Another is that it is a sound observation of the law writers that: "It is easy to make precedents but very difficult to anticipate the ramifications of their application." And also, such reasoning is of doubtful value. Cf. 25 Mich.Law Review, 654 (659).

The Court of Errors and Appeals of New Jersey in Albright v. Cortright, 64 N.J.L. 330, 45 A. 634, 637, 48 L.R.A. 616, 81 Am. St.Rep. 504, said:

"It may be true that there is here, as there seems to be in England, a common misapprehension on this subject, and that a good deal of fishing that is thought to be of right is only permissive. But it is not desirable to change an important rule of law merely because it is sometimes misunderstood. In country life a multitude of acts are habitually committed that are technically trespasses. Persons walk, catch fish, pick berries and gather nuts in alieno solo, without strict right. Good natured owners tolerate these practices until they become annoying or injurious, and then put a stop to them. Little practical inconvenience results from this state of things, which the courts may well leave to regulate itself."

The prevailing opinion invites technical trespasses at least, closing eyes to feared actual damage which may follow such trespasses expressed in the plea of defendant and findings of the lower court. These threats of damage the plaintiff seeks to minimize by its allegation of its complaint as follows:

"That upon opening of the portion of the Conchas Dam reservoir to line B as shown on Exhibit A-4 to boating and fishing and other recreational purposes to the general public, the State of New Mexico will place adequate patrols on the shores of the lake in order to prevent any person from touching or allowing their boat to touch any part of the shore, or land on the bottom of the lake and will patrol and adequately con-

trol and supervise all portions of the lake in order to protect private property."

Just how this declaration of the plaintiff of its intention to "place adequate patrols on the shores of the lake" upon defendant's property squares with due process of law is not clear to me, and happily is not developed in the prevailing opinion. The foregoing allegation of the complaint, however, does indicate that the plaintiff anticipates that rights of defendant may be invaded and proposes to commit trespass of its own in order to repel damaging trespasses by members of the public whom it proposes to invite to commit what it appraises as mere technical trespasses.

The majority say that what is proposed to be permitted is not a trespass. This assertion, unsupported by citation of authorities, I may not let go unchallenged. What my learned associates of the majority mean, perhaps, is that in their opinion the trespasses invited will be inconsequential.

To say that in a case where there has been no separation of the land and the water, a going upon the water is not a trespass is of course shocking. And the principle that the land owner owns above and below the surface has been so uniformly asserted by law writers as to require little citation. "It [is] the consensus of the holdings of the courts in this country that the air space, at least near the ground, is almost as inviolable as the soil itself." See Herrin v. Sutherland, 74 Mont. 587, 241 P. 328, 332, 42 A.L.R. 937.

It has always been my understanding that the land owner is entitled to the "quiet, undisturbed, peaceable enjoyment" of the land. This old-fashioned idea finds support in Art. 2, Sec. 4 of our constitution where it is said that all persons have the right "of acquiring, possessing and protecting property."

To say that a trespass is not a trespass because the declarants do not anticipate that evil consequences will arise therefrom is a dangerous departure from principle.

Mr. Street in his work on "Foundations of Legal Liability," Vol. 1, page 19, et seq., shows how jealous the common law is in the protection of the owner of land against trespass. As I gather it, because there is often no other eye than that of the law to guard his lands, the law protects the land owner against trespass even though he is not able to prove a special damage, and if the trespass has been committed the plaintiff land owner suing for trespass will be entitled to nominal damages even though he has not been able to prove any actual damage. This deep concern for the land owner is illustrated by the following quotation from Mr. Street's comments on trespass upon realty heretofore cited:

"Upon comparing the rule in trespass upon realty (trespass quare clausum) with the rule in trespass for assault and battery, we note this distinction: In the field of battery, a touching which does no physical hurt is not actionable unless it be hostile. The person touched in a friendly way is

perhaps supposed to consent to the touching. At any rate there is a legal presumption in favor of the friendly hand. In the field of trespass quare clausum it is different. There the legal presumption is against the intruder, and to escape liability he must nearly always show actual leave to enter. In both fields the state of the law seems to be such as to give the necessary protection respectively to person and property and no more. A man may well be expected to protect himself within certain limits from physical hurt. *But there is often no other eye than that of the law to guard his lands.*

"The reason for the stricter rule in trespass upon realty is apparently found in the fact that upon the action of trespass quare clausum has been largely put the burden of vindicating property right—one of the greatest ends, says Lord Camden, for which man entered into human society. The law unquestionably does not prize property more than it does personal security, but at some points it has had to put forth more energetic efforts to protect property than it has to protect personal security. When it was once determined that a man could resort to a form of trespass to settle a matter of disputed title, the character of the trespass upon realty was fixed. Thenceforth the common law, in considering liability for intrusions upon realty, could not undertake to discriminate between the much and the little. In the language of Littleton, J., 'the law is all one, for great things and for small.'" (Emphasis supplied.)

Furthermore, the guess of the majority that the incursions into the space above the soil owned by the defendant will not be consequential is not shared by the trial court nor by the plaintiff, which has proferred its services to patrol the banks of the streams to minimize or prevent anticipated evil consequences, and it is not shared by our legislature which has inveighed against such incursions as heretofore pointed out.

The reference in the majority opinion to the extension beyond the conventional appropriation of water for beneficial use such as agriculture, mining, etc., are confusing unless the argument is that the practicing fisherman appropriates water to a beneficial use when he goes fishing in the waters of our natural streams.

It may be admitted that fishing is one of the best of the outdoor sports and beneficial to the individual and ultimately to society in general. But if it is claimed that the fisherman pursuing his art is effecting an appropriation of water for a beneficial use "in accordance with the laws of the state" to which the water is "subject," it is more than I can accept. It must be remembered that at the time of the adoption of Art. 16, Sec. 2 of our constitution, which says that the unappropriated water of natural streams is "subject to appropriation for beneficial use, in accordance with the laws of the state," we had a code governing the appropriation of water for beneficial use. Surely no one may reasonably claim that a fisherman appropriates water according to

the provisions of this code. The only law that I know of that might be applicable to the fisherman in aid of his use of water is the code controlling and regulating game and fish which says that the fisherman must have a license before he may fish in our streams and the *same law* says that such a license does not afford fishing on posted lands or in the streams within enclosed lands without the consent of the owner. But the majority in effect say that the legislature had no power to impose these regulations and restrictions. So, the majority view reduces itself to the proposition that, while the appropriation of waters of natural streams for the beneficial purposes of agriculture, mining, power and industrial activities must be "in accordance with the laws of the state," there is no law and none may be enacted "in accordance with" which the fisherman may operate. This result, which is satisfactory to the minds of the majority, rather confirms my view that Sec. 2 of Art. 16 of our constitution has no application at all to the right of fishery as here involved.

From all of the foregoing and after painstaking consideration of the case, I am unable to comprehend any rational justification for the prevailing decision and believe it unjust and dangerous.

Therefore, I dissent.

SADLER, Justice (dissenting).

Another birthright of Anglo-Saxon jurisprudence—the citizen's dominion over his own property—has been stricken down and laid low, not as might have been expected, by the grasping for power of some inordinately ambitious chief executive, nor yet by action of the legislative branch of our government (which contrarily has sought to preserve the right here denied, 1941 Comp. § 43-301(9), but anomalously enough, through error and misapprehension so easily demonstrable as to make the result announced appear incongruous, by the very department—*the judicial*—long since come to be regarded as the last refuge and sanctuary of the rights, the liberties and even the lives of the people!

If one be disposed to think this statement evidences undue alarm over the holding today announced by a bare majority of the court, one has only to realize that it but represents the initial precedent which later will be urged as authority for throwing open to public fishery every perennially flowing stream in the state. The majority do little to allay the fears this decision will instill in the minds of landowners generally throughout the state by asserting that trespass on the banks or in the beds of streams is not involved, that "access to this public water can be, and *must be,* reached without such trespass." (Emphasis mine.) Thus while their opinion gives lip service to the landowner's immunity from such trespass, at the same time it announces a ruling on the issue presented which in its natural and logical implications pulls down the very immunity declared. Protest as they will that the question is not involved, the majority cannot down the obvious fact that it is in-

volved, since a trespass upon these waters as they flow across or rest upon appellee's land, is a trespass upon the land itself.

In spite of the declaration by the majority that their holding does not forecast a subsequent decision upholding the right to use the banks and beds of streams in enjoying this so-called common right of fishery, they can no more destroy the logic of today's contrary holding than they can transmute colors by calling black—white. The holding is that so long as the fisherman may fish without touching the land of another he commits no trespass. It rests fundamentally upon the proposition that such waters are "public." They are no less so when they flow across an owner's land at a depth requiring one to tread upon the land itself in order to enjoy fishery in them. Obviously, the logic and rationale of today's holding is that the fisherman so treading will not be a trespasser. Themselves seemingly sensing the ultimate holding toward which the logic of their opinion leads, and applied would so resolve, the majority's effort to curb and limit its sweeping implications in no way renders it less objectionable nor more consonant with or conformable to sound reason.

If further proof were needed that the foregoing criticism correctly appraises the prevailing opinion in this connection, it is abundantly supplied by the following quotation therefrom with the significant language italicized by me for emphasis, since it is revolutionary in its import and obviously goes beyond the holding thus far of any court, anywhere, which purports to follow and apply the Colorado doctrine of public waters, to-wit:

"The doctrine which made all such waters public, *and available to the general public until in some manner specifically appropriated to beneficial use, and* likewise available for specific appropriation to private use under some system of priority of right, perhaps crude enough at first, has obtained in the Southwest, certainly in the area now comprising this state, for some two or three centuries."

Indeed, the glorification in the prevailing opinion of New Mexico's admitted attractiveness to tourists, especially the fisherman, in which all of us take just pride, the approving quotation from Nekoosa-Edwards Paper Co. v. Railroad Comm., 201 Wis. 40, 228 N.W. 144, 229 N.W. 631: "The small streams of the state are fishing streams to which the public have a right to resort so long as they do not trespass on the private property along the banks," in the knowledge that our small streams are not of a type to which the public may resort without trespassing on the private property of others; the quotations from texts and cases suggestive that the common right of fishery under the civil law confers on the public a right to use the banks of streams and the intimation that our law of public waters is derived from the civil law through Spanish and Mexican sovereignty—these and, in fact, the opinion's ratio decidendi itself—in my judgment, fairly place it on record in bold advocacy of throwing open to

public fishing all streams in New Mexico even though crossing privately owned and enclosed lands.

Much of the confusion in which the majority have become enshrouded in their consideration of this case arises from the effort to treat literally the constitutional declaration that waters in flowing streams "belong to the public." If they belong to the public, then the public owns them and all have a common interest in public property. Thus runs the train of thought. So, from this starting point and weighing the several attributes and incidents of title and ownership of ordinary property, as commonly understood, the follower of this false logic is lead easily and inexorably to the conclusion that where a given thing belongs to the public, a common right in its use and enjoyment exists. Hence, the result announced by the majority.

Now, it is misleading and brings one to false results to speak or conceive of waters as "private" or "public," if by such designations it is intended that waters of the one class are the subject of individual ownership and by the other of public ownership. Water in a running stream, with or without a constitutional declaration that it is "public" is no more capable of ownership, public or private, in the ordinarily understood sense, than is the air we breathe. This is a fact of life requiring but its statement to establish its truth. The prevailing opinion agrees, as all of us know, that our constitutional expression on the subject, Const. Art. 16, § 2, is merely declaratory of what the law already was in this jurisdiction and, as a practical matter, in jurisdictions the world over, as to flowing waters. The rationale is that, being incapable of ownership by anyone owing to their elusive and migratory character, they are the property of none and, hence, belong to all—the public; or, as is sometimes said, what is nobody's is everybody's—the public's. The fee simple owner of real estate is said to own from the center of the earth to the skies—"a coelo usque ad centrum"—but it has never been supposed that this "ownership" as it relates to the air was anything more than a right of control to the height man could exert control. And all that was ever intended by the declaration that certain waters are public, be it found in statute, constitution or decision, is that their use may be controlled and regulated for the benefit of the public. Cf. State v. Cochran, 138 Neb. 163, 292 N.W. 239, 247; United States v. Tilley, 8 Cir. 124 F.2d 850, 860. Hence, to classify waters as "private" or "public," extending to the one an exclusive and to the other a common right of fishery with ownership the test is to apply a false criterion since there is no genuine ownership in either instance. Nevertheless, such a distinction is made the basis of the reasoning of the prevailing opinion throughout. The premise being false, the entire argument founded on it must fail.

Two decisive considerations establish convincingly the error into which the ma-

jority have fallen. In the first place, the common law applies and under it the owner of the soil has an exclusive right of fishery in the waters involved. In the second place, even if correct in the claim that the appellee possesses no exclusive right of fishery in these waters, the state as a police measure, by a statute whose validity has never been challenged, has expressly denied to the licensees on whose behalf appellant presumes to speak, the right to fish within the private enclosure where these waters are resting. 1941 Comp., § 43-301(9). The correctness of either proposition abundantly supports the judgment entered in this case, and both being correct, it is doubly fortified.

Let us notice the first proposition. The prevailing opinion freely admits in its opening passages that under the common law the appellee has an exclusive right of fishery in and upon these waters, although toward its close, as though grasping for every reed of support, however slender, it goes so far as to claim support for its position, even under the common law. Fundamentally, though, and by and large, it asserts the common law has nothing to do with the matter. It argues that the doctrine of riparian rights as known to the common law has been so thoroughly repudiated in this jurisdiction that not the tiniest shred remains. Conceivably so, possibly, but in order to make its argument stand up, the appellant must establish the truth of this claim or it hopelessly and ignominiously fails. Unhappily for it, the argument simply cannot stand the acid test of careful analysis.

In 1876, the territorial legislature enacted: "In all the courts in this territory (state) the common law as recognized in the United States of America, shall be the rule of practice and decision." 1941 Comp., § 19-303. The effect of this statute is set forth by this court in Beals v. Ares, 25 N. M. 459, 185 P. 780, in the following language, to-wit:

"When the Legislature in 1876 adopted the common law as the rule of practice and decision, the whole body of that law as limited in the case of Browning v. Estate of Browning, supra, came into this jurisdiction. Where it found a statute counter to its provisions, it yielded to the statute, but it gave way only in so far as the statute conflicted with its principles. In so far as was possible it operated in conjunction and harmony with the statutes. If the statute conflicted with it, it bided its time, and upon repeal of the statute became again operative. In other words, the common law, upon its adoption, came in and filled every crevice, nook and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment, in so far as it was applicable to our conditions and circumstances."

The limitation on the wide sweep application of the common law was to have in this jurisdiction, as laid down in Browning v. Estate of Browning, 3 N.M., Gild. (E.W.S.) 659, Gild. (B. W. Co.) 460, Johns. 371, 9 P. 677, 684, to which reference is

made in the foregoing quotation from Beals v. Ares, is set forth in the following language from the former case, to-wit:

"We are, therefore, of opinion that the legislature intended by the language used in that section, to adopt the common law, or lex non scripta, and such British statutes of a general nature not local to that kingdom, nor in conflict with the constitution or laws of the United States, nor of this territory, *which are applicable to our condition and circumstances,* and which were in force at the time of our separation from the mother country." (Emphasis mine.)

Thus it is that the common law doctrine of riparian rights was transplanted into this jurisdiction in its entirety unless rejected because deemed inapplicable "to our condition and circumstances." If deemed inapplicable in its entirety, then no part of that doctrine was ever the law of New Mexico. But the mere fact that some parts of it were unsuited to local conditions did not have the effect of condemning the entire doctrine thus resulting that we separated the wheat from the chaff, as it were, retaining the good and rejecting the bad. In other words, to speak figuratively as we did in Beals v. Ares, supra, and likening the riparian rights doctrine to a cloud, when it began to settle over our jurisprudence it found much of the field elsewhere completely occupied by it already taken over by this so-called Colorado doctrine based upon diversion of waters and application to beneficial use. These strange peaks, which to carry on the figure will represent the Colorado doctrine, rising to dispel and displace the descending cloud, prevented much of the latter from ever finding lodgment here. But to the extent the field was not completely occupied by them, the cloud continued to descend and, as said in Beals v. Ares, "came in and filled every crevice, nook and corner in our jurisprudence."

And so it is that in the "crevices, nooks and corners" of our jurisprudence, never supplanted or repealed by any hostile legislation, will be found in our law so much of the common law doctrine of riparian rights as does not conflict with a full exploitation of the dominant purposes of the contrary doctrine, in full flower here at the time of the adoption of the common law. In other words, to paraphrase the language of this court in Beals v. Ares the riparian rights doctrine "gave way only in so far as the Colorado doctrine conflicted with its principles. In so far as was possible the doctrine of riparian rights operated in conjunction and harmony with the Colorado doctrine."

The majority do not so much as attempt to point out, nor can they, in what respect the retention by the landowner of his exclusive right of fishery in a non-navigable stream crossing his land is either destructive of or inconsistent with the fullest exploitation by the public of the diversion of such waters from the stream and their application to beneficial use, whether such use be for mining, milling, irrigation,

manufacturing, power, or for any other known use to which water may be dedicated. Until this showing can be made, the exclusive right of fishery survives.

My conviction that the appellee has the exclusive right of fishery rests fundamentally upon the proposition that such was his right at common law, and that our legislature and decisions have not thus far seen fit to deny him, or take from him, that right. It is a rule of construction, well recognized, that the common law is to be deemed superseded only when such a holding seems inescapable. 12 C.J. 186, 15 C.J.S., Common Law, § 12, p. 619. It is presumed to continue in force until displaced by express statutory authority, or compelling reasons of public policy. Neither reason for its displacement or for superseding it appears here.

While this exclusive right of fishery may seem unimportant at first blush, in my opinion, it is of the very highest importance because it rests upon the same foundation as that which supports the age-old dominion of an owner over his freehold estate. It may not be amiss to recall that for some time there has been a developing school of thought holding to the proposition that the great natural resources of mankind, so essential to human welfare, should not lie in private ownership. I will mention only a few, such as coal, oil, natural gas, etc. The philosophy back of such an idea is that God placed these great natural resources in the bowels of the earth, and that no single individual should be permitted to acquire ownership in them. It is the old struggle —public against private ownership—limited, for the time being, at least, to the great natural resources so essential to man's existence. Extended beyond that and embracing all kinds of property, it would, of course, create a communal state. Naturally, such a philosophy is directly opposed to our system of privately owned property as the reward of free enterprise.

The extremes of the two schools of thought, private ownership versus public ownership, must meet and compromise on common ground as to some of these properties, such as coal, oil, natural gas. The claim of common ownership must be satisfied with government control and conservation in the interest of the public. As to such an essential as water, of course, we have the outright constitutional declaration that, when in natural streams, it belongs to the public. But we have never yielded to the idea that natural resources, such as coal, oil and natural gas belong to the public. They are still the subject of individual ownership as a reward of private enterprise. And even as to waters, the public interest therein is absolute only to the extent necessary to accomplish the dominant purposes provoking the declaration that they belong to the public. The right of fishery as here involved is not one of those purposes.

The wild berries growing upon my land are exclusively mine, and merely because they are wild no stranger has the right to trespass and pick them. The exclusive

right of fishery in non-navigable streams is just as sacred as an owner's exclusive right to pick wild fruit and berries upon his own land. When, by virtue of public ownership of waters flowing in natural streams, we take away from an owner through which a non-navigable stream flows rights in such waters appurtenant to ownership of the land and unessential to the attainment by the state of the dominant purposes underlying the constitutional declaration that such waters belong to the public, then, in truth and reality are we violating the constitutional inhibition against the taking of private property for public use without just compensation. It is my prediction that it will represent but the first step toward taking away other rights until now deemed no less secure.

The constitutional declaration on the subject of waters but recognized the existing status of perennially flowing streams, as it had been established by custom and judicial decision in the semi-arid west. And that custom and those judicial decisions uproot the common law only to the extent of holding such waters in trust in the state for appropriation to public uses. Until such time the common law right of the landowner in the use of waters flowing across his land remains, including his exclusive right of fishery. It can no more be taken from him, *lawfully,* without just compensation, than can a right of way for a ditch, to convey such waters to the land of his neighbor.

Let me put the matter in this way: A owns land across which flows a perennial stream carrying a substantial flow of unappropriated waters. Thus, without in any manner impairing or curtailing the use of waters in the stream by those having lawful priorities therein by virtue of vested or licensed applications to beneficial use, A uses the waters on his lands for irrigation, for powering a mill, for watering his stock, or for any other needed purpose. Has he committed a trespass? If so, against whom? If not, then by what right has he enjoyed the use of such waters if not as a hereditament, corporeal or incorporeal, attached to his land and incident to his ownership thereof? And, if it be either, where do you find it defined as such, if not in the common law? Neither man-made laws nor human declarations, in statute or constitution, can revoke or nullify a law of nature. Joshua made the sun stand still and Moses opened a way across the Red Sea for the children of Israel but all of us believe God had something to do with those miracles.

And so it is that when water in the form of rain from the heavens falls on A's land and flows by natural drainage across the same to the channel of some stream, enriching and irrigating as it flows, even after entering the channeled stream, what constitutional or statutory declaration that such waters are "public" or "belong to the public" can gainsay to the landowner such advantage as a natural right incident to his ownership of the land? Nor can the state, as trustee of these waters for the public, with any greater claim in reason, logic or law, challenge any use he might make of

unappropriated waters while on his premises that neither impairs nor diminishes the use by vested or licensed applications to beneficial use by other appropriators.

I make no argument that appropriation of waters to recreational purposes, such as fishing, boating and the like, may not be deemed a beneficial use and properly so—I have conceded that all along. Nor do I deny that private property may be taken for devoting waters to such purposes upon a proper showing and compensation to the owner therefor and for the rights and privileges incident to ownership of such property. All I claim in this connection is that before you can take from me my exclusive right of fishery in nonnavigable waters flowing across or on my land, you must compensate me for it just as you would if you took a part of my land. And such was the view, too, of the public authorities when they made the contracts and conveyances which gave rise to this controversy. The majority appraise the right of fishery very highly in establishing its character as a beneficial use but reduce it to a low estate or rank in a holding which takes it from the landowner as an exclusive right without compelling payment therefor.

It is interesting to note how the majority escape the effect of the damaging admission they are forced to make that at common law the right of fishery in these waters in their original state flowing over appellee's land was exclusive. They do it by qualifying the admission instead of admitting it outright as immemorially declared in text and decision. The rationale of the prevailing opinion is to admit only that *enjoyment* of the right is exclusive. The reasoning runs that the public has possessed the right all along but because only the owner is so situated that he can enjoy it without trespass, such enjoyment and not the right itself, is exclusive. This is drawing the bead too fine for me and such reasoning ignores and blinds itself to the fact that the right springs from ownership of the land—not as a mere *accident* of ownership but a *prerogative* of ownership. Furthermore, it is pertinent to inquire: Does that attain the dignity of a right in any one of the one hundred thirty five million people populating this country each of whom is said to possess this common right, save in him alone who can lawfully enjoy it? The question answers itself.

Only one case has been called to our attention that is exactly in point. It is Hartman v. Tresise, 36 Colo. 146, 84 P. 685, 4 L.R.A.,N.S. 872. It fully sustains the appellee in the case at bar in its contention that its right of fishery in the waters in question is exclusive. The decision was by a divided court and the majority here elect to follow the minority or dissenting opinion rather than the majority holding which, to my mind, is much the better supported in logic and reason. Any effort to weaken its force by the circumstance that the decision is by a divided court or that the court rested its decision as well on another point, Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003, in no manner detracts from it as supporting

authority. In so far as a decision of the question discussed so much at length hereinabove is concerned, I am quite willing to rest my dissent upon the Colorado case just cited. Its reasoning is unanswerable.

There is still another support for the judgment rendered which is absolutely conclusive of its correctness. 1941 Comp., § 43-301(9), so far as material, provides:

"(9) No * * * fishing license shall entitle the holder therefor to * * * fish * * * within or upon any privately owned enclosure *without consent of the owner.*" (Emphasis mine.)

Apparently, this statute was not called to the attention of the trial court. Its effect is twofold. First, it is a legislative recognition that the law on the main question is as contended by appellee. In the second place, even if appellee be wrong in its contention, this statute stands as an insuperable barrier against awarding appellant the relief prayed. It has never been declared invalid. Indeed, its validity has never been challenged. The state which issues the license may impose such reasonable conditions on its use as it sees fit. But, reasonable or unreasonable, this condition stands as an effective barrier to a holder doing the very thing appellant asks this court to declare he has the right to do, unless and until at a proper time and in a proper forum, it is stricken down. The declaration of its unconstitutionality in the prevailing opinion, in order to support reversal, reviews no ruling of the trial court and is contrary to all precedent by reason thereof. Hutchens v. Jackson, County Treasurer, 37 N.M. 325, 23 P.2d 355.

In an effort to avoid the damaging effect of this statute, it will not do to urge that it injects a new theory. It does nothing of the kind. Mayfield v. Crowdus, 38 N.M. 471, 35 P.2d 291. It is simply another good reason supporting the judgment rendered and properly to be considered, even if the one upon which the trial court rested judgment should prove wrong. Lockhart v. Wills, 9 N.M. 344, 54 P. 336. Nor does it lie in appellant's mouth to claim there is no proof that these waters are within a private enclosure. State Game Commission is relator herein. Its members and employees of all persons within the state are presumed to know the game and fish laws. If it be the law, as appellant urges and the majority hold, that appellee does not possess the exclusive right of fishery in these waters, such has been the law all along and the state and the relator cannot be excused for ignorance thereof. Thus the only plausible explanation that can be given why appellant saw fit to contract the right of fishery over any part of the waters impounded by the Conchas Dam is that they lay within the private enclosure of an owner whose consent was required under the statute in question. But for the statute, if the law on the main question be as today declared, there was no occasion to contract for a right of fishery. The state—the public—possessed it already. The appellant may not now avoid the conclusive effect of its act in this behalf by pleading ignorance of the law.

I heartily concur in the able dissenting opinion of my brother Bickley which establishes convincingly that, until today, the law was as claimed by the appellee. Regrettably, the result of this decision is to tear down safeguards which have existed almost from the beginning where Anglo-Saxon jurisprudence prevails for the protection of an individual's dominion over his own property. The common law has dramatized the sanctity of the home and premises of the individual against invasion by strangers and trespassers in the age-old maxim: "A man's house is his castle." So it was and immemorially has been but no more, to view the matter realistically, since henceforth a rod, reel and fly are to perform the office of a writ of entry.

I dissent.

On Motion for Rehearing.

BRICE, Justice.

On consideration of motion for rehearing our conviction as to the correctness of the result reached in the majority opinion is not weakened, but strengthened rather. It is asserted by appellee in its motion for rehearing, that the Pablo Montoya Grant was public domain of the United States from July 4, 1848, the effective date of the Treaty of Guadalupe Hidalgo, 9 Stat. 922, until March 3, 1869, the date of the Act of Congress, 15 Stat. 342, confirming the grant, and probably up to the date of the patent, which was April 20, 1877. Then appellee, assuming the truth of its assertion, contends that the United States owned both the land and the unappropriated water composing the grant, at the date of its confirmation or patent, and that all water thereon not theretofore appropriated to some beneficial use, became the property of appellee as assignee of the United States, and that the Mexican-Spanish law is not involved.

As a basis for this conclusion it is said that the original Mexican grant was void because at the date of the purported grant by officials of the Mexican territory of New Mexico to Pablo Montoya (1824), those officials were without power to make the grant, and therefore the land remained the property of the Mexican government until its cession to the United States. In support of this claim appellee cites Hayes v. United States, 170 U.S. 637, 18 S.Ct. 735, 42 L.Ed. 1174.

There are a number of answers to this contention, any one of which is decisive and opposed to appellee's contention.

First. The appellee requested the court to find, and the court did find, the following facts:

"That the Pablo Montoya Grant was made by the Republic of Mexico prior to the American occupation, was favorably reported to Congress by the Surveyor General of New Mexico, was confirmed by Act of Congress approved March 3, 1869, was surveyed under the direction of the United States, and was patented by the United States April 20, 1877; that the confirmation, survey and patent of said grant were

without any exceptions whatever, and the said survey and patent described only the exterior boundaries of the grant and included everything within such exterior boundaries, including the South Canadian and Conchas Rivers which were not meandered in said survey or in any manner excluded from the patent or the grant."

By the terms of Articles 8 and 9 of the Treaty of Guadalupe Hidalgo and Article 5 of the Gadsden Treaty, 10 Stat. 1031, the United States was bound to protect the private rights of property which had been acquired by Mexican citizens in the ceded territory. Under these treaties perfect titles to grants of land needed no confirmation by the political authorities of the United States to establish their validity. Ainsa v. New Mexico & Arizona R. Co., 175 U.S. 76, 20 S.Ct. 28, 44 L.Ed. 78; Board of Trustees, etc. v. Brown, 33 N.M. 398, 269 P. 51.

The foregoing finding judicially determined that the grant in question was made by the Republic of Mexico, not by some unauthorized person in its name. If so made, the grant will be assumed to be perfect, needing no confirmation.

A history of this grant, as shown by the record and the statutes of the United States, is not out of place here.

For the purpose of providing for the establishment of existing rights acquired under the Mexican Government in the Territory of New Mexico, and to segregate them from the public lands of the United States, the Congress enacted the act of July 22, 1854, establishing the office of surveyor general of New Mexico and providing for his jurisdiction and duties, as follows:

"That it shall be the duty of the Surveyor-General, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; * * * which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm bona fide grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico. * * *" 10 Stat. 309.

The Surveyor-General acting within the authority conferred by Congress examined into the validity of the Pablo Montoya Grant and filed his decision on November 20, 1860, which is in part as follows:

"This grant, filed April 11, 1860, was called up for investigation, November 6,

1860, in the office, Don Pablo Montoya, deceased, original claimant, petitioned the provincial deputation of the Territory of New Mexico for a grant of land lying in Red River in the County of Taos, * * *

"On the 19th day of November, 1824, the provincial deputation answered in due form the petition of the said Don Pablo Montoya, and granted the lands petitioned for according to the laws and usages of the Mexican Government. The original grant to Don Pablo Montoya now being in the archives of this office, the verbal testimony which was taken here, proving the signatures to the papers, and the occupancy of the land up to the death of Montoya, some fourteen years, and the hostility of the Indians after that time, which forced his family to return, prove the validity of the claim, and the right of his heirs to the full enjoyment of this property. * * * Therefore, in view of these clearly defined points in this case, this office approves of this claim, and to the fullest extent recommends to the Congress of the United States the final confirmation of this claim to the petitioners, the children and grandchildren, the heirs at law of Don Pablo Montoya, deceased."

Thereafter, by the act of March 3, 1869, the Congress of the United States confirmed this grant as private land claim "No. 41" and further provided:

"That such confirmation shall only be construed as a quitclaim or relinquishment of all title or claim on the part of the United States to any [state] lands not improved by or on behalf of the United States, and not including any military or other reservation embraced in either of the said claims, and shall not affect the adverse rights of any person or persons to the same, or any part or parcel thereof."

Thereafter, on the 20th day of April, 1877, a patent was issued to the heirs of Pablo Montoya, covering the Pablo Montoya Grant, in which is recited the decision of the Surveyor-General and the confirmation of the grant by Congress. The patent recites that the United States "Have given and granted and by these presents do give and grant unto the said children and grandchildren, the heirs at law of Don Pablo Montoya, deceased, and to their heirs and assigns the tract of land embraced and described in the foregoing survey." This recital is limited by the confirming act, which authorized the issuance of a patent quitclaiming the interest of the United States in the grant, and reserving to all third persons any interest they might have therein.

Aside from the findings of the trial court that the land was granted by the Republic of Mexico to Pablo Montoya, the question of its validity was considered and determined by the legally constituted authorities of the United States upon the application of Pablo Montoya or his heirs.

[redacted] The congressional confirmation and United States patent as between the United States and the heirs of Pablo Montoya, was conclusive as to the validity of the Mexican grant. Only third persons could question the grantee's title. Board of

Trustees of Anton Chico Land Grant v. Brown, 33 N.M. 398, 269 P. 51; Beard v. Federy, 3 Wall. 478, 18 L.Ed. 88.

In Hayes v. United States, 170 U.S. 637, 18 S.Ct. 735, 739, 42 L.Ed. 1174, the Supreme Court said:

"Reviewing such acts (congressional land grants acts), the conclusion was reached that it was the intention of Congress that a claimant should not be required to offer proof as to the authority of the officials executing a public grant, but that the court should, in deciding upon a claim, assume as a settled principle that a public grant is to be taken as evidence that it issued by lawful authority. And in the Peralta Case [U.S. v. Peralta, 60 U.S. 343], 19 How. 343 [15 L.Ed. 678] in a proceeding under the act of March 3, 1851, relating to lands in California, the doctrine of the Arredondo Case [U.S. v. Arredondo, 6 Pet. 691, 8 L.Ed. 547] was applied."

The above had reference to the manner of confirming Mexican land grants before the establishment of the Court of Private Land Claims, which had jurisdiction of the controversy in the Hayes Case.

The question of the validity of grants made by the officials of the Territory of New Mexico in 1823 and 1825 was before this court in Stoneroad v. Beck, 16 N.M. 754, 120 P. 898. It was held by this court that the authorities of the Territory of New Mexico were not authorized to issue either patent involved in that case, and that both were void under the Mexican law. However, the grants had been confirmed by act of Congress and patents issued, based upon alleged void Mexican grants. It was determined that both being void originally under Mexican law, that as the United States patents had issued, each had the same standing, applying the principles of Southern Pacific R. Co. v. United States, 183 U.S. 519, 22 S.Ct. 154, 46 L.Ed. 307.

But the Supreme Court of the United States, in reversing this court (Jones v. St. Louis Land & Cattle Co., 232 U.S. 355, 34 S.Ct. 419, 420, 58 L.Ed. 636), stated:

"The act of Congress was not a gratuity, it was intended to be a discharge of the obligations of the treaty between the United States and Mexico. It was a confirmation of rights which existed, *and as they existed.*" (My emphasis.)

It was then stated that the report of the surveyor general approving the Mexican grants was the basis of the act of Congress confirming them, and further:

"The proceedings, therefore, for the confirmation of titles derived from Mexico, commenced with the surveyor general, and were consummated by the confirming act, the surveyor general deciding in the first instance. The petition to him 'is the commencement of proceedings, which necessarily involve the validity of the grant from the Mexican government.' Congress, however, constituted itself the tribunal of ultimate decisions of the validity or invalidity of the claim, as, of course, it might do in the discharge of the treaty obliga-

tions, or delegate that duty to the judicial department. * * *

"The confirmation, therefore, cannot be disassociated from what preceded it, and it may be said of such direct confirmation * * * through special tribunals created by Congress, that it constitutes a declaration of the validity of the claim under the Mexican laws, and that the claim is entitled to recognition and protection by the stipulations of the treaty."

It thus appears that a confirmation by Congress under the congressional act involved, determined that a Mexican grant was valid, and when so determined the courts are not authorized to go behind this adjudication, unless the rights of third persons are involved, as in Board of Trustees v. Brown, supra. At the time of the grant the question was solely a political one, determinable alone by the political department of the government and its judgment was final. Appellee cites Hayes v. United States, supra, in support of its contention. But in the Jones case, [232 U.S. 355, 34 S. Ct. 421] the Supreme Court of the United States said:

"We are not called upon to consider the power of the territorial officers (referring to New Mexico as a territory of Mexico). The validity of the grants has been pronounced by Congress, and we are only required to consider their relation to each other and the public domain;"

And substantially the same doctrine was stated in the Hayes Case, hereinbefore quoted.

It may be, and probably is, true that the territorial deputations of the Mexican Territory of New Mexico were without power to grant land during the years of 1824 to 1828. Chaves v. United States, 175 U.S. 552, 20 S.Ct. 201, 44 L.Ed. 269; United States v. Vallejo, 1 Black 541, 17 L.Ed. 232; Hayes v. U. S. supra; Board of Trustees v. Brown, supra. But that question was not, and could not be, raised in this case, not only for the reasons before stated; but under well settled rules of law, the appellee will not be permitted, when its interest may be adversely affected, to deny the source of its title as vouched for by the Mexican claimant, after the United States Government, relying thereon, confirmed the grant as legal and subsisting at the date of cession to this country.

The validity of the Mexican grant having been determined by the authorities, and in the manner provided by law, this court, upon the record before us, is bound by that adjudication.

The rights of appellee to the water and fishery are exactly the same as those of the owner of any valid Mexican grant confirmed by Congress prior to the Act of 1891, 26 Stat. 854, establishing the Court of Private Land Claims.

It is next asserted that "The United States owned both land and water on its public lands and all water rights on such lands must come within some act of Congress, and no act of Congress has ever

recognized the public rights as determined in the decision in the case at bar."

In support of this proposition, dictum first stated in Howell v. Johnson, C.C., 89 F. 556, 558, is quoted by appellee, as follows:

"The legislative enactment of Wyoming was only a condition which brought the law of congress into force. The national government is the proprietor and owner of all the land in Wyoming and Montana which it has not sold or granted to some one competent to take and hold the same. Being the owner of these lands, it has the power to sell or dispose of any estate therein or any part thereof. The water in an innavigable stream flowing over the public domain is a part thereof, and the national government can sell or grant the same, or the use thereof, separate from the rest of the estate, under such conditions as may seem to it proper."

This case was followed in California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 162, 55 S.Ct. 725, 731, 79 L.Ed. 1356, in which the Supreme Court said:

"As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. Howell v. Johnson, C.C., 89 F. 556, 558. The fair construction of the provision (Desert Land Act of March 3, 1877) now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named."

In Ickes, Sec'y, v. Fox, 300 U.S. 82, 57 S.Ct. 412, 417, 81 L.Ed. 525, the Supreme Court stated:

"The Federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of March 3, 1877 * * *, *if not before,* Congress had severed the land and waters constituting the public domain and established the rule that for the future the *lands should be patented separately.* Acquisition of the government title to a parcel of land was not to carry with it a water right; but all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states." (My emphasis.)

In neither case was the "ownership" of water involved. So far as I am informed no court has ever held that lands granted by a United States patent carried title to running water passing through them. In those states in which the common law of riparian rights is in force, the patents of the United States conveyed to the grantee "no property in the water itself, but a simple usufruct while it passes along." United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S.Ct. 770, 775, 43 L.Ed. 1136. Likewise, patents to land in the arid states have never been

held to convey as property the running water on the granted land.

But we need not trouble ourselves about the question of the ownership of water in running streams on public lands. Appellee's patent was dated April 20, 1877, after the Desert Land Act (Act of March 3, 1877, 19 Stat. 377, 43 U.S.C.A. § 321 et seq.) had become effective. Assuming that the appellee's title is from the United States, unaffected by any previous Mexican grant, the title to the flowing water was not included in the conveyance; for by the Desert Land Act, "* * * if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately." Ickes, Sec'y, v. Fox, supra. Appellee obtained no title to water or to its use by virtue of the patent from the United States.

The appellee states:

"The Mexican laws have no application. We recognize that the laws or customs of the Republic of Mexico might constitute local customs or laws within the meaning of the Act of Congress of July 26th, 1866, above referred to, and that a water right acquired by individuals or by a corporation for mining, agricultural, manufacturing or similar purposes under such laws or customs would be entitled to the protection of the Act of Congress referred to. This is the effect of the decision in Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 29 S.Ct. 493, 53 L.Ed. 822, but in no other way can the laws or customs of the Republic of Mexico have any application."

It is certain that the customs and laws of the Republic of Mexico are the basis for the public control of water in New Mexico, but whether any rights greater than those mentioned by appellee remained in the public, I do not find it necessary to determine. It was stated in the case cited:

"So far as the claim is rested on the original grant and the Mexican law, it may be disposed of in a few words, without going into all the questions that would have to be answered before an opposite conclusion could be reached. 'Whatever may have been the general law throughout the Republic of Mexico on the subject of water, it is reasonably certain that, in the state of Sonora, the doctrine of appropriation, as now recognized, was to some extent in force by custom. In this territory irrigation was practiced in the Santa Cruz Valley prior to the cession, and it is well known the right of appropriation without regard to the riparian character of the lands was there in force probably from the time when the Spaniards first settled in the valley. Our statutes, as well as those of New Mexico, seem to have had their origin in the Mexican law as modified by custom.' This is the statement of the territorial court, and we know nothing to control it. It is not met by arguments as to the general character of Mexican law, or by inference from the situation and nature of the grant. * * *

"But, while it is true that in Beard v. Federy, supra [3 Wall. 478, 491, 18 L.Ed. 88, 92], Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense. 'Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power, makes it good and valid; so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by the force of such words that are foreign to the business of confirmation.' Gilbert, Tenures, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign, it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be issued, says that it shall be issued 'to the confirmee.' Act of March 3, 1891, Chap. 539, § 10, 26 Stat. at L. 854, 859, U.S.Comp. Stat.1901, pp. 766, 771. It would be possible, perhaps, to argue to the contrary from provisions in §§ 8 and 13, that the confirmation shall only work a release of title by the United States, but we are satisfied that the true intent of the statute and the reason of the thing are as we have said." Boquillas Land & Cattle Co. v. Curtis, supra [213 U.S. 339, 29 S.Ct. 494].

This would seem to indicate that the appellee has only the title and rights conferred by the Mexican grant. Appellee cites H. N. D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744, as holding that in confirming Mexican land grants the title and rights acquired by the act of confirmation are not limited by conditions or limitation imposed by the laws of Spain or Mexico. The land involved in the case mentioned was concededly public land at the time of the cession, and title had never passed from the Mexican Government. But whether it had or not, it is immaterial in this case.

In 1907 the legislature of New Mexico enacted a comprehensive law for the control of water in streams and water courses entitled "An Act to Conserve and Regulate the Use and Distribution of the Waters of New Mexico," etc., which provided among other things:

"Section 1. All natural waters flowing in streams and water courses, whether such be perennial, or torrential, within the limits of the Territory of New Mexico, belong to the public and are subject to appropriation for a beneficial use.

"Sec. 2. Beneficial use shall be the basis, the measure and the limit of the right to the use of water * * *." Ch. 49, N. M.L.1907.

This was carried into the Constitution, written in 1910, as follows:

"The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use

in accordance with the laws of the state. Priority of appropriation shall give the better right." Sec. 2, Art. 16, N.M.Const.

The common law was adopted as the rule of practice and decision in the Territory of New Mexico in 1876, Laws 1876, c. 2, § 2. Of this act this court, through Mr. Justice Roberts, in Beals v. Ares, 25 N.M. 459, 185 P. 780, 788, said:

"When the legislature in 1876 adopted the common law as the rule of practice and decision, the whole body of that law as limited in the case of Browning v. Estate of Browning, supra, [3 N.M. (Gild.) 659, 9 P. 677] came into this jurisdiction. Where it found a statute counter to its provisions, it yielded to the statute, but it gave way only in so far as the statute conflicted with its principles. In so far as was possible it operated in conjunction and harmony with the statutes. If the statute conflicted with it, it bided its time and upon repeal of the statute became again operative. In other words, the common law, upon its adoption, came in and filled every crevice, nook and corner in our jurisprudence where it had not been stayed or supplanted by statutory enactment, in so far as it was applicable to our conditions and circumstances. Where a statute existed at that time, patterned after the civil law, or copied from some other state or country and it conflicted with the common law, such common law occupied all the field of jurisprudence not actually covered by the statute, and, upon repeal of such statute, the common law immediately took possession and resumed its sway over the rights and remedies theretofore regulated by such statute."

Justice Roberts' statement that the common law fills "every crevice, nook and corner" of the law except the statutes is not quite accurate. Before we had any statute on the subject of the ownership or use of water, and after the adoption of the common law as the rule of practice and decision in this jurisdiction, the territorial Supreme Court had accepted as the law of the Territory those rules that custom had established for its use, patterned after the Spanish-Mexican law, wholly unknown to the common law. The Albuquerque Land & Irrigation Co. v. Gutierrez, 1900, 10 N. M. 177, 61 P. 357, affirmed in 188 U.S. 545, 23 S.Ct. 338, 47 L.Ed. 588.

Regarding the acts of Congress recognizing the right to the use of water in streams and lakes on public lands, it was further stated in California-Oregon Power Co. v. Beaver, etc. Co., supra:

"The effect of these acts is not limited to rights acquired before 1866. They reach into the future as well, and approve and confirm the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of the arid land states, as the test and measure of private rights in and to the nonnavigable waters on the public domain. * * *

"If the acts of 1866 and 1870 did not constitute an entire abandonment of the common-law rule of running waters in so

far as the public lands and subsequent grantees thereof were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result." * * *

"* * * The fair construction of the provision now under review (Act of 1877) is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. * * *

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since 'Congress cannot enforce either rule upon any state,' * * * the full power of choice must remain with the state."

The old customs and rules were continued in force by the courts as the law of this jurisdiction until they were, in whole or in part, enacted into statutes or incorporated into the state constitution. See Ch. 49, N.M.L.1907 and Sec. 2, Art. 16, N.M.Const.

On the principal question the appellee contends that the declaration of public ownership of waters in streams in this statute and in the Constitution, means "public" ownership only in the sense that they might be appropriated for irrigation and other public uses; that is "has no application to fishing rights," which it is asserted are common law rights and are the exclusive property of the owner of the bed of the stream.

On the other hand appellant contends that appellee has not now, and never has had, any exclusive right to fish in the water on the Pablo Montoya Grant or in any part of the Conchas Lake; that all the waters involved belong to the public, from which it follows, as appellant asserts, the public has a common right to fish therein if it can be done without trespassing on private property. If appellee owns the beds of the streams on the Pablo Montoya Grant, as claimed by it, (a question I do not decide) it obtained no interest of any kind (riparian or otherwise) in the water flowing over those beds by virtue of its United States patent. This water was reserved to the people by federal laws. California-Oregon Power Co. v. Beaver etc. Co., supra.

I do not doubt but that the water of non-navigable streams had been severed

from the public domain of the arid west long before the passage of the desert land act of 1877, by prior acts of Congress as well as by the government's recognition of the customs, laws and court decisions of the western states in relation thereto as intimated in the Ickes Case, and in California-Oregon Co. v. Beaver, etc., Co., supra. If appellee has any fishing rights in the Conchas Lake, it is only by virtue of the statute of 1876 adopting the common law as the rule of practice and decision in this jurisdiction.

The early cases involving fishing rights followed the common law in holding that the beds of fresh water streams where the tide did not ebb and flow belonged to the riparian owners, and in one or two early cases this was held to apply to the Mississippi River. But it was soon discovered that the common law was not suitable to this country, in which there were fresh water navigable streams thousands of miles in length. I have referred to the decisions of the United States Supreme Court, but call particular attention to People ex rel. Loomis v. The Canal Appraisers, 33 N.Y. 461, overruling earlier New York cases, and McManus v. Carmichael, 3 Iowa 1, in which practically all of the cases to that time were reviewed. In New York, Iowa, and many other states, the civil law, which held that all streams navigable in fact were navigable in law, was adopted with the conclusion that such streams were public streams and that the public had the right to resort thereto for fishing and other purposes that did not interfere with navigation. Regarding the adoption of the civil law the New York court said:

"The rule of the civil law, as already observed, is well defined, of universal recognition on the continent of Europe, and, we have clearly seen, better adapted to the state of things on the continent of America than that which arose from the condition of the waters of the island of Great Britain. * * *

"Navigable rivers, in the language of the civil law, are not merely rivers in which the tide flows and reflows, but rivers capable of being navigated, that is navigable in the common sense of the term. In the words of the Digest, a navigable river is 'statio iturve navigio,' or, as Lord Mansfield observed, 'ex facto oritur jus.' The Code Napoleon defines, with precision, rivers navigable and those not navigable, and the soil of the former belongs to the nation, and that of the latter, and islands which may be formed therein, to the proprietors of the shore on that side where the island is formed. * * * We have now ascertained the doctrine of the common law, and that of the civil law, upon the subject now under consideration, and have traced the same to their respective sources. We have seen, in applying the principles of the common law to the waters of this continent, how great has been the embarrassment of courts and judges and text writers; how variant have been the conclusions reached by them, and how contradictory and unsatisfactory have been the reasons for the results arrived at."

It does not always follow that the owner of the bed of a stream owns the fishing rights therein. It is the law of England at the present time, and generally in this country, that the fact of ownership of the bed of a stream is not the criterion for the determination of the right to fish therein. The question depends upon whether the waters are public or private. Wyatt et al. v. Attorney General [1911] A.C. 489, 21 Ann.Cas. 775, affirming the Supreme Court of Canada in holding that the public and not the owner of the bed of a navigable stream owns the fishing rights therein. This case is followed by an annotation in 21 A.&E.Ann.Cas. entitled "The right of fishing in a navigable river is generally in the public, even though the bed thereof may be owned by the owners of land along the river."

The principal American case on this question is Willow River Club v. Wade, 100 Wis. 86, 76 N.W. 273, 42 L.R.A. 305. I call attention to the following texts in further support of this proposition:

"In accordance with the general rules announced in the preceding sections, it is not disputed that the public has a prima facie right to fish in all navigable streams, just as it has in other public waters, even though the beds thereof may be owned by the riparian owners. A riparian owner has no exclusive right to a fishery in tidal or navigable waters. Hence, a stranger has a right to row a boat upon navigable streams flowing through private property and to take fish from the water, provided he does not trespass on the adjacent property." 22 A.J., Fish and Fisheries, Sec. 16.

"As a general rule all the members of the public have a common and general right of fishing in public waters, such as the sea and other navigable or tidal waters, and no private person can claim an exclusive right to fish in any portion of such waters, except in so far as he has acquired such right by grant or prescription, as discussed in § 9, infra. This rule applies notwithstanding the title to the bed of such a stream is in the riparian owner, and notwithstanding his ownership of the abutting upland carries with it the right of access to deep water." 36 C.J.S., Fish, § 6.

And see annotation in 60 L.R.A. 481 entitled "Right to fish."

The only question remaining that is material to a decision is whether the waters involved in this suit are public waters.

I am unable to find in the declarations of public ownership of water in the laws and constitution of this state, from which I have quoted, any reservation of fishing rights or any other right existing at common law in connection with the usufructs of public water flowing by or through the lands of any person.

Water has been classified as "public" and "private," depending upon the rights to its use. No right to the use of water was conveyed to appellee by his patent, nor did it obtain any under the act of 1876 adopting the common law as the rule of practice and decision in this state. Under the fed-

eral statutes enacted while this was a territory, the declaration of public ownership of water was recognized and protected by the refusal of the government to convey any interest or right therein to patentees. Whether the legislature could confer fishing rights to the owners of lands adjacent to streams consistently with the constitution, I do not decide; but see Hume v. Rogue River Packing Co., 51 Or. 237, 83 P. 391, 92 P. 1065, 96 P. 865, 31 L.R.A., N.S., 396, 131 Am.St.Rep. 732, and 22 A.J. "Fish & Fishery" Sec. 12.

However this may be, no person has the right to approach public water through private property, or fish in public water while on private property without the consent of the owner; but he may fish in public water if he does not trespass upon the lands of another; and fishing in public water from a boat is not a trespass upon the property of the owner of the underlying land. Willow River Club v. Wade, supra; Diversion Lake Club v. Heath, 126 Tex. 129, 86 S.W.2d 441.

The appellee contends that the decision in the Diversion Lake Club Case is not authority here because the river which was dammed to make the Modina Lake was navigable in law, though not in fact; from which it was concluded that the water was public. But what difference does it make whether the public character of the water resulted from a declaration of the legislature that the stream was navigable, from which the inference that the water was public would follow; or that the declaration of its public character was made direct without the necessity of an inference? In either case the water was public, and the fact that the underlying soil belonged to individuals did not affect public rights therein, as the Texas court held.

It is said that "Another birthright of Anglo-Saxon (?) jurisprudence has been stricken down" by this court. If this were true, it would not be the first to fall by court action. The Supreme Court of the United States, and the courts of most of the states, have "stricken down" the claim that the right of fishery belongs to the owners of lands adjacent to thousands of miles of fresh water streams in this country, and no doubt these decisions were met with the same cry of destruction of ancient "birthrights." In truth the common law of private water in running streams has never been a part of the jurisprudence of New Mexico. These waters have always been public, and they have been confirmed as such by our statutes and constitution.

I concur in the proposed disposition of the case in the opinion by Mr. Chief Justice MABRY. The motion for rehearing is denied.

MABRY, C. J., and LUJAN, J., concur.

BICKLEY and SADLER, Justices (dissenting).

The majority, seemingly not quite satisfied to rest the result declared on what was said in their former opinion, have put for-

ward additional grounds considered by them as fortifying the position taken. In our view, the new matter written in disposing of the motion for rehearing merely represents confusion worse confounded. The extremity to which the majority are driven to find supporting argument is witnessed by the effort to impair what this court said long ago in Beals v. Ares, 25 N.M. 459, 185 P. 780, upon the status of the common law in our jurisprudence, for nearly thirty years regarded as a virtual chart and compass in the field occupied by the common law.

We are satisfied with what we have written in our former dissents. We there pointed out the fallacy in the argument advanced, as well as danger to the security of property rights involved, in the course embarked upon by the majority opinion. It is no answer to say that this invasion of a birthright of Anglo-Saxon jurisprudence does not represent the first encroachment. That frequently affords the explanation, although it furnishes no justification, for the denial of a right long cherished and deemed secure.

We reaffirm our dissent.

On Second Motion for Rehearing.

BRICE, Chief Justice, and LUJAN, Justice.

After appellee's first motion for a rehearing was overruled, it was granted leave to file and filed a second motion for rehearing. The cause is now before us on said motion.

It is said by the appellee that the majority opinion, in disposing of the first motion for a rehearing, "misconstrued appellee's contention as to the ownership of the water involved." Commenting on this point, the appellee states:

"We have never intended to contend, as stated on page 1 of the majority opinion on Motion for Rehearing [182 P.2d 457], that 'all waters thereon (on the Grant) not theretofore (prior to date of patent) appropriated to some beneficial use, became the property of appellee as assignee of the United States.' Nor have we intended to contend 'that lands granted by a United States patent carried title to running water passing through them.' (Opinion on Motion for Rehearing, page 7 [182 P.2d 460]). What we have contended, and do contend, is that after the patent, the water remained subject to appropriation for any beneficial use, but that any such appropriation or use must be derived from some Act of Congress permitting such appropriation or use, and that there is no such Act permitting use by the public for fishing or any other general use, the acts of Congress being limited to appropriation for some specific purpose.

"We start with the premise, which seems to be uncontroverted, that the United States owned both the land and water on its public domain, and had the right to dispose of the land and the water either together or separately. California Oregon Power Co. v. Beaver Portland Cement Co.,

295 U.S. 142, 145, 55 S.Ct. 725, 79 L.Ed. 1356, 1364.

"It disposed of its land by patent, but left the disposal of the water to appropriation for beneficial use under local customs and laws. It did not, however, give the states blanket authority to dispose of or permit the use of the water. * * *

"None of these acts of Congress give the public generally any right to use the water for fishing or otherwise. The rights given are those of appropriation to some specific beneficial use—'irrigation, mining and manufacturing.' As is stated in California Oregon Power Co. v. Beaver Portland Cement Co., supra, 'the only rule spoken of (in these acts of Congress) is that of appropriation.'

"We have then this situation in the case at bar: The United States owned both the land and the water. It has disposed of the land. It has authorized the acquisition of rights in the water by appropriation for specific beneficial purposes. It has not authorized the acquisition of rights by the public generally, and such right consequently can not exist."

We accept the statement of appellee that it did not contend that all waters on the grant not theretofore appropriated to some beneficial use became the property of appellee as assignee of the United States; nor that lands granted by a United States patent carried title to running water passing through them.

The statement in the majority opinion on rehearing, was in answer to the following statement in appellee's brief:

"It is, of course, well settled that the United States owned both the land and the waters on its public land, and had the right to dispose of land and water together or separately. * * *

"The Pablo Montoya Grant was, as above stated, a part of the public lands of the United States, and the same was confirmed and patented without any restrictions or qualifications whatever. The confirmation and the patent purport to vest in the confirmee the complete title to everything within the boundaries of the Grant as surveyed. No mention is made of any reservation of any right in the public to fish in or use the waters of any stream within the Grant. Existing legislation of Congress saved vested rights to the use of water acquired by appropriation in accordance with local customs, but nothing more."

Appellee then states as its conclusion on the question:

"* * * Our contention is that after the patent issued for the Pablo Montoya Grant, anyone had, and now has, the right to appropriate this water for any of the purposes specified in the Acts of Congress above referred to, but that after such patent, the water could not be used for any purposes not specified in the acts of Congress."

But a pertinent question is, What interest has appellee in the water or its use?

Appellee, at least inferentially concedes, as indeed it must, that the United States patent to the Pablo Montoya Grant conveyed to its predecessor in title the land only, after the water had been severed therefrom. "As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * That Congress intended to establish the rule that for the future (after March 3rd 1877) the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named." California-Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 160, 55 S.Ct. 725, 731, 79 L.Ed. 1356, and Ickes, Secretary v. Fox, 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525, quoted from in our opinion on motion for rehearing.

Regarding the interest of the state in the public waters within its boundaries, it is said:

"Nothing we have said is meant to suggest that the act, as we construe it, has the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest. What we hold is that following the act of 1877, if not before, all nonnavigable waters then a part of the public domain became publici juris, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain." California Oregon Power Co. v. Beaver Portland Cement Co., supra.

The claim heretofore made, and upon which the minority opinion rests, is that the appellee as the owner of the land, had certain riparian rights in the water, among them the right of fishery; and that such rights were subordinate only to the rights of individuals who had appropriated the water and used it beneficially. Whether this contention has been abandoned is not plain; but we will assume that the present contention, to-wit that the state has not a plenary control over public waters, but that its authority is limited to providing for appropriations for irrigation, mining and manufacturing purposes is in addition to its claim of riparian rights, or the common law right of fishery.

The question of the extent of state control over public waters has been so definitely settled by decisions of the Supreme Court of the United States, and considered in our opinion on motion for rehearing, that but slight reference need be made here. These waters are publici juris and the state's control of them is plenary; that is, complete; subject no doubt to governmental uses by the United States. California Oregon Power Co. v. Beaver Portland Cement Co., supra; Ickes v. Fox, supra; Sec. 2, Art. 16, N.M.Const.; Ch. 49 N.M.L.1907. Mr. Justice Sadler in his dissenting opinion, states:

"I make no argument that appropriation of waters to recreational purposes, such as fishing, boating and the like, may not be deemed a beneficial use and properly so—I have conceded that all along."

But he believes that such right should be exercised by the State through condemnation proceedings. If the use of water for establishing public fisheries is a public use, within the meaning of our Constitution and laws, as Mr. Justice Sadler concludes, then it may be taken and appropriated for such use without condemnation. Such use is in the same category as that of use for irrigation, mining and manufacturing; and it has never been suggested that the appropriation and diversion of water for these purposes, though destructive of fisheries, require condemnation proceedings before they can be exercised. If the state may use public waters to establish public fisheries, upon the theory that such use is a beneficial one, then the State's plenary power over public water is its authority therefor. The legislature has made ample provision for the public use of public waters for fishing, by Ch. 43, N.M.Sts. 1941, a comprehensive law authorizing the State Game Commission, (among other things) "to establish and * * * operate fish hatcheries for the purpose of stocking public waters of the state * * *"; all for the use and benefit of the public, to be enjoyed under the protection of state laws.

But upon what theory can the appellee object to the use of public water by the authorized public? It has not now, nor has it ever had, any right, title or interest in these waters. No water, water right, or the use of water, was conveyed to it by the United States. The water was reserved for the use of the public. California Oregon Power Co. v. Beaver Portland Cement Co., supra. Appellee has no more right to the use of the unappropriated water on the land grant than has any other person, except as the law against trespassing on private property favors it. The public waters of this state, by legislative authority, have been dedicated to the use of the public for fishing and recreation, and the Conchas lake is not an exception. We do not find that we erred in so holding.

The appellee asserts that "the majority opinion on the motion for rehearing misinterprets the finding of the district court as to the making of the Pablo Montoya Grant."

We may assume for the purposes of this case that appellee was entitled to show the lack of jurisdiction in the Mexican authorities to make the original grant, as it contends. But the United States conveyed no water, water right, or the right to use water, to its predecessor in title; and it is entirely immaterial whether the Mexican title was invalid.

Another question posed was fully considered and decided in our opinion on the first motion for rehearing, and we adhere to the views therein stated.

Amici Curiae have filed a brief in opposition to the claims of the state. The

questions submitted therein were either not presented below or have been fully answered in one or more of the majority opinions. We adhere to our original views, particularly those stated in our opinion on rehearing. Such being the case, the second motion for rehearing will stand denied by operation of law. Flaska v. State, 51 N. M. 13, 177 P.2d 174.

SADLER, Justice (dissenting).

The decision of this court on second motion for rehearing in the case of Flaska v. State, 51 N.M. 13, 177 P.2d 174, has rendered futile further consideration or discussion of the issues on this appeal. Neither the late Chief Justice BICKLEY nor myself, both having disagreed with the majority opinion herein, participated in the decision mentioned in the Flaska case, having recused ourselves. Nevertheless, both entertained the view that, regardless of the merits of the doctrine there announced, it should be without application to pending cases because of a contrary practice long prevailing in this state as demonstrated by the decisions of this court on rehearing in the cases of State v. Armstrong, 31 N.M. 220, 243 P. 333; Odell v. Colmor Irrigation & Land Co., 34 N.M. 277, 280 P. 398 and State v. Pate, 47 N.M. 182, 138 P.2d 1006, in each of which a judge or judges participated on rehearing as successor to some judge no longer on the court who had participated in rendering the original decision.

The foregoing remarks may seem superfluous in as much as the rule laid down in the Flaska case now has become the law of this state. Chief Justice BRICE, Mr. Justice LUJAN and myself as the only members of the court still remaining such who participated in the original opinion, thus alone are entitled to participate in disposing of appellee's second motion for rehearing. What has been said by me in previous opinions filed in this case, properly classifies me as in favor of granting the motion, a result I am as helpless to accomplish as are my participating brethren to give more than minority expression to the views advanced in the annexed opinion prepared by the CHIEF JUSTICE and subscribed by Mr. Justice LUJAN. Since under the Flaska decision the motion must stand denied by operation of law, it would avail nothing for two opposing minorities on the court to debate the merits of their respective views. Suffice it to say that such an unsatisfactory ending to a case involving issues so important is to be deplored.

183 P.2d 153

STATE ex rel. McCULLOH et al. v. POLHEMUS.

No. 5017.

Supreme Court of New Mexico.
June 24, 1947.

Rehearing Denied Aug. 15, 1947.

Harry L. Bigbee, of Santa Fe, for appellants.

Charles B. Barker, of Santa Fe, and W. A. Sutherland, of Las Cruces, for appellee.

McGHEE, Justice.

This action was filed in the name of the state on the relation of the Attorney General and the members of the Basic Science Board, and asked that the defendant be enjoined from practicing any of the healing arts.

The defendant questioned the right of the then relators to so appear. The trial court overruled his contention as to the Attorney General and sustained it as to the members of the Basic Science Board. The Attorney General was then allowed, over the objection of the defendant, to join the Department of Public Health and the District Attorney of the First Judicial District as relators, and the case so pro-

ceeded. The defendant did not call for proof of authority, take a cross appeal, nor assign error here, but in his brief and in the oral argument claims there is nothing in the record to show the Department of Public Health authorized such action, and that the Attorney General and District Attorney do not have the authority to so appear. In the absence of proof to the contrary, we will assume that the Attorney General had proper authority from the Department of Public Health. His contention that the Attorney General and District Attorney do not have the authority to appear as relators on behalf of the state is without merit. State v. Connelly, 39 N.M. 312, 46 P.2d 1097, 100 A.L.R. 878; art. 6, Sec. 24, N.M. Constitution. See also State v. District Court, 39 N.M. 523, 51 P.2d 239; State v. Compere, infra.

The trial court found that the defendant has been for many years advertising and holding himself out as competent to diagnose physical ailments and diseases, and that during this time has had more than 3,000 patients at his office in Santa Fe where he has advised and treated them for compensation; that he does not hold a license from any board in this state; that his treatment of all diseases consists of one or all of the following methods: (1) colonic irrigation, (2) diet, (3) steam baths, (4) the use of certain herbs, or herb compounds, including senna leaves, licorice root and psyllium seeds, all ground and mixed in powder form. It further found that the defendant is unskilled and uninformed in the practice of medicine, and the diagnosis of the diseases of the body; that at least three of the patients of the defendant, and who were treated by him, died shortly prior to the filing of this action; that proper medical or surgical treatment may and could have prolonged their lives; that many, if not all, of his patients regard him as a physician specially skilled and versed in the healing arts and in the diagnosis and treatment of diseases and bodily ailments generally, and competent to diagnose and treat all manner of sickness.

Findings Nos. 12, 18 and 19 read:

"12. The treatment by defendant of all diseases treated by him consists in one or more, or all, of the following methods: (1) colonic irrigation, (2) diet, (3) steam baths, (4) the use of certain herbs, or herb compounds, including senna leaves, licorice root and psyllium seeds, all ground and mixed in a powder form.

"18. To the extent that the defendant engages in practice of medicine, and of prescribing for or treating diseases or bodily ailments requiring surgery or medication, his practice constitutes a nuisance and a menace to the public health.

"19. To the extent that the defendant's practice is strictly confined to naturopathic methods, with examinations and diagnosis

only to determine if the patient's ailment is properly treatable by such methods, and where his patients are not misled but are informed that defendant means to limit his treatments to naturopathic methods and subjects and that he does not profess to have ability to diagnose diseases generally, nor to determine or advise when medication or surgery is required, his practice does not constitute a public nuisance or a menace to the public health.

"In other words, as long as defendant's patients know that his practice is confined to use of the naturopathic methods mentioned in Finding twelve (12) above, and that he does not pretend to have ability to treat any diseases or causes except such as respond to such methods, and does not profess always to know whether or not the paticnt has such an ailment as will respond to such treatments, and does not hold out himself to be a regular and qualified physician or his method to be a 'cure-all,' the patient has fair warning, and the public health is not endangered by defendant's practice."

The operative part of the decree reads:

"1. The defendant should be and hereby is permanently enjoined and restrained from engaging in the practice of medicine, and from in any manner holding himself out or advertising himself to be one qualified to practice medicine, and from administering drugs, or diagnosing ailments, treating or advising patients under the general practice of medicine. Defendant's engaging in any of the matters and things aforesaid from which he is hereby directed to be restrained constitutes and is a danger to the public health and a nuisance.

"2. The defendant's practice of naturopathy, strictly confined within the limits of that branch of the healing arts and of the methods of treatment employed therein, as outlined in the Court's Findings of Fact, does not in itself constitute a public nuisance or a danger to the public health and injunction against such practice should not be ordered herein so long as defendant's practice conforms with the requirements of the Court's Findings of Fact No. 12 and defendant does not fail in the duty prescribed upon him in Finding of Fact No. 16, and complies with the requirements of the Court set forth in the Court's Finding of Fact No. 19."

It is from Finding No. 19 and paragraph 2 of the decree based thereon that the state has appealed.

A reading of the record shows everything is grist that comes to the defendant's mill; that he is incompetent to practice the healing arts and that his practice is a menace to the public health. To allow him to continue to practice the healing arts would be clearly dangerous to the health and lives of the people, and a nuisance. The trial court should have granted

an injunction as asked by the state. State v. Compere, 44 N.M. 414, 103 P.2d 273.

The decree will be reversed and the case remanded to the district court with instructions to grant an injunction as prayed in the complaint, and it is so ordered.

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

COMPTON, J., not participating.

183 P.2d 155

MURCHISON & CO. et al. v. STATE CORPORATION COMMISSION.

No. 4975.

Supreme Court of New Mexico.

July 22, 1947.

H. A. Kiker and Manuel A. Sanchez, both of Santa Fe, for movants.

C. C. McCulloh, Atty. Gen., and William R. Federici, Robert V. Wollard, and Thomas C. McCarty, Ass't Attys. Gen., for respondent.

McGHEE, Justice.

This case arose in the State Corporation Commission upon an order to show cause issued by the commission requiring the defendants, who operate a pipe line for the transportation of oil, to show cause why an order should not be entered requiring

them to comply with Sec. 69-308, N.M.S.A. 1941, by making application for a license to operate their pipe line and to pay all license fees required to be paid under the statute. The defendants asserted that they were not a common carrier but were a contract carrier and that therefore they are not subject to the provisions of the pipe line statute regulating common carriers.

Upon a hearing the commission held that the defendants' operations came within Section 69-301 to 69-312, N.M.S.A.1941, and ordered that they apply for and procure a license for the year beginning July 1, 1945, and that on or before April 25, 1946, they pay to the commission one-tenth of one cent per barrel for all oil or gasoline transported through their pipe line for the calender months of April through December, 1945, and for the months of January, February and March, 1946.

The defendants, unwilling to comply with the order of the commission, have removed the order and proceedings to this court under art. 11, Sec. 7, of the New Mexico constitution.

The right to remove orders of the corporation commission to this court and have them here reviewed is limited to orders made by the commission under powers granted it by art. 11, Sec. 7, supra. The power to make such an order as we have in this case is not there included, and we are therefore without jurisdiction to make the review asked. In re Wallace Transfer Co., 35 N.M. 652, 6 P.2d 199.

The proceedings will therefore be remanded, and it is so ordered.

LUJAN, SADLER and COMPTON, JJ., concur.

BRICE, C. J., not participating.

183 P.2d 156

CRIST v. TOWN OF GALLUP.

No. 4938.

Supreme Court of New Mexico.

March 19, 1947.

Rehearing Denied Aug. 2, 1947.

F. A. Catron, of Santa Fe, for appellant.

Mechem & Hannett and A. T. Hannett, all of Albuquerque, and John R. Scanlon and George E. McDevitt, all of Gallup, for appellee.

McGHEE, Justice.

This is an action against the Town of Gallup to recover the value of bonds made worthless by the act of the town in paying bonds out of their numerical order. The trial court rendered judgment on the pleadings on the grounds the sole remedy of the plaintiff was by foreclosure, and that the issuance of the bonds was not submitted to a vote of the people as provided by Art. 9, Sec. 12 of the Constitution of New Mexico. We will refer to the parties as they appeared below.

By conventional proceedings, the municipality created a street improvement district, levied an assessment against the abutting property, and issued paving bonds payable out of the proceeds of the assessment, unless the owner of the property paid the assessment in full within 30 days after it became effective, it then was payable in 10 equal annual installments, the first on or before June 1, 1932, and the others successively on the same day in each year thereafter until paid in full. Failure to pay any installment when due immediately matured the whole of the unpaid principal. The bonds were in the principal sum of $100,000 consisting of 200 bonds in the denomination of $500 each. They all matured on Dec. 1, 1941, and were payable in numerical order. The plaintiff is the owner of 26 of these bonds, being numbers 63, 66 to 75, inclusive, and 81 to 95, inclusive. Attached to the bonds are numerous interest coupons.

The complaint had withstood attack by demurrer and stated a cause of action unless defeated by the defensive new matter. On account of the state of the pleadings the trial judge apparently considered only the two defensive matters above stated. Previously, Judge Moise had sustained demurrers to such new matter, but after our decision in Munro v. City Albuquerque, 48 N.M. 306, 150 P.2d 733, Judge Barker believed such decisions to be erroneous and as the orders were only interlocutory, in effect vacated them by allowing such matter to be again pleaded. This was a matter within his discretion and was not error as contended by plaintiff. 41 Am. Jur. Sec. 255, Pleading, p. 472.

Is foreclosure the sole remedy of plaintiff?

As shown by the recitations in the judgment, the trial judge based his decision on the Munro Case, supra. In that case we excused the City from liability for failure to foreclose assessment liens and allowing them to be barred by limitations, on the ground the bondholder was given the equal right of foreclosure, and that it was his duty to inspect the records and himself file suit on default of the city. It is true the majority spoke quite softly of the trust relation, but it did not repudiate this doctrine, which had been firmly established by Hodges v. City of Roswell, 31 N.M. 384, 247 P. 310; State ex rel. Ackerman v. City of Carlsbad, 39 N.M. 352, 47 P.2d 865, and State ex rel. Lynch v. District Court of McKinley Co., 41 N.M. 658, 73 P.2d 333, 113 A.L.R. 746. This limited result was reached over the vigorous protests of Mr. Justice Sadler and District Judge Barker, who sat in the case as a member of this court.

In Freeman v. Town of Gallup, 10 Cir., 152 F.2d 273, 274, in a case involving paving bonds of the same series as in this case, the circuit court of appeals of the Tenth Circuit gave our decision in the Munro case the same construction as did Judge Barker in the present case, that is, that plaintiff's sole remedy was by foreclosure, although Judge Phillips seems to have been largely influenced by his interpretation of our limitation statute, overlooking, however, the trust relation where limitation does not start running until the trust is repudiated.

We are of the opinion the Supreme Court of Colorado stated the correct rule on this point in Wangnild v. Town of Haxtun, 106 Colo. 180, 103 P.2d 474, and in the second appeal of the same case in 109 Colo. 518, 127 P.2d 328, that the owner of special improvements bonds could maintain an action for damages resulting from the failure of the treasurer of the municipality to pay the bonds in their numerical order as required by statute, which caused depletion of the fund out of which the bonds were payable to such extent that it did not contain money for payment of the owner's bonds.

We likewise approve the statement of that court in the second appeal that the town was a trustee of the special assessment funds acting for the bondholders, who were the cestuis que trustent, and that where such relationship exists no statute of limitations begins to run until there has been a repudiation of the trust.

The trial court erred in holding plaintiff's sole remedy was by foreclosure.

Does the fact that the issuance of the bonds sued on was not submitted to a vote of the qualified electors of the town as provided by Article 9, Section 12, of the New Mexico Constitution prevent recovery?

The liability sought to be imposed on the defendant is not because sufficient assessments were not levied to meet the indebtedness or that it assumed such indebtedness as a general liability, but for unlawful disbursements of funds collected, to the damage of plaintiff. As stated by Mr. Justice Sadler in his dissenting opinion in the Munro case, it arises not from within, but without the statute, and as he said, by our own decisions such a liability is not within statutory or constitutional limitations touching the creation and amount of municipal indebtedness. See Barker v. State ex rel. Napoleon, 39 N.M. 434, 49 P.2d 246; State ex rel. Martin v. Harris, 45 N.M. 335, 115 P.2d 80; In re Atchison T. & S. F. R. Co's. Taxes in Eddy Co. for 1933, 41 N.M. 9, 63 P.2d 345; 38 Am.Jur. 138, 139; 38 A. L.R. 1277.

The trial court also erred in its decision on this point.

An additional affirmative defense is urged but it was not passed on by the trial court on account of the state of the pleadings, that some bonds were accepted by the town from property owners as payment of the assessments and the liens against their property released, without any money changing hands; and that the town maintained complete records of such transactions.

Ordinarily, we do not pass on questions not necessary for a decision, but due to the long lapse of time since this case was filed and the misunderstanding of our holding in the Munro case, we state these facts, if true, do not constitute a defense. The bondholders had the right to assume that only money would be received in payment and they were not required to inspect the records to see that worthless bonds were being accepted.

The judgment will be reversed and the case remanded to the district court for further proceedings in accordance with this opinion, and it is so ordered.

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

On Motion for Rehearing.

In its motion for rehearing and in the argument thereon the appellee urges that the treasurer and not the town is the trustee, and calls our attention to the following statement in State ex rel. Ackerman v. City of Carlsbad, 39 N.M. 352, 47 P.2d 865, 869: "The city treasurer is the trustee, if this be a trust. His is the discretion if there is any."

A reading of the opinion impresses one that the court was not drawing a distinction between the city and its ministerial officer as the trustee. It is said elsewhere in the opinion: "While the city assumes no general liability for the payment of these bonds, it does obligate itself to create such paving fund, to collect and enforce

the special assessments, to place the proceeds in the fund, and to pay 'this bond out of such receipts in the manner provided by the ordinance under which this bond is issued.' Such a bond issue is an optional part of our statutory scheme for financing municipal improvements."

This court directly held the city was the trustee in Hodges v. City of Roswell, 31 N.M. 384, 247 P. 310, and State ex rel. Lynch v. District Court, 41 N.M. 658, 73 P.2d 333, 113 A.L.R. 746, and did not disaffirm it in the Munro case [Munro v. City of Albuquerque], 48 N.M. 306, 150 P.2d 733. It has also been so held by the Circuit Court of Appeals for the 10th Circuit in Gray v. City of Santa Fe, 89 F.2d 406, and in the same case in 10 Cir., 135 F.2d 374. The same holdings are made in City of New Orleans v. Warner, 175 U.S. 120, 20 S.Ct. 44, 44 L.Ed. 96; Wangnild v. Town of Haxtun, 106 Colo. 180, 103 P.2d 474, Id., 109 Colo. 518, 127 P.2d 328, and Blackford v. City of Libby, 103 Mont. 272, 62 P.2d 216, 107 A.L.R. 1348.

We reaffirm our previous holding that the town and not the treasurer is the trustee.

The town also urges that if there be a trust it is an implied or resulting trust, and that therefore the statute of limitations began running at the time of the commission of the wrongful acts, and that the action is barred. In addition to the case of Wangnild v. Town of Haxtun, cited in the original opinion, we call attention to the case of City of New Orleans v. Warner, supra, where the city had voluntarily undertaken the collection and disbursements of drainage assessments under authority of permissive legislation but had failed to discharge its duties. In a suit by a warrant holder against the city it was claimed by the defendant that his only recourse was to the fund and that the statute of limitations barred the action. In answering this contention, Mr. Justice Brown stated [175 U.S. 120, 20 S.Ct. 48]: "Having thus voluntarily assumed the obligations of a trustee with respect to this fund, it cannot now set up the statute of limitations against an obligation, which, as such trustee, it had undertaken and failed to perform. The rule is well settled that in actions by cestuis que trust against an express trustee, the statute of limitations has no applications, and no length of time is a bar. While that relation continues, and until a distinct repudiation of the trust by the trustee, the possession of one is the possession of the other, and there is no adverse relation between them."

Blackford v. City of Libby, supra, was an action by the holder of a warrant payable out of a special improvement fund where a deficit was caused by the treasurer paying one warrant two times, of which the plaintiff had notice at the time of the second payment. The city pleaded limita-

tions; that in making the payment of the second warrant, the city treasurer was acting as agent for the warrant holders, and not for the city and the payment was from a special fund, and not the funds of the city; that the duties of the city treasurer in that regard were defined by statute and the council had no control over him, and that in making the payment the treasurer was performing a governmental function.

The court held against these contentions, and among other things said [103 Mont. 272, 62 P.2d 218]: "When it so received that money, it became a trustee. Now it is being sued for negligence on account of its violation of that trust. The city must answer for its negligence in handling the trust funds."

The case quotes approvingly from State ex rel. Clark v. Bailey, 99 Mont. 484, 44 P. 2d 740, 744, on the status of the city treasurer: "The office of city treasurer is a continuing one, regardless of the person who may occupy it at any particular time, and the contention that the defendant in this action was not the person who held the office when the funds embezzled were received is not material. The city must answer for the illegal acts of its servants. * * * The city, and not the treasurer, is liable to the bondholder here." And further quoting: "A fund that is derived from a special levy or one created for a specific purpose is in the hands of municipal officials in trust. The municipality is merely a custodian, and its duties relative to such funds are purely ministerial. It may not use or divert them."

And again: "As we have already indicated, the fund as it was accumulated was held by the city as a trust fund for the warrant holders. While it was not in the strict sense of the word an express trust, the rule, we think, with respect to the running of the statute of limitations in such cases has a reasonable and practical application. It has been very generally held that, as between the trustee and the beneficiary of an express and continuing trust, the statute of limitations does not run until the trust has been clearly and unequivocally repudiated, and until notice of such repudiation has been received by the beneficiary." (Citing cases.)

In its brief and argument on rehearing the town for the first time calls attention to Sec. 27-117, 1941 N.M.S.A., of our limitation statutes which read: "None of the provisions of this chapter shall run against causes of actions originating in or arising out of trusts, when the defendant has fraudulently concealed the cause of action, or the existence thereof from the party entitled or having the right thereto."

It states as there was no allegation or proof of concealment that this statute and case of Patterson v. Hewitt, 11 N.M. 1, 66

P. 552, 55 L.R.A. 658, affirmed in 195 U.S. 309, 25 S.Ct. 35, 49 L.Ed. 214, are an absolute bar to the plaintiff's action. In answer to this claim we cite Chap. 181, Laws of 1941, the first section of which appears as Sec. 27-122, 1941 N.M.S.A., as follows: "No suit, action or proceeding at law or equity, for the recovery of judgment upon, or the enforcement or collection of any sum of money claimed due from any city, town or village in this state, or from any officer as such of any such city, town or village in this state, arising out of or founded upon any ordinance, trust relation, or contract written or unwritten, or any appropriation of or conversion of any real or personal property, shall be commenced except within three (3) years next after the date of the act of omission or commission giving rise to the cause of action, suit or proceeding; and no suit, action or proceeding to recover damages for personal injury or death resulting from the negligence of any city, town or village, or any officer thereof, shall be commenced except within one (1) year next after the date of such injury. All such suits, proceedings or actions not so commenced shall be forever barred, provided, however, that as to all such actions heretofore accrued, suit to recover thereon may be instituted at any time on or before December 31, 1941, but not otherwise."

We call attention to the fact that this action was filed Dec. 29, 1941, and that under the law as established in Orman v. Van Arsdell, 12 N.M. 344, 78 P. 48, 67 L.R.A. 438, the statute operated retrospectively and had the effect of reviving an action theretofore barred, provided it was filed on or before Dec. 31, 1941. This case has never been overruled and we find it cited in Re Goldsworthy's Estate, 45 N. M. 406, 115 P.2d 627, 148 A.L.R. 722, as well as in Bunton v. Abernathy et al., 41 N.M. 684, 73 P.2d 810. In fact, this 1941 Act and the case of Orman v. Van Arsdell, supra, provide an effective bar against escape on the part of the town even if we held with it in its contention that at most there was only an implied or resulting trust.

The town will have to reimburse the plaintiff for the loss sustained by him on account of its wrongful acts.

Our opinion in this case must not be understood as overruling the Munro case holding that a municipality is not liable to the bondholder for losses incurred because of its failure to institute foreclosure proceedings before the liens became barred by limitations under our decision in Altman v. Kilburn, 45 N.M. 453, 116 P.2d 812, 136 A.L.R. 554.

The motion for a rehearing is denied.

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

COMPTON, J., not participating.

183 P.2d 605

STATE ex rel. STATE TAX COMMISSION v. SAN LUIS POWER & WATER CO. et al.

No. 4943.

Supreme Court of New Mexico.

July 28, 1947.

F. S. Merriau, of Raton, and Malcolm Lindsey and L. H. Larwill, both of Denver, for appellants.

Harry L. Bigbee, Sp. Tax Atty., of Santa Fe, for appellee.

McGhee, Justice.

The appellant, defendant below, is the owner and operator of an irrigation system consisting of a dam and canals in Taos County used for the storage and distribution of water to various farmers for irrigation purposes. In August, 1939, the

treasurer of Taos County attempted to assess the irrigation works of appellant for the years 1934 to 1938, inclusive. On such assessment a tax deed was issued to the State on December 4, 1941. The state sued to quiet its title under the deed and it was held void by the district court for lack of a description sufficient to identify the property.

The defendant water company filed a counterclaim asking a declaratory judgment that its works are not taxable apart from the increased value of the lands served thereby. The court held such works were subject to taxation and it is this decision the water company asks us to reverse.

The defendant does not own the lands which are irrigated but stores and distributes the water for hire to the landowners. The lands served by the defendant's system are in New Mexico and Colorado. The court found that it had never been the custom in the State of New Mexico to assess irrigation works separate and apart from the increased value of the lands served thereby, and concluded as a matter of law that such had become the public policy of the state.

Art. 8, Sec. 3, of the New Mexico Constitution provides: "The property of the United States, the state and all counties, towns, cities and school districts, and other municipal corporations, public libraries, community ditches and all laterals thereof, all church property, all property used for educational or charitable purposes, all cemeteries not used or held for private or corporate profit, and all bonds of the State of New Mexico, and of the counties, municipalities and districts thereof shall be exempt from taxation."

Section 76-101, 1941 Comp., provides: "All property, real, personal and intangible shall be subject to taxation, except as in the constitution and existing law otherwise provided. Taxation upon property shall be at the rates and subject to the conditions as may be fixed by legislative acts."

In Sims v. Vosburg, 43 N.M. 255, 257, 91 P.2d 434, 435, we said: "All tangible property in New Mexico is subject to taxation in proportion to value, and should be taxed, unless specifically exempted by the constitution or by its authority. Secs. 1, 3, and 5 of Article VIII, N.M. Constitution; Albuquerque Alumnae Ass'n v. Tierney, 37 N.M. 156, 20 P.2d 267; State v. State Tax Commission, 40 N.M. 299, 58 P.2d 1204."

Article 10, section 3, of the Constitution of the State of Colorado is as follows: "All taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws, which shall prescribe such regulations as shall secure a just valuation for taxation

of all property, real and personal; Provided, That the personal property of every person being the head of a family to the value of $200 shall be exempt from taxation. Ditches, canals and flumes owned and used by individuals or corporations, for irrigating land owned by such individuals or corporations, or the individual members thereof, shall not be separately taxed so long as they shall be owned and used exclusively for such purposes."

It will be noticed that the New Mexico constitution exempts community ditches and their laterals, while the Colorado constitution exempts ditches, canals and flumes used in irrigating land owned by such individuals or corporations or the individual members thereof for irrigating their lands. This same company sought to have its irrigation works held exempt from taxation in San Luis Power & Water Co. v. Trujillo, 93 Colo. 385, 26 P.2d 537, 541 but the Supreme Court of Colorado there held such property taxable. It is true that there the ownership of the water was in the water company, while this case concerns public water, the use of which belongs to the owner of the land on which it has been beneficially used and is appurtenant thereto. It is the physical property of the defendant used for the storage and distribution of the water that is sought to be taxed, not the water rights.

The defendant says that as the water it delivers greatly increases the value of the land that, therefore, it is the land so benefitted that should pay the taxes and not its works, although it is in business for profit. It would, in our opinion, be just as logical to make the home owner pay the taxes of a public utility because its service adds value to the home.

Community ditches and their laterals are exempted from taxation by the constitution but other irrigation works are taxable.

The defendant strongly contends that because the taxing authorities have heretofore neglected their duties and failed to assess irrigation works that we should, in effect, hold that our constitution has been amended in this respect. This we cannot do.

The defendant likewise urges upon us that its plant is the only one in the State that has been so assessed and that it would be discriminatory to single it out for taxation. The record shows that the taxing authorities in Taos county have been trying to put this property on the rolls for many years but their assessments were held invalid by the district court. This is, however, a test case and the law having been declared it may be assumed that the taxing authorities will do their duty. Oden Buick, Inc., v. Roehl, 36 N.M. 293, 13 P.2d 1093. We agree that the defendant can not be singled out and its property alone assessed while other like properties are allowed to go tax free. Hillsborough Tp. v. Cromwell, 326 U. S. 620, 66 S.Ct. 445, 90 L.Ed. 358. This is

before us on a declaratory judgment, and if the taxing authorities fail to perform their duty and place other like properties on the tax rolls the district court may grant such relief as may be proper.

We have considered this case as of the time it was tried in the district court and leave the constitutionality of Chapter 86 of the 1947 Session Laws for determination to the time it may be properly brought before us.

We are of the opinion that the decision of the district court was correct. The judgment is affirmed, and it is so ordered.

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

183 P.2d 607

STATE ex rel. DEL CURTO et al. v. DISTRICT COURT OF FOURTH JUDICIAL DIST. et al.

No. 4970.

Supreme Court of New Mexico.
May 28, 1947.

Rehearing Denied July 24, 1947.

Reese & Reese, of Roswell, and Rodey, Dickason & Sloan, of Albuquerque, for petitioner.

W. A. Keleher and Theo. E. Jones, both of Albuquerque, for respondents.

McGHEE, Justice.

This is an original action seeking to prohibit a retrial of Burguete v. Del Curto, which involves the ownership of a state grazing lease, in which we reversed the judgment of the district court because the state was not a party to the suit. Burguete v. Del Curto, 49 N.M. 292, 163 P.2d 257.

A mandate was issued directing the district court to vacate its judgment and dis-

miss Burguete's cause of action, but a majority granted a motion to recall the original mandate and ordered the issuance of a new one in which the direction to dismiss was omitted. The Commissioner of Public Lands then entered a limited appearance as a defendant in the lower court. For the purpose of this case only we will treat it as a general appearance on his part.

We held in State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059, and in State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027, that an action against the Commissioner of Public Lands, except to compel the performance by him of a ministerial duty, is an action against the state, which may not be maintained without its consent.

The only authority which may give this consent is the legislature. We hold that the attempt of the Commissioner of Public Lands to make the state a party defendant was a nullity, and that, therefore, it is still not a party to the suit.

We must hold, therefore, that the order modifying the mandate in Burguete v. Del Curto, supra, was improvidently made; that the district court is without jurisdiction to do anything in the case except to dismiss it as directed by the majority opinion in Burguete v. Del Curto, supra.

The alternative writ of prohibition heretofore issued will, therefore, be made absolute, and it is so ordered.

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

SADLER, Justice (dissenting).

I dissent.

The prevailing opinion is not quite accurate in stating that the majority in the opinion on former appearance before us of this litigation "granted a motion to recall the original mandate and ordered the issuance of a new one in which the direction to dismiss was omitted." The majority in that case accomplished more than that. Indeed, they made no specific direction as to issuance of a new mandate at all. They simply deleted from the *opinion* on file the direction for a dismissal upon remand and substituted for such language, the following:

"The judgment is reversed and the cause remanded with direction to the trial court to set aside its judgment and for further proceedings consistent with and conformable to the views herein expressed."

The foregoing is said to demonstrate that the order entered on motion to recall mandate, in effect, was an opinion on rehearing since it removed from the opinion filed one direction to the district court on how to proceed following remand and substituted therefor another direction. Necessarily, the change was for the purpose of giving the plaintiff an opportunity to

satisfy the trial court that the Commissioner could properly be made a party defendant, either with or without his consent. This was a decision the majority in the former opinion expressly declined to make since the matter was not before this court for review, never having been ruled upon by the trial court. The latter court, *the only court* having original jurisdiction to decide the question took the view that neither the state nor the Commissioner was a necessary party to the suit.

That the matter was never passed upon by the court in the former opinion is abundantly demonstrated by excerpts from the opinion. At one point, we said [49 N. M. 292, 163 P.2d 258]:

"The jurisdiction of the Commissioner not ever having been invoked by any of the transaction, as between any of the parties, touching upon the use of the lands by one not a party to the lease, and himself a stranger to the Commissioner, and this proceeding not arising out of a contest action before the Commissioner, and the Commissioner not being made a party hereto, can this suit be maintained?"

Again, at another point, the opinion reads:

" * * * Certainly, in any event, the jurisdiction of a court of equity may not be invoked absent this necessary and indispensable party, the Commissioner.

"The Commissioner is not a party to this litigation."

Further on, the opinion proceeds:

"And, whether the Commissioner could be made a party to such suit without his consent, we, likewise, need not, and do not decide. We know that in State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090, mandamus was employed without question of its appropriateness if it could be said that a clear legal duty rested upon the Commissioner to respect a clear legal right. See also American Trust & Savings Bank of Albuquerque v. Scobee, supra [29 N.M. 436, 224 P. 788], in this connection."

In the former opinion, it was clearly held that the Commissioner was an indispensable party. As already pointed out, we expressly declined to offer a gratuitous opinion on whether he could be made a party. no effort having been made to join him as such and any declaration on the subject operating to review no ruling of the trial court. Accordingly, in a motion to recall the mandate, the plaintiff informed this court of the Commissioner's willingness to enter a voluntary appearance in the case and asked such an amendment of the mandate as would give the lower court power to act upon the application for leave to appear. We so amended the language of our opinion on file as to permit this. And, now, the defendants in that case, but as

the relators here, seek by prohibition to deny the district court the exercise of jurisdiction, obviously possessed by it, to determine in the course of trial whether the appearance before it of a state official as a party litigant amounts to an unwarranted appearance by the state. The present majority sustain them in this claim.

If the defendants be correct in this contention, then when this court entertained appeals in State ex rel. Evans v. Field, 27 N.M. 384, 201 P. 1059; American Trust & Savings Bank of Albuquerque v. Scobee, 29 N.M. 436, 224 P. 788; State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027; Looney v. Stryker, 31 N.M. 557, 249 P. 112, 50 A.L.R. 1404; Arnold v. State, 48 N.M. 596, 154 P.2d 257, and others unnecessary to cite, where the state's immunity to suit was involved, we were reviewing judgments and decrees that were complete nullities and might have been ignored as such in the absence of direct review.

In this very case, where presence of the state as an indispensable party was urged by motion as a ground for dismissal and the motion denied, could it be successfully maintained that, absent a direct review, the judgment entered would be a nullity as between the plaintiff and defendant, granting the same would not be binding on the state? Cf. Mann v. Whitely, 36 N.M. 1, 6 P.2d 468. If not, then the district court had jurisdiction to render it even though it determined erroneously, as in our former opinion we held it did, its power to proceed. State ex rel. St. Louis Rocky Mountain & Pacific Co. v. District Court, 38 N. M. 451, 34 P.2d 1098.

In the group of cases cited, supra, involving the state's immunity from suit, it so happens that in each of them the claim to immunity was sustained. But the claim is not always well taken. Board of Trustees of Town of Casa Colorado Land Grant v. Pooler, 32 N.M. 460, 259 P. 629; Gamble v. Velarde, 36 N.M. 262, 13 P.2d 559. See, also, the historic case of United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171. As indicated in the Pooler case, supra, the matter is one rarely easy to decide.

In that case, this court said [32 N.M. 460, 259 P. 630]:

"Whether a suit nominally against individuals is really against the state is not always easy to decide. The question has given the courts much trouble, and in some situations its consideration has disclosed contrariety of opinion. See case notes, 108 Am.St.Rep. 830 and 44 L.R.A.(N.S.) 189."

In both the cases of Board of Trustees v. Pooler and Gamble v. Velarde, cited supra, the claim, although interposed, was not sustained. Are we to understand that our district courts have jurisdiction to resolve the issue when they determine it correctly but not when they decide it erro-

neously? In answer to a similar contention in State ex rel. St. Louis, Rocky Mountain & Pacific Co. v. District Court, supra, we said [38 N.M. 451, 34 P.2d 1099]:

"It is argued that 'subject matter,' as the term is used in the Gilmore Case [(Gilmore v. District Court), 35 N.M. 157, 291 P. 295], means not jurisdiction of workmen's compensation litigation, but, to be specific, jurisdiction of claims filed within the statutory time. That is to say, the statute confers jurisdiction upon the district courts to award compensation to those entitled to it, not to those not entitled; to render some judgments, not others.

"We consider the law settled to the contrary in this state. Here the test of jurisdiction is not the right or authority to render a particular judgment; it is the right or authority to render any judgment."

In the Heron case, 46 N.M. 296, 128 P.2d 454, at page 458, after referring to the foregoing exposition on prohibition in the St. Louis, Rocky Mountain & Pacific Co. case, supra, we applied a test which still obtains. Mares v. Kool, 51 N.M. 36, 177 P.2d 532. We said:

"We think it fair to say of our decisions on the question when to prohibit, in line with what has just been quoted from State ex rel. St. Louis, Rocky Mountain & Pacific Co. v. District Court of Eighth Judicial District, supra, that if, absent prohibition in the given case, the judgment therein rendered, unless reversed for error on direct review, would be binding on the parties and not subject to collateral attack as a mere nullity, then prohibition will not lie; otherwise it will."

Unless the judgments reviewed by us in the many cases cited supra, brought here by appeal and involving the question of the state's immunity to suit, all were nullities; unless, in disregard of our former decisions in the cases of State ex rel. St. Louis, Rocky Mountain & Pacific Co. v. District Court, 38 N.M. 451, 34 P.2d 1098; State ex rel. Heron v. District Court, 46 N.M. 296, 128 P.2d 454; Mares v. Kool, 51 N.M. 36, 177 P.2d 532, and many others which might be cited, we are to transform prohibition before us from a yardstick of jurisdiction into a vehicle for review, then the alternative writ herein was improvidently issued and should be discharged.

It should be remembered that all we held in Burguete v. Del Curto, 49 N.M. 292, 163 P.2d 257, 260, was that, upon the state of the record as it then stood, the plaintiff could not proceed because of the absence of an indispensable party—the state as owner of the land under lease. At times we mentioned the Commissioner of Public Lands as the indispensable party, unquestionably thinking of him as synonymous with and the representative of the state and at other times contemplaing him as a party when not so viewed, as in connec-

tion with our citation of the Vesely case on the question whether the Commissioner could be joined without his consent, where we said:

"We know that in State ex rel. McElroy v. Vesely, 40 N.M. 19, 52 P.2d 1090, mandamus was employed without question of its appropriateness if it could be said that a clear legal duty rested upon the Commissioner to respect a clear legal right."

The point is that we did not go beyond the holding that the state or the Commissioner was an indispensable party. Whether under the special facts of this case the state, or the Commissioner if his presence amounts to a joinder of the state, would enjoy the sovereign's immunity from suit, or whether under the law and facts, consent could be derived; or whether, under the dominion accorded the Commissioner over public lands and his expressed willingness to appear as a party, even viewing his appearance as that of the state, it could be treated as an intervention with him as the actor and the proceeding regarded as one *by* rather than *against* the state—all are questions which remained open, unsettled and undetermined at the time of our decision in the former case. Notwithstanding the state's immunity to suit, none could question the Commissioner's right as a plaintiff to become a party to suits of many kinds in protecting the state's interest in public lands where jeopardized.

All that our further order on motion to recall and amend the mandate accomplished was to correct the erroneous direction in the opinion filed calling for a dismissal and thus leave it open for the district court to exercise its unquestioned original jurisdiction to settle and determine these matters. They were questions that had never been decided arising on our decision that the state was a necessary party. The district court was the only court having original jurisdiction to determine them in the first instance.

Laying aside momentarily any possibility of plaintiff securing presence of the state as a party in a manner that would not amount to a suit against the state, let us suppose this to be a case where the state had consented to be sued. We know as a fact that the state has consented to suit in certain cases. Should we order a dismissal and deny to the plaintiff the privilege of asking leave to amend to make the state a party? Obviously not. The direction should be one for "further proceedings" consistent with the opinion. That is exactly what we have done here. We have given the plaintiff an opportunity, if he can, to show consent of the state to be sued and thereupon to join it as a defendant; or, to secure its presence as a party voluntarily, in the capacity of an actor, such as an intervenor or otherwise, in any manner open to the plaintiff. The fact, if it be a fact,

that the plaintiff may be unable to do so is no proof whatever that the trial court lacks jurisdiction to hear and determine the matter.

My opinion remains the same as that entertained at the time we were considering plaintiff's motion to recall and amend mandate in the former case. In a memorandum circulated among the justices at that time, I stated:

"The only question for serious consideration by us, it seems to me, is whether we should now of our own accord go into the question of the plaintiff's right to get the Commissioner in as a party under any condition or conditions and if we conclude he can not, then let the present mandate stand. I do not favor such a course because it is really a matter for presentation to, and decision by, a Nisi Prius Court in the first instance, its ruling on the matter to be reviewed by us. Hence, we should be exercising an original jurisdiction properly belonging to the trial court, not a proper appellate jurisdiction, and that, too, on a question neither briefed nor argued before us thus far."

The district court has unquestioned jurisdiction to determine whether an appearance by the Commissioner of Public Lands, under the circumstances, amounts to an appearance by the state; and, as well, the further question whether the state can become a party to the suit, voluntarily or otherwise. If these questions be erroneously decided, the remedy of an aggrieved party is by appeal, not prohibition.

Accordingly, the alternative writ should be discharged. The majority concluding otherwise, the foregoing is to express my complete disagreement both with the result and the reasoning of the prevailing opinion.

On Motion for Rehearing.

BRICE, Chief Justice.

The opinion of the court in Burguete v. Del Curto is the law of that case, and is binding on us and on the district court. This court by its mandate did not authorize the trial court to permit new parties to be added, nor did it authorize a new trial. The fact that the Commissioner of Public Lands had signified his willingness to enter *his* appearance in the case as the motion to recall the mandate indicated, is immaterial. We did not authorize any such proceeding, and the district court's jurisdiction is limited by the law as stated in the opinion of the court. The mandate directed the district court to set aside its judgment; and authorized "further proceedings consistent with and conformable to the views herein (in the opinion of the court) expressed."

This accorded with the opinion; but if there had been any doubt about this court's intention the district court must look to the opinion, not to motions filed in

this court. Even the mandate must give way to the opinion as to the law of the case, if there is any conflict between them. In First National Bank of El Paso, Tex., v. Cavin, 28 N.M. 468, 214 P. 325, the mandate ordered a new trial with no limitations, and the district court granted it. But the supreme court on a second appeal held that the trial court erred in trying the issues anew, except as to an accounting authorized by the opinion of the Court. This court said:

"Appellee strenuously contends that the lower court, at the second trial, was correct in rehearing all the issues involved, and bases this contention largely upon the wording of the judgment and mandate of this court made and issued at the time this case was first before this court on appeal. * * * In effect they contend that when a case is reversed and a new trial ordered, the lower court is bound by the judgment and mandate only, and may close his eyes to any limitations or conditions imposed in the opinion of the court. * * *

"The only thing contained in the mandate issued on said judgment was a direction to the lower court to grant a new trial. If, as the appellee's counsel contend, the only thing the lower court looks to is the judgment and mandate of this court, it is useless for this court to write an opinion, and, in effect, the rule of the 'law of the case' is destroyed, for no one will contend that the court will look to the judgment or mandate, such as was rendered and issued in this matter, for the law of the case, but necessarily must look to the opinion of the court."

The mandate in this case, however, requires the district court to proceed according to the law as it was adjudged to be in the opinion of the court. It does not permit of a new trial or the addition of parties contrary to the express terms of the opinion. Neither in the opinion nor in the mandate is there any suggestion of a new trial or the addition of parties, and the opinion of the court does not permit of it.

The effect of the opinion is that the state was a necessary party to the suit, and that this court was without authority to pass on the merits, and that it should be dismissed.

The trial court is without authority to retry any issue or permit the making of additional parties, as the opinion of the court fixed the law of the case in favor of sustaining the motion to dismiss for want of an indispensable party. Whether right or wrong, the district court's jurisdiction is limited to a dismissal of the case. A similar question was decided in City of Orlando v. Murphy, 5 Cir., 94 F.2d 426, 429. The court stated in its opinion:

"* * * Where the merits of a case have been once decided on appeal, the trial court has no authority, without express leave of the appellate court, to grant a new

trial and rehearing, or a review, or to permit new defenses, on the merits to be introduced by amendment. * * *

"When, as here, the reversing decision, though it directs the entry of no particular judgment, yet comprehensively canvasses and finally disposes adversely of the right of plaintiff to recover, and remands the cause for further proceedings not inconsistent with the opinion, the District Court should not permit the filing of, and the retrial of the case on, amendments which do not go to and remove the adjudged deficiencies in the cause of action. It should, as was done here, refuse the amendments and proceed to judgment in accordance with the reversing opinion."

It is to be regretted that the Commissioner of Public Lands was referred to in the Burguete opinion a number of times, when the reference should have been made to the state. The Commissioner of Public Lands is merely an agent of the state with such powers, and only such, as have been conferred upon him by the Constitution and laws of the state as limited by the Enabling Act. This court has stated that the Commissioner of Public Lands has "absolute dominion" over the state's public lands, State ex rel. Otto v. Field, 31 N.M. 120, 241 P. 1027; but that was modified in Burguete v. Del Curto, in which it was said [49 N.M. 292, 163 P.2d 259]:

"It's well settled in New Mexico that under the Enabling Act, our Constitution and the statutes based thereupon, the Commissioner of Public Lands has complete dominion, which is to say complete control, over state lands. (Citations.) This 'dominion' is, of course, subject to the restrictions imposed by the Enabling Act, the Constitution, and the statutes, and the manner of its exercise is subject to review by the courts."

But this last statement fixes the Enabling Act, Constitution and state laws as limitations on his authority, not a grant of it. The fact is the Commissioner of Public Lands has only such authority as has been granted to him by the Constitution and state laws, as limited by the Enabling Act.

By the Constitution of the State of New Mexico, Article 21, Sec. 9, the following compact with the United States was adopted:

"This state and its people consent to all and singular the provisions of the said act of congress, approved June twentieth, nineteen hundred and ten, concerning the lands by said act granted or confirmed to this state, the terms and conditions upon which said grants and confirmations were made and the means and manner of enforcing such terms and conditions, all in every respect and particular as in said act provided."

By this compact the Enabling Act became a part of the Constitution of New Mexico. Lake Arthur Drainage Dist. v. Field, 27 N.M. 183, 199 P. 112.

Article XIII of the Constitution reads as follows:

"Sec. 1. All lands belonging to the Territory of New Mexico, and all lands granted, transferred or confirmed to the state by congress, and all lands hereafter acquired, are declared to be *public lands* of the state *to be held or disposed of as may be provided by law* for the purposes for which they have been or may be granted, donated or otherwise acquired. * * *

"Sec. 2. The commissioner of public lands shall select, locate, classify, and have the direction, control, care and disposition of all public lands, *under the provisions of the acts of congress relating thereto and such regulations as may be provided by law.*" (Our emphasis.)

The Constitution of New Mexico in this particular is very similar to the Constitution of Idaho; Secs. 7 and 8 of Art. IX of which read as follows:

"Sec. 7. The Governor, Superintendent of Public Instruction, Secretary of State, and Attorney General * * * shall constitute the State Board of Land Commissioners, *who shall have the direction, control and disposition of the public lands of the State, under such regulations as may be prescribed by law.*

"Sec. 8. It shall be the duty of the state board of land commissioners to provide for the location, protection, sale or rental of all the lands heretofore, or which may hereafter be granted to the state by the general government, *under such regulations as may be prescribed by law,* and in such manner as will secure the maximum possible amount therefor." (Our emphasis.)

The powers conferred by the Idaho Constitution on the State Board of Land Commisioners are so similar to those conferred by our Constitution on the Commissioner of Public Lands as to render highly persuasive what is said by the Idaho Supreme Court in Balderston v. Brady, 17 Idaho 567, 107 P. 493, 494, regarding such powers. The Board of Land Commissioners of that state were going to relinquish certain public lands to the United States, as ordered by a resolution of the legislature. In that action brought to contest the right and authority of the board to release the land to the United States, the court held that the resolution was not *"a regulation prescribed by law,"* and held that the board of land commissioners was not authorized to make such release, and further stated:

"In support of the demurrer the defendant contends that the board is vested by the Constitution (section 7, art. 9) with *unqualified power and authority* over the lands granted by the United States to the state, and is vested with *unlimited discretion* in the matter of selection of such lands, and may likewise, in its discretion, relinquish any such lands." (Our emphasis.)

Secs. 7 and 8 above quoted, are then quoted by the court.

"Now, there can be no question or doubt but that the 'direction, control and disposition of the public lands of the state' is vested in the State Board of Land Commissioners. It is equally clear and certain that this power must be exercised *'under such regulations as may be prescribed by law.'* Both of the foregoing sections of the Constitution contain the same provision as to this *limitation of power.* * * *

"The real question then recurs: Has the state *authorized* the relinquishment of sections 16 and 36, and has the *State Land Board* the authority to relinquish the state's right to such land? But one answer can be given to this query. *The authority for such an act cannot be found in either the Constitution or statute.* It is therefore perfectly safe to say that no such power exists. We have hereinbefore said that the board must act under the law. It must find authority in the Constitution and statute for its acts. * * *" (Our emphasis.)

Also see Newton v. State Board of Land Commissioners, 37 Idaho 58, 219 P. 1053; Walpole v. State Board of Land Com'rs, 62 Colo. 554, 163 P. 848; Burke v. Southern Pacific Ry. Co., 234 U.S. 669, 34 S.Ct. 907, 58 L.Ed. 1527.

Nothing stated in this opinion is intended to question the authority of the Commissioner of Public Lands to reserve to the state all minerals in any contract, sale or conveyance of state lands. We agree that he has that authority, as held in State ex rel. Otto v. Field, supra.

There is no law authorizing the Commissioner to substitute himself for the state in litigation; nor can he make the state a party or enter its appearance without specific authority from the legislature, and none has been granted to him which will authorize him to enter the appearance of the state in the Del Curto case, and that is the effect of his act. See State ex rel. Evans v. Field, 27 N.M. 384, 385, 201 P. 1059.

The district court lost complete jurisdiction of the Del Curto case when it was appealed to this court. Upon remand it regained only such jurisdiction as the opinion and mandate of this court conferred; and in effect that was a direction to dismiss the case because of the lack of an indispensable party.

The contention that the district court should first pass upon the question of the right of the Commissioner of Public Lands to make himself a party to the suit as a representative of the state, in view of the preceding conclusion, we think need not be answered. But as the Commissioner cannot make himself a party to the suit in his official capacity, because it would be in effect an attempt to make the state a party without authority of law, it would but prolong litigation to permit it.

Our original conclusion will not be disturbed.

It is so ordered.

LUJAN, McGHEE, and COMPTON, JJ., concur.

SADLER, Justice (dissenting).

The majority still furnish no reason why this court should abandon its long established doctrine of declining to interfere by prohibition with proceedings below where the trial court has jurisdiction of the subject matter and the parties, even if we can see the court about to fall into error. All we held in the former case was that the state was an indispensable party. Whether it could be made a party is left undetermined. Since when, then, is a district court without jurisdiction to decide the preliminary question whether the state has consented to be sued in given circumstances and, if so, whether joinder as a party of a named public official amounts to a suit against the state?

Of course, it is easy enough for us to anticipate the correct answers to these inquiries while hearing an appeal and endeavor to take a short cut to final determination by directing dismissal on remand. We did so in our original opinion and then reversed the holding on reconsideration by substituting a direction for "further proceedings." To say now that the trial court lacks jurisdiction to "further proceed" in the face of that command is as insupportable as to assert ourselves without jurisdiction so to direct. The majority are holding the district court lacks jurisdiction to decide an *elemental* question certain to arise in every suit or action by or against the state, namely, has the legislature consented?

What is said in the prevailing opinion touching the "absolute dominion" of the Commissioner of Public Lands over state lands as dwelt upon in previous decisions of this court meets with my approval.

I persevere in my dissent, otherwise.

183 P.2d 615

DAVIES v. RAYBURN et al.

No. 5029.

Supreme Court of New Mexico.

July 23, 1947.

Rehearing Denied Aug. 25, 1947.

J. Lewis Clark, of Estancia, for appellant.

Fred H. Ayers and F. Ernest Ayers, both of Estancia, for appellee F. C. Bowden.

McGHEE, Justice.

The appellant, plaintiff below, seeks a reversal of a decree that she had lost title to the tract of land which is the subject of this action on account of its sale for taxes to the appellee Bowden and in quieting his title on a cross-complaint.

The appellant in practical effect attacks the findings of fact of the trial court, but she has not complied with Sec. 6 of Rule 15 by stating the substance of all evidence bearing upon the proposition, and we therefore accept such findings. Alamogordo Improvement Co. v. Prendergast, 45 N.M. 40, 109 P.2d 254.

When the appellant went to pay her taxes on the tract in 1935 she made inquiry as to its prior assessment and was told by the treasurer that it was not assessed prior to 1935, when it had in fact been assessed for prior years in School District 6 instead of in District 15, where it was situated. Although she knew the land was assessable for prior years she did not request that it be assessed. At a tax sale held December 6, 1934, the land was sold for taxes and a deed therefor issued to the state. Shortly after she had been told the land was not assessed prior to 1935 she was told of the mistake and that the land had been sold to the state. Several months after she had such knowledge the land was sold by the Tax Commission to the defendant Bowden.

In State ex rel. McFann v. Hately, 34 N. M. 86, 278 P. 206, we held that a redemption can not be prevented by the fault or mistake of the collecting officer whose duty it is to furnish the taxpayer the requisite information, and we have followed this case in

numerous decisions since that time and protected the taxpayer who failed to pay delinquent taxes because of a mistake by the collecting officer. In Scudder v. Hart, 45 N.M. 76, 110 P.2d 536, we protected a mortgagee where such a mistake had been made even though the owner had been advised of the mistake in time to effect a redemption, but in this case it is clearly indicated that had the mortgagee also been advised of the mistake, relief would have been denied him. In that case we quoted with approval the first part of 61 C.J. 1290, Sec. 1794, to the effect that a landowner seeking to redeem his property but failing to do so because of erroneous information given him by the collecting officer would be protected. In the latter part of this same section we find: "To enable the owner to claim the right to redeem on this ground, however, it must appear that the fault or mistake was exclusively that of the officer, unmixed with any mistake or negligence on the part of the owner himself * * *."

See also Gow v. Tidrick, 48 Iowa 284, where it is held that the fact that the treasurer, honestly mistaken, told the defendant, a prospective bidder at a tax sale, that the taxes had been paid and the land would not be sold, is not ground for setting aside a subsequent tax sale where the party complaining having been informed thereof, bought the fee but did not redeem from the tax sale, although he had ample time to do so.

In this case the appellant was advised of the mistake and of the fact that her land had been sold to the state for delinquent taxes and although she had ample time in which to redeem it she failed to do so.

She has lost her land as the result of her own negligence, and the judgment will be affirmed. It is so ordered.

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

183 P.2d 845

STATE v. ARNOLD.

No. 5020.

Supreme Court of New Mexico.

Aug. 6, 1947.

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

William T. O'Sullivan, of Albuquerque, for appellee.

COMPTON, Justice.

A jurisdictional question presents itself at the outset. This court will notice the state of the record to determine whether it has jurisdiction and may, from its own discovery, question that fact. Lack of jurisdiction at any stage of a proceeding is a controlling consideration to be resolved before going further. Davidson v. Enfield, 35 N.M. 580, 3 P.2d 979. An examination of the record discloses that the final judgment was entered September 3, 1946. The order granting an appeal was entered December 21, 1946. No timely application for an appeal was made or filed.

Rule 5, paragraph 1 of the Rules of the Supreme Court, section 19-201(5), relating to the taking of appeals is as follows: "Within three months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the Supreme Court."

This rule modifies Sec. 105-2501, N.M. 1929 Comp., which reads as follows: "Within six months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the supreme court of the state."

Thus the question is presented (1) whether Rule 5, Section 1, effectually modifies Section 105-2501, 1929 Comp., and if so, (2) do we have jurisdiction to proceed to a determination of the matter on the merits in the face of the rule limiting the time.

It is contended by appellant that the statute in question is concerned solely with substantive rights and cannot be modified or limited by rule and that, consequently, the rule is void. Accordingly, the appellant urges this court to proceed to a determination of the issues involved. In 1933 the legislature enacted a statute concerning the rule making power known as Laws of 1933, Chapter 84, 1941 Comp., Sec. 19-301, reading as follows: "The Supreme Court of the state of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. The Supreme Court shall cause such rules to be printed and distributed to all members of the bar of the state of New Mexico and to all applicants, and the same shall not become effective until thirty (30) days after they have been so printed, made ready for distribution and so distributed."

The rule adopting all statutes relating to pleading, practice and procedure is Section 19-302, 1941 Comp., as follows: "All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act (§§ 19-301, 19-302) have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto."

It would serve no good purpose for us to indulge in exhaustive discussion of the Supreme Court's rule making power. The subject is so well considered in the case of State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1, that we see no occasion to add to what is there said. Suffice it to say that, whatever the source, this Court possesses unquestioned power to make rules touching pleading, practice and procedure. That this much is affirmed in State v. Roy, supra, none can question. The decisive consideration in the case before this court, then, is whether the rule adopted by it limiting the time for taking an appeal to three months, rather than six months as previously provided by statute, effects a substantive right or a matter of procedure merely.

This exact question has been before the Supreme Court of Colorado and decided by it adversely to the contention of appellant in the case at bar. The Colorado Act

of 1913, Laws 1913, p. 447, granting to the Supreme Court the power to make "rules of practice and procedure in all courts of record" expressly stated that such rules should supercede any statute in conflict therewith. At the time the Act was passed the statutory period for issuing a writ of error was three years. In 1917 the Supreme Court adopted a rule reducing this period to two years. It was over this new rule that the contest as to the validity of the enabling act was presented to the Supreme Court in Ernst v. Lamb, 73 Colo. 132, 213 P. 994, 995.

The plaintiff in error, barred by the rule but not by the statute, contended that the Act of 1913 was unconstitutional as an effort to delegate legislative power and that the rule was void because it attempted to change the statute of limitation as if it were a matter of procedure. Both points were ruled against the plaintiff in error. In a very succinct statement the Supreme Court of Colorado announced its ruling in this language, to-wit: "But now the point is made that a limitation on the time within which error may be brought is not within the scope of this act, because neither a matter of practice nor procedure. We think otherwise. (Then follows a history of legislation concerning practice and procedure in Colorado). With a history like the foregoing, covering 60 years, we cannot say that the limitation of a writ of error does not belong to the category procedure." See, also, Walton v. Walton, 86 Colo. 1, 278 P. 780.

The processes for the administration of the law are composed of three elements: pleading, practice and procedure. Statutes relating to pleading and practice are procedural and may be modified by rule. See "The Source of Authority for Rules of Court Affecting Procedure", Washington University Law Quarterly, June 1937 issue, Volume 22, Secs. 3, 4 and 5.

It may be readily conceded that if the legislature had authorized no appeal, this court would be powerless to create the right of appeal by rule. The creating of a right of appeal is a matter of substantive law and outside the province of the court's rule making power. Nevertheless, once the legislature has authorized the appeal, reasonable regulations affecting the time and manner of taking and perfecting the same are procedural and within this court's rule making power.

We conclude from what has been said that the rule in question reducing the time for taking an appeal from six months to three months is dealing with a matter of procedure and is within the rule making power of this court. Accordingly, it appearing that the appellant neither applied for nor was granted an appeal within the

period prescribed by the rule, its appeal should be dismissed.

It is so ordered.

LUJAN, SADLER, and McGHEE, JJ., concur.

BRICE, C. J., not participating.

183 P.2d 847

MITCHELL v. ALLISON.

No. 4974.

Supreme Court of New Mexico.

July 17, 1947.

O. O. Askren, of Roswell, for appellant.

E. E. Young, of Roswell, for appellee.

COMPTON, Justice.

Appellant Joe Mitchell sought to recover damages from appellee Claude Allison, for breach of an oral contract, wherein appellant employed appellee, a real estate broker to purchase a certain tract of land for appellant. Upon motion the trial court dismissed the complaint, in which the following was charged as ground for the recovery of damages:

"That during the month of June, 1945, the plaintiff desired to purchase the North Half of Sec. 13, Township 14 South, Range 25 East, in Chaves County, New Mexico, and

during said time was approached by defendant Allison with reference to buying said property from one A. H. Konigmacher of Fresno, California, and at said time the defendant advised the plaintiff that he thought he could buy said land for $3 per acre, and after further conference defendant offered to act for plaintiff and secure a deed for said land free of encumbrance, for the plaintiff for $3 per acre, from the said Konigmacher; and at said time the plaintiff accepted the offer of the services of the defendant and authorized the defendant to negotiate with the owner of said land and procure a deed from said owner to plaintiff.

"The defendant, as a broker for the plaintiff, disregarded his duties to the plaintiff and ultimately negotiated a deal with the said Konigmacher and placed in the name of one Sherman; and, on information and belief, this was done by the defendant for the purpose of fraudulently retaining the mineral rights in said land."

By bill of particulars appellant stated that the contract was oral and that appellant agreed to compensate the appellee for his services as purchasing agent with payment of the customary commission therefor.

As we construe the alleged contract, the appellant verbally employed the appellee to buy the described land from the owner for him at a price of $3 per acre; the deed to be made direct to appellant and the consideration to be paid by appellant to the owner.

The trial court was of the opinion that the contract was void in that it was within the statute of frauds, and that it necessarily followed that no recovery of damages was authorized.

Whether the trial court erred in dismissing the complaint upon the ground stated is the question to be answered.

Sec. 4 of the English statute of frauds reads as follows: "No action shall be brought whereby to charge any person * * * upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them * * * unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

There is a conflict of authority as to whether an agent verbally employed to buy specific real estate, who purchases it for himself or a third person with the agent's own funds, may be compelled to deliver title to his principal or respond in damages for his breach of the agreement. The authorities are collected in annotations in 42 A.L.R. 10; 54 A.L.R. 1195, and 135 A.L.R. 232.

While courts are divided on the question; the weight of authority, and the trend

of recent decisions, are to the effect that such agreements are not within the statute of frauds. This is the conclusion of such outstanding authorities as Williston, Pomeroy, Scott and the Restatement. We quote from leading texts, as follows:

"* * * The modern current of authority appears to be to the effect that if an agent be employed to negotiate the purchase of land for his principal, and violates the principal's confidence by purchasing the land with his own money and taking a deed therefor to himself, he becomes a constructive trustee for the principal's benefit, upon payment of the purchase price. This is the rule adopted by the American Law Institute. 'The agency may be established by a written contract or a verbal contract, or no contract whatever, the assumption of confidence involving a purely gratuitous service, for which the agent is to receive no compensation in any form.'" Pom.Eq.Juris. (4th Ed.) Sec. 1056-b.

"(2) A person who agrees with another to purchase property on behalf of the other and purchases the property for himself individually holds it upon a constructive trust for the other, even though he is not under a duty to purchase the property for the other.

"Comment on Subsection 2:

"* * * Where one person orally undertakes to purchase land on behalf of another, it may be urged that the other cannot enforce a constructive trust because the undertaking is oral and there is no compliance with the provisions of the Statute of Frauds. The answer to this objection is that the other is not enforcing an oral contract, but is enforcing a constructive trust based upon the violation of a fiduciary duty. The undertaking to act for the other is sufficient to constitute the relation of principal and agent between them. * * *

"The rule is applicable not only where a person is employed professionally to purchase the property for the employer, as in the case of a real estate broker, but also where a person gratuitously agrees to purchase the property on behalf of another." Restatement Law of Restitution, Sub-Sec. 2, Sec. 194.

"Even though there was no pre-existing fiduciary relation, and even though the defendant was not employed professionally by the complainant, and even though no continuing fiduciary relation was contemplated, yet if the defendant undertakes with the complainant to purchase property for him, and purchases the property for himself, he can be charged as constructive trustee of the property. Although the oral undertaking is not enforceable as a contract, because of lack of consideration or because the property is an interest in land, yet a fiduciary relation was created and the fiduciary will not be permitted to profit through a breach of his duty as fiduciary

* * *. Accordingly, it is held that a person who undertakes to purchase land for another and who purchases it for himself is chargeable as constructive trustee of the property, even though the undertaking is gratuitous and oral." 3 Scott on Trusts, Sec. 499.

"* * * There is substantial support for the view that the breach of agreement and of the agency involved in the agreement is no more than a breach of contract, and that it does not give rise to a constructive trust; according to the theory of the courts adopting this rule, to recognize such a constructive trust would virtually abrogate the statute of frauds. The majority rule is, however, that the breach of contract is a breach of confidence by the agent and gives rise to a constructive trust, the proof of which is not within the statute of frauds or the parol evidence rule, and it has been held to be immaterial that there was no consideration for the agreement of agency, where the agency is entered upon and the purchase made." 54 A. J. "Trusts" Sec. 237.

Also see Browne's Statute of Frauds, Sec. 96.

It seems that the modern English cases are in accord with these texts. "Bartlett v. Pickersgill, the leading early English case on this point, was decided in 1760, and the doctrine announced therein appears to have continued to be the law in England till 1829, when it was repudiated in Lees v. Nuttall, 1 Russ. & Myl.Ch. 53 [39 Eng. Reprint, 21], where it was held that if an agent employed to purchase an estate becomes the purchaser for himself, he is to be considered as a trustee for his principal. Lees v. Nuttall was affirmed in 2 Myl. & K.Ch. 819 [39 Eng.Reprint, 1157], where the agency was created wholly by parol. Supporting this view in Heard v. Pilley, 4 Ch.App.L.R. 548, text 552, another English case in which the agent was appointed by parol, the Lord Chancellor in part said: 'I cannot at all accede to the argument urged in reply, that under these circumstances, when the agent goes to his principal and says, "I will go and buy an estate for you," it is not a fraudulent act on his part afterward to buy the estate for himself and to deny the agency. I think that would be an attempt to make the statute of frauds an instrument of fraud.'" Quinn v. Phipps, 93 Fla. 805, 113 So. 419, 423, 54 A.L.R. 1173, 1181.

The theory of the rule we follow is that such agreements create a relation of trust and confidence to which the statute of frauds does not apply.

The cases on the question, pro and con, are so numerous (see Annotations in A.L.R. cited) that we content ourselves with citing the following which support the rule adopted: Harrop v. Cole, 85 N.J.Eq. 32, 95 A. 378, affirmed in 86 N.J.Eq. 250, 98 A. 1085; Quinn v. Phipps, 93 Fla. 805, 113

So. 419, 54 A.L.R. 1173; Lamb v. Sandall, 135 Neb. 300, 281 N.W. 37.

[redacted] It is asserted that the agreement in question was not supported by a consideration.

But it is the assumption by the agent of the undertaking to purchase, and the confidence necessarily reposed in him by the principal, who accepts the agent's offer to act, instead of acting himself, that is the basis of the agent's liability. Rice v. First Nat. Bank, 50 N.M. 99, 171 P.2d 318; Wright v. Smith, 23 N.J.Eq. 106; 3 Pomeroy's Eq.Jur. (4th Ed.) Sec. 1056; Restate. Law of Restitution, Subsection 2 of Sec. 194; 3 Scott on Trusts, Sec. 499. "The agency may be established by a written contract or a verbal contract, or no contract whatever, the assumption and confidence involving a purely gratuitous service, for which the agent is to receive no compensation in any form," Harrop v. Cole, supra [85 N.J.Eq. 32, 95 A. 379].

The judgment is reversed and cause remanded with instructions to the district court to set aside its judgment, overrule the motion to dismiss, and proceed not inconsistent herewith.

It is so ordered.

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

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

183 P.2d 850

MILLER et al. v. HOEFGEN et al.

No. 5025.

Supreme Court of New Mexico.

Aug. 6, 1947.

[redacted]

Lewis R. Sutin, of Albuquerque, for appellants.

Gilbert & Gilbert, of Santa Fe, and Dailey & Rogers, of Albuquerque, for appellee Hoefgen.

COMPTON, Justice.

This is a suit to recover damages from the master for negligence of his servant in the operation of the master's truck.

For convenience we will refer to the parties as they appeared in the lower court.

On March 25, 1945, an automobile in which plaintiffs, James Miller and Stella Miller, were riding, was struck by a pick-up truck operated by the defendant, Buell Rinner, Jr., seriously injuring plaintiffs. The truck was owned by the defendant, Leonard K. Hoefgen, doing business as Valley Oil Company. The plaintiffs charged Rinner with operating said truck negligently, and that Rinner was employed by Hoefgen and was acting within the scope of his employment at the time of the accident. The ownership of the truck and the negligence of Rinner was admitted by Hoefgen. He denied, however, that Rinner was acting within the scope of his employment.

On the day in question, Rinner was employed by Hoefgen in a filling station. Rinner had worked overtime fixing a tire for a customer and his manager permitted him to use the truck in question to go to lunch. The accident occurred while Rinner was driving the truck to lunch.

The court found for the plaintiffs as against the defendant, Rinner; and for the defendant, Hoefgen, on the ground that Rinner was not acting within the scope of his employment at the time of the accident. Rinner did not appeal.

The following are the findings of fact made by the trial court except those we deem unnecessary to a decision:

"4. That on the date of the said accident, Sunday, March 25, 1945 defendant Buell Rinner, Jr. was employed by defendant Leonard K. Hoefgen, at his service station situated on North Fourth Street, Albuquerque, New Mexico and was on duty and in the employ of said Leonard K.Hoefgen on that date; That Buell Rinner, Jr. had worked approximately one-half hour past his lunch time in the employ of and for the benefit of Leonard K. Hoefgen, and because of his being late for lunch Earl Hoefgen told him to take the pick-up truck involved herein and go to lunch.

"5. That at the time of the accident on March 25, 1945 the defendant, Buell Rinner, Jr. sometimes called Buell Renner Jr.,

was driving the automobile pick-up truck of the defendant, Leonard K. Hoefgen, d/b/a Valley Oil Company, for his sole purpose and pleasure and not as a servant, agent or employee or in the furtherance of the business of the defendant, Leonard K. Hoefgen, d/b/a Valley Oil Company."

Then concluded as a matter of law:

"2. That at the time of the accident on March 25, 1945 the defendant Buell Rinner, Jr., sometimes called Buell Renner, Jr., was not engaged in the scope of his employment as a servant, agent or employee of the defendant, Leonard K. Hoefgen, d/b/a Valley Oil Company.

"3. That the defendant, Leonard K. Hoefgen doing business as Valley Oil Company, is entitled to judgment that the plaintiffs take nothing against him by reason of their complaint herein, and that he have and recover of and from the plaintiffs the costs of suit herein incurred."

The question for our determination is whether the defendant, Rinner, was acting within the scope of his employment at the time his negligence caused the injuries to plaintiffs. Finding No. 5 is attacked because it is asserted that it is not supported by substantial evidence.

The evidence of Rinner's employment at the time of the accident was the testimony of Earl Hoefgen, the manager in charge of the service station where Rinner was employed. The undisputed facts relative to the issue of scope of employment are that on the day in question Rinner had worked at the filling station until 12:30 p. m., one-half hour past lunch time, to service a car for a customer of Hoefgen. Rinner finished this service and started to lunch. The manager, Hoefgen, observing the time, said to Rinner: "Mr. Rinner, it is past noon, you may take the pick-up and go home to your dinner."

In the course of his employment, Rinner, among other things, was required to operate the truck in question, using it for the delivery of fuel oils. His usual lunch time was from 12:00 to 1:00 p. m. This hour, however, was indefinite, depending upon the business at the station at the particular time. He always had an hour off, regardless of the time he went to lunch. It was a usual thing for Rinner and other employees to work beyond the regular lunch hour. Previously, the truck in question had not been used by Rinner, or other employees to go to their meals or on personal errands.

It is a rule supported by the weight of authority that liability of the master for the use of an automobile by the servant is created only when it appears (1) that its use is with the knowledge and consent of the master, and (2) that it is used within the scope of employment of the servant and to facilitate the master's business.

The rule is stated in 42 C.J. 1109, Sec. 868, as follows: "The use by the chauffeur of the owner's vehicle for the purpose of going to and from his place of employment is a use for the purposes of the chauffeur, and the owner is not liable for an injury occasioned while it is being so used, either without his knowledge or consent or with his permission, as *for example, where he is going to or returning from a meal.* * * *" (Emphasis ours.)

Again in 5 Blashfield, Cyclopedia of Automobile Law and Practice, Perm.Ed., § 3042 p. 199; as follows: "Although the eating of food may be necessary to keep up an employee's vitality so as to enable him to perform the duties of his employment, ordinarily a servant cannot be said to be on his master's business or acting within the scope of his employment while eating *or on his way to* eat." (Emphasis ours.)

The exceptions to the rule are stated in 5 Blashfield, Op.Cit. at page 201: "However, the circumstances may be such that a servant may be within the scope of his employment in going to and from meals. Thus, if the servant's contract of employment entitles him to transportation to and from meals, or if the contract provides that meals shall be furnished by the master, or if a driver is permitted to drive the master's automobile to and from his meals for the purpose of enabling him *to reach his work earlier,* or where such travel is combined with his master's business, or where the deviation was slight, his negligent acts in driving to and from his meals may be within the scope of his employment." (Emphasis ours.)

Plaintiffs assert that they come within the exceptions. On the contrary the defendant, Hoefgen, contends that they come within the rule.

As we appraise the evidence in the case, the defendant, Hoefgen, as an accommodation to the defendant, Rinner, permitted him to use the truck on a personal errand. Its use by the defendant, Rinner, did not shorten the lunch period, nor enable him to return to work earlier. There was no previous understanding that Rinner would be permitted to use the truck for working overtime. See Ebers v. Whitmore, 122 Neb. 653, 241 N.W. 126; Thannisch Chevrolet Co. v. Kline et al., Tex.Civ.App., 134 S.W. 2d 433; Gewanski v. Ellsworth, 166 Wis. 250, 164 N.W. 996; Bloom v. Krueger, 182 Wis. 29, 195 N.W. 851.

We, therefore, conclude that at the time of the accident Rinner was engaged in a personal mission and that his business relations with the defendant, Hoefgen, were terminated, or at least suspended, prior to the time the injuries were sustained by plaintiffs.

We have considered all assignments of error and find no merit in them. The findings of fact made by the trial court are amply supported by the evidence.

The trial court was correct in its holding and the judgment should be affirmed, and it is so ordered.

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

184 P.2d 114

MARINE TRUST CO. OF BUFFALO, NEW YORK, v. LORD.

No. 4979.

Supreme Court of New Mexico.

Aug. 25, 1947.

M. W. Hamilton, of Santa Fe, for appellant.

Charles B. Barker, of Santa Fe, for appellee.

John T. Watson, of Santa Fe, for administrator de bonis non.

LUJAN, Justice.

On December 12, 1930, Neil P. Renehan, borrowed $1,000 from his uncle, Fred D. Corey, to secure the payment of which he pledged certain shares of American Telephone and Telegraph Company and Union Gas Corporation stocks. Apparently, the loan was a demand obligation matured in August, 1935. The indebtedness was not paid and on September 15, 1941, the appellee, as successor in interest of Corey, filed this action. On August 23, 1945, it was awarded judgment for $1,330.42, less certain credits to be made when the stocks in the United Gas Corporation should be sold. Shortly after the rendition of the judgment, Renehan died. Under a stipulation of counsel, filed herein, DeForrest D. Lord, as administrator de bonis non of his estate, was substituted as appellant by order duly entered.

Appellant interposed three defenses in the lower court: (1) that at the time the action was filed it was barred by the Statute of Limitations; (2) that the stock was pledged on the express condition that if its market value decreased to the approximate sum of the loan, it should be sold by Corey and the indebtedness thereby liquidated; and (3) that Corey held the stock until its market value had diminished below the amount of the loan.

It will be seen from the statement of facts that the debt became barred by the statute, more than four years having elapsed after its maturity before action was taken, unless the cause of action was revived. Revivor is claimed by virtue of a certain letter written by Renehan to Mrs. Corey.

Secton 27-115, New Mexico Comp. 1941, reads: "Causes of action founded upon contract shall be revived by an admission that the debt is unpaid, as well as by a new promise to pay the same; but such admission or new promise must be in writing, signed by the party to be charged therewith. * * *"

The letter in question reads as follows:

"January 10, 1940

Dear Winifred:

I just received your letter as I have been away for the past two weeks.

At the time that I borrowed $1,000.00 from Uncle Fred I did, as you state in your letter, pledge as security for the loan 3 shares of American Telephone and Telegraph Company Capital stock and 100 shares of United Gas Company common stock. These stock certificates were endorsed by myself and turned over to Uncle Fred at the time of the loan. They were worth at that time approximately $2,500.00. At the time I requested the loan I asked Uncle Fred to consider the stock as his own

and to dispose of it if it got close to the amount of the loan plus interest.

Later on when the stock did get down to a point just covering the loan I told Uncle Fred that he had better sell the stock as I did not see any immediate prospects of being able to pay him back. However, Uncle Fred considered the stock to be worth a good deal more than it was selling at and said that he would hold it until times and conditions were better. He was really doing me a great favor by acting in that way because I also thought that the market would eventually pick up and the stock would again be worth somewhere near what I paid for it.

At the present time United Gas Company common stock is selling in the neighborhood of $2.00 a share, and of course with my endorsement you have a perfect right to sell this stock at any time you see fit.

For the many things that Uncle Fred did for me I do want to do anything within my power for you, and will do so when I am financially able to, but at the present time we are all having pretty tough going.

My best to you and the children,

Sincerely yours,
Neil"

The trial court held that the indebtedness had been revived by the above letter. Our statute does not prescribe any particular language for an acknowledgement or promise sufficient to lift its bar. It is enough if it shows the writer has treated the indebtedness as subsisting and one for which he is liable and willing to pay.

We are of the opinion, and so hold, that the above mentioned writing is a sufficient acknowledgement of the indebtedness and constitutes a promise to pay the same under the test prescribed in Joyce-Pruitt Co. v. Meadows, 27 N.M. 529, 203 P. 537. The report of that case has a full and exhaustive discussion of the point at issue here. We deem it unnecessary to add to the discussion there found since it fully supports our holding in this case. See, Also, Romero v. Hopewell, 28 N.M. 259, 210 P. 231; Cleland v. Hostetter, 13 N.M. 43, 79 P. 801; and Reymond v. Newcomb, 10 N.M. 151, 61 P. 205.

The trial court refused to find at appellant's request as a condition attached to the holding of the collateral by appellee that same was to be sold and the proceeds, or so much thereof as might be necessary, applied in satisfaction of the debt, whenever the market value of the stock so held might diminish to the approximate amount of the loan. We have but to determine whether the trial court erred in refusing to make this requested finding. Without going into detail, it suffices to say that the evidence was such that it supports the finding of the court on this issue. Such being the case, we will not disturb it.

The judgment will be affirmed and it is so ordered.

BRICE, C. J., and McGHEE and COMPTON, JJ., concur.

SADLER, J., did not participate.

184 P.2d 300

HARLOW v. HARE.

No. 5041.

Supreme Court of New Mexico.

Sept. 3, 1947.

Otto Smith and Dee C. Blythe, both of Clovis, for appellant.

Dailey & Rogers, of Albuquerque, for appellee.

McGHEE, Justice.

The appellee, plaintiff below, was awarded $420.21 for total temporary disability from January 3 to June 18, 1943, $450 for partial permanent disability, and $252.50 for attorneys' fees and court costs, on account of a latent injury to his left hand caused by a fall on February 2, 1943, while working as an electrician for the defendant, Hare. The employer had actual knowledge of the fall and had the plaintiff carried to a hospital where he remained for seven days. The injuries then appeared to be a wrenched back and left arm. The only treatment given the hand was the application of an antiseptic. The plaintiff returned to work for Hare on February 11, 1943, after being paid $5.14 compensation by the defendant insurance carrier. It is conceded that this sum did not cover the wrist injury which later became apparent.

The only defense asserted here is that when the suit was filed December 26, 1944,

it was barred by limitation under Section 57-913, 1941 Code.

The plaintiff left Hare's employ shortly after February 11, 1943, and went to Utah. It is apparent from his conversations with two of Hare's foremen about July 1, 1943, that the hand had given him some trouble there and they told him that Hare would pay for any lost time or medical expenses on account thereof, but there is no evidence in the record to show that any one then considered the hand injury of any importance, and, according to the findings of the court, it was not until he had to quit work on January 3, 1944, and went to a skin specialist in Denver, Colorado, that he learned that the hand was in a serious condition. He was sent by airplane to the Mayo Clinic where he underwent radical surgery for an ulceration of the left palm and wrist. The hand was saved but was left with twenty-five percent. total permanent disability at the wrist.

The contention of the defendants that the plaintiff underwent a surgical operation on his hand in Utah about April 1, 1943, and limitation then started running must be disregarded as there is no evidence to support it. It is true that plaintiff's Exhibit 1, which is a report of a physician of an examination of the plaintiff made on June 29, 1945, contains such a statement, and the entire letter was admitted in evidence but just before the close of the case the defendants moved that all of the letter except the diagnosis be stricken, and this motion was sustained. This leaves unimpeached the finding of the trial court that the nature and extent of the hand injury was unknown until the diagnosis in Denver on January 3, 1944, and a like diagnosis at the Mayo Clinic on January 5, 1944.

We had the question of when the limitation statute in the Workmen's Compensation Act begins to operate on a latent injury before us in Anderson v. Contract Trucking Company, 48 N.M. 158, 163, 146 P.2d 873, 876, and there said:

"We are prepared to say now, with the question squarely presented, * * * that the limitation statute begins to operate, not from the date of the accident, unless the accident and injury must necessarily be treated as concurring incidents with no latent and undiscernible injury present; but it begins to run 'from the time of the employer's failure to pay compensation for disability when the disability can be ascertained and the duty to pay compensation arises.' Salt Lake City v. Industrial Commission [93 Utah 510, 74 P.2d 657, 658]."

The findings of fact of the trial court are supported by substantial evidence and we reaffirm our decision in Anderson v. Contract Trucking Co., supra, and hold that limitation did not start running until January 3, 1944, and that the plaintiff's claim was timely filed.

A fee of $250 will be allowed the plaintiff's attorneys for services in this court.

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

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

COMPTON, J., having heard case below, not participating.

184 P.2d 301

STATE v. SMITH.

No. 5019.

Supreme Court of New Mexico.

Aug. 12, 1947.

Rehearing Denied Sept. 16, 1947.

Wm. T. O'Sullivan and Wm. Y. Wilson, both of Albuquerque, for appellant.

C. C. McCulloh, Atty. Gen., Robert V. Wollard and Wm. R. Federici, Asst. Attys. Gen., for appellee.

McGHEE, Justice.

The defendant was charged with the murder of his one year old step-daughter, Darla Jeane Ducharme, and a verdict of guilty of murder in the second degree was returned by the jury.

At about 7 p. m., August 8, 1946, the defendant and the child left his home in Albuquerque in an automobile. The only clothing the child was wearing was a diaper. She was happy and no bruises were visible on her body. The defendant returned at approximately 10:40 p. m. with her dead body in his arms. There were bruises on her buttocks, back, throat, face and head. Later that night an autopsy was performed on the the body and the physician was of the opinion that death was caused by asphyxiation. The next day he opened the head and found several cerebral hemorrhages. The doctor testified that the cause of death was probably a combination of cerebral hemorrhage, a blow on the side of the head and suffocation; that it was the result of force externally applied and not from natural causes.

The contentions of the defendant: (a) that there was no proof to establish beyond a reasonable doubt any criminal agency was the proximate cause of the death; (b) that there was no substantial evidence to connect the defendant with the death as such agent; (c) that assuming such facts were sufficiently established the offense was no greater than manslaughter, and (d) that there was not sufficient evidence to support the verdict, may be disposed of together. We have carefully examined the record, including the admissions of the defendant and we find that there is substantial evidence to warrant the submission of murder to the jury and to support the verdict.

The defendant has made several assignments of error based on the instructions given and the failure of the court to instruct on certain points. We quote the record made on the instructions:

"The Court: Have you any objections or exceptions to the instructions to the jury?

"Mr. O'Sullivan: I except to No. 6 so far as it uses the term 'suffocation'.

"Having noted an exception to Instruction No. 6 insofar as the same includes the word 'suffocation' as the cause of death, I

respectfully except also to the court's instructions as to 'flight' on the part of the defendant.

"The Court: Expand your exception to wherever the word 'suffocation' is used.

"Mr. O'Sullivan: I so expand it.

"And I respectfully except to the charge relating to murder in the first degree and murder in the second degree, and also to the submission of the issues to the jury on the basis either of murder in the first degree and murder in the second degree.

"I further except to the use of the word 'abiding' along in the phrase 'abiding conviction' as contained in the instruction concerning 'reasonable doubt' without a further definition of the meaning of the word 'abiding'.

"The Court: Anything more?

"Mr. O'Sullivan: I will submit defendant's requested instruction No. 1. (This instruction refers to the failure of the state to use certain witnesses who were in attendance on the court).

"The Court: It will be denied."

On account of his failure to comply with rule 70-108 and point out the errors or to tender a proper instruction the defendant is now precluded from claiming that the court erred in the instructions given. State v. Blevins, 39 N.M. 532, 51 P. 2d 599; Laws v. Pyeatt, 40 N.M. 7, 52 P. 2d 127; State v. Richardson, 48 N.M. 544, 154 P.2d 224.

The defendant makes his strongest attack on instruction No. 21, which reads: "If you believe from the evidence beyond a reasonable doubt that the defendant on the 8th day of August, 1946, or at any other time within ten years next prior to the 30th day of August, 1946, the date of the filing of this information, at the County of Bernalillo, in the State of New Mexico, did strangle, suffocate and/or inflict blows on the body of the said Darla Jean Ducharme, thereby inflicting in and upon the body of the said Darla Jean Ducharme mortal wounds, of which said mortal wounds the said Darla Jean Ducharme died, and that such wounding and killing was done by the defendant of his malice aforethought, and without premeditation and deliberation, then you are instructed that such killing would constitute murder in the second degree."

This instruction without the phrase "and/or" was held erroneous in State v. Sanchez, 27 N.M. 62, 196 P. 175, for stating that premeditation was not an essential element of murder in the second degree. The statement was made in the argument that a check of the files in murder cases in Bernalillo county showed that the district judges had there overlooked the decision of this court in State v. Sanchez, supra, and that except for the "and/or" phrase and minor changes to fit the facts, the in-

struction above quoted had been given in every murder case tried in that county since early in 1921 in which murder in the second degree has been submitted to the jury, and strange to say the attorneys for the defendants have also overlooked our decision in the Sanchez case. As it is possible the same condition prevails in some other district, we have copied the instruction and called attention to the error therein contained.

It also contains the highly objectionable phrase "and/or" which has no place in pleadings, findings of fact, conclusions of law, judgments or decrees, and least of all in instructions to a jury. Instructions are intended to assist jurors in applying the law to the facts, and trial judges should put them in as simple language as possible, and not confuse them with this linguistic abomination. As stated above, the defendant waived the error by failing to object to the instruction before it was given.

The defendant assigns error on account of a failure of the court to instruct on the questions of motive for the crime, the effect of exculpatory matter in the statements of the defendant admitted in evidence and his theory of the case. A sufficient answer to this assignment is that he did not request or tender any instructions on these points. It must be deemed that he acquiesced in the failure of the court to instruct thereon and he cannot be heard to complain in this court for the first time on appeal. State v. Garcia, 46 N.M. 302, 128 P.2d 459.

Error is assigned on account of the claimed insufficiency of the supplemental bill of particulars. Instead of moving for an additional bill the defendant contented himself with the taking of an exception to the one furnished. We cannot now hear this complaint on this point. State v. Roy, 40 N.M. 397, 415; 60 P.2d 646, 110 A.L.R. 1.

The defendant saved an exception to the refusal of the court to give the following instruction: "The court instructs the jury that it is the function of a trial at law to get at the truth of a case and that it is the duty of the parties to exhaust reasonably within their power, as the jury sees the power is within their reach, the avenues of testimony leading to a determination of the truth. In determining where the facts of this case lie, it is proper for you to look to the manner in which the case is presented to you to determine whether or not the parties to this case, or either of them, have reasonably exercised the opportunities open to them to enlighten you as to what the facts are, and if you find in the exercise of reasonable diligence, that there were reasonably at hand, within the command of either party to this case, witnesses who might give you valuable testimony upon any material fact, who were not put upon the stand, you

are entitled to draw such inferences as reasonable men would draw under such circumstances from the failure to employ such opportunity."

The defendant urges that the failure to give this instruction was error, as the state failed to call Pat Dugan, the Chief of Police of Albuquerque, M. Ralph Brown, the District Attorney, and Harry D. Robins, the Assistant District Attorney. The witnesses were equally available to the defendant, and it was not error to refuse to so instruct. Husch v. State, 211 Ala. 274, 100 So. 321.

The defendant realizes the inadequacy of the record of which he now complains and seeks to escape the consequences thereof by asking us to exercise our inherent right to invoke the doctrine of fundamental error.

We have carefully examined the record and are satisfied that substantial justice has been done in this case. It is not, in our opinion, a proper case for the application of the doctrine. See State v. Garcia, 46 N.M. 302, 128 P.2d 459, and State v. L. O. Smith, 51 N.M. 184, 181 P.2d 800.

The other errors assigned are likewise without merit.

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

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

184 P.2d 416

ALBUQUERQUE BROADCASTING CO. v. BUREAU OF REVENUE et al.

No. 4998.

Supreme Court of New Mexico.

Aug. 11, 1947.

Rehearing Denied Sept. 10, 1947.

A. T. Hannett, of Albuquerque, for appellant.

Harry L. Bigbee and Louis C. Lujan, both of Santa Fe, for appellees.

BRICE, Chief Justice.

The question is whether the appellant is liable to the Emergency School Tax as provided in Art. 14, N.M.Sts.1941, as follows:

"There is hereby levied, and shall be collected by the bureau of revenue, privilege taxes, measured by the amount or volume of business done, against the persons, on account of their business activities, engaging or continuing, within the state of New Mexico, in any business as herein defined, and in the amounts determined by the application of rates against gross receipts, as follows:

* * * * * *

"G. At an amount equal to two (2) percent of the gross receipts of the business of every person engaging or continuing in the business of conducting * * * radio broadcasting stations * * *." Sec. 76-1404, N.M.Sts.1941.

The trial court was of the opinion that the appellant was liable to such tax and entered its judgment accordingly. The appellant is of the opinion that the tax is a burden on interstate commerce and is exempt under the commerce clause of the federal constitution and under the following statute: "None of the taxes levied by this act shall be construed to apply to sales made to the government of the United States or any agency or instrumentality thereof, except a corporate agency or corporate instrumentality, nor to sales to the state of New Mexico or any of its political subdivisions; provided that deposits of gold and silver with the United States' mint shall not be considered as sales to the

government of the United States and shall not be exempt hereunder; nor shall such taxes apply to any businesses or transactions exempted from taxation under the Constitution of the United States or the state of New Mexico." Sec. 76-1405, N.M. Sts.1941.

At the conclusion of the trial of the case the trial court made the following decision:

"1. The plaintiff is a corporation organized under the laws of the State of New Mexico, with its principal office and place of business in Albuquerque, New Mexico.

"2. The Bureau of Revenue of the State of New Mexico, created by the legislature of said state and charged with the duty and function of collecting taxes levied by the Emergency School Tax Act of the State of New Mexico (Ch. 73, Session L. 1935, as amended), is hereinafter referred to as the Act; R. L. Ormsbee is the Commissioner of said Bureau, and Earle Kerr is the Director of the School Tax Division of said bureau. Said bureau and said named defendants maintain their offices in the Capitol building at Santa Fe, New Mexico.

"3. That in the month of May, 1936, plaintiff engaged in the radio broadcasting business at Albuquerque, New Mexico, and ever since said date has held, and now holds a commercial license to broadcast by radio, said license having been issued by the Federal Communications Commission under the Federal Communications Act of 1934, as amended [47 U.S.C.A. § 151 et seq.].

"4. Plaintiff at all times since the issuance of a license to it has operated its radio broadcasting station KOB and now continues to operate the same.

"5. In connection with its broadcasting business, plaintiff maintains a studio in Albuquerque where programs are rendered, which programs are broadcast over its transmitter located some eight miles distant, both in Bernalillo County, New Mexico, and the plaintiff broadcasts by the generation at the broadcasting station of electro magnetic waves which pass through space to receiving instruments which amplify them and translate them into audible sound waves; the essential elements in the broadcasting operations conducted by the plaintiff are a supply of electric energy, a transmitter, the connecting medium of 'ether' between the transmission and receiving mechanism, located in this and said other states.

"6. That plaintiff's station KOB located at Bernalillo County near Albuquerque, as aforesaid, employs apparatus for the transmission on a frequency of 770 kilocycles assigned by Federal Communications Commission of signals by radio to the receiving instruments of residents of at least sixteen states, as well as the Republic of Mexico and Dominion of Canada.

"7. Plaintiff's entire income consists of payments to it by advertisers for broadcasts from its Albuquerque station of advertising programs originating there or transmitted to it from other states by wire, a major portion of which originates in other states, and is transmitted to Station KOB by the National Broadcasting System, American Broadcasting Company (formerly Blue Network), or Mutual Broadcasting System over interstate telephone wires acting as common carriers in interstate commerce. Plaintiff sells time to its customers at stipulated rates during which it broadcasts from its station such advertising programs as may be agreed upon. During such time as is not sold it broadcasts at its own expense sustaining programs as required by regulations of Federal Communications Commission.

"8. That the plaintiff, in serving potential listeners in sixteen states, broadcasts the advertising material of its customers to many times more potential listeners who are prospective customers of its advertisers outside the boundaries of New Mexico than it reaches within the boundaries thereof.

"9. The programs broadcast from KOB consist of advertising programs and sustaining programs. The advertising programs are of three types.

"(a) Network programs supplied by national network broadcasting companies through the State of New Mexico on the interstate wires of the American Telephone and Telegraph Company, which wires are tapped by KOB at Albuquerque. These chain broadcasting companies programs so transmitted and tapped originate in studios maintained in other states and countries.

"(b) National spot advertising which is a program supplied by national advertisers and reaches the studio of the plaintiff for broadcasts by means of transcription from outside of New Mexico, or by phonograph records or transcriptions transmitted in interstate commerce from other states to the KOB studio for broadcasting.

"(c) Local advertising broadcasts which originate locally in the studio of KOB, but are heard in said sixteen other states.

"10. Radio Station KOB is affiliated with the chain broadcasting companies as heretofore found herein, and chain broadcasting is conducted by national broadcasting chains and KOB in the following manner, to-wit:

"Using the National Broadcasting Company, hereinafter referred to as NBC, as an illustration, NBC maintains its principal studios in New York, New York, and in Hollywood, California, where the major portion of its programs originate, and all NBC programs which are broadcasted over KOB originate outside the State of New Mexico. NBC has affiliated its chain of broadcasting stations to 152 stations in the

United States and Canada, and it solicits advertising from national manufacturers and others interested in marketing commodities on a nationwide scale. It solicits business from such advertisers, and after offering them a program which is tentatively accepted by the advertisers, the NBC thereupon submits by teletype message to its 152 affiliates a program including the advertisers' message. KOB and other affiliates reply by teletype to the New York office of NBC and if a sufficient number of stations agree to accept the program, NBC thereupon advises the advertisers of the number of affiliates who have accepted and who are willing to clear for the definite time; if the number is sufficient and sufficiently diversified in territory to suit the desires of the advertisers a contract is thereupon entered into between NBC and the advertisers. NBC commits itself to nothing until NBC actually has a buyer for KOB time, and KOB has agreed to sell that time.

"11. The program is thereupon delivered by a voice into the microphone of NBC in its studio in New York, Hollywood, or elsewhere outside the State of New Mexico. KOB received the voice's message over interstate telephone wires from the studio outside the state, and by the turning of a switch, connects the interstate telephone wire with the mechanical facilities of KOB. The program, including the advertiser's message, goes out on the ether and is relayed and amplified and broadcast by the broadcasting facilities of KOB.

"12. By the foregoing process, KOB delivers its potential listening audience in the area it serves to the voice at the microphone in New York or Hollywood, as the case may be, and the voice delivers the message into the radio receiving sets in such area and the message is available to all potential listeners in said area who choose to tune in. If the voice delivering the advertiser's message in the program in New York or Hollywood, as the case may be, stops, the message stops. KOB upon turning the switch and or connecting its facilities with the national hookup becomes an integral part of all affiliates using the program to fulfill the intent and purpose of NBC to blanket and offer the programs to every listener in the United States and Canada.

"13. NBC determines the value of KOB's service as a part of its chain by making its own investigations and surveys as to the number of potential listeners served by KOB and on its survey, so made, determines the value of KOB to its chain and compensates it for such service accordingly.

"14. Radio broadcasting stations, including the plaintiff's station, are necessarily engaged in interstate commerce whenever delivering an advertising message of their customers into the ether by radio, because modern science has as yet found no method

[redacted]

by which to control radio message within state lines.

"15. Uncertainty has previously existed among those in interest as to whether the owners of radio stations in New Mexico were required to secure a license, pay the license tax or fee, make returns, pay excise taxes, and otherwise comply with the provisions of the Emergency School Tax Act of the State of New Mexico.

"16. Plaintiff has not, in the past, made returns and paid excise taxes pursuant to the provisions of the Emergency School Tax Act, and until recently neither the defendants nor any of their predecessors in office, made demand of plaintiff for the payment of taxes, but defendants demanded, on September 21, 1945, that plaintiff pay, as of October 30, 1945, taxes, penalties and interest, as provided by the Emergency School Tax Act.

"17. That all of plaintiff's broadcasting activities are located within the State of New Mexico, and all of their broadcasting activities are located and performed solely within the State of New Mexico."

Conclusions of Law

"I. The business in which plaintiff is engaged is in part interstate commerce, and part intrastate commerce. The requirements of the Emergency School Tax Act with respect to payment of the privilege tax levied therein of 2% are not in direct and necessary effect a substantial burden upon interstate commerce.

"II. The Emergency School Tax Act of the State of New Mexico does not discriminate against interstate commerce, and treats both interstate commerce and intrastate commerce equally, and does not create a burden upon interstate commerce, as applied to radio broadcasting companies, and the tax involved in this action, levied by the statutes of the state of New Mexico upon radio broadcasting, is a legal and constitutional tax.

"III. The Emergency School Tax Act of the State of New Mexico, as applied to the business of radio broadcasting, is hereby declared to be a constitutional tax, and is a non-discriminatory tax, which does not create a burden upon interstate commerce, and is therefore declared to be legally levied against the business of radio broadcasting.

"IV. The Court finds that it has jurisdiction of the parties and the subject matter hereto, and that judgment should be entered for the defendant, to the extent of the Court's judgment in this case."

The Supreme Court of the United States, in the case of Fisher's Blend Station v. Tax Commission of the State of Washington, 297 U.S. 650, 56 S.Ct. 608, 610, 80 L.Ed. 956, has decided the question here posed, in favor of the appellant. The statutes of Washington, construed in that case, are in

practical effect not different from those here involved; and the facts are substantially the same. It was conceded by the appellee in the argument that unless by subsequent decisions that court has overruled or modified the decision in the Fisher's Blend case, the district court erred in holding appellant liable to the tax.

The Fisher's Blend case follows a long line of decisions of the Supreme Court of the United States in which it is held that a state cannot tax interstate commerce either by laying the tax upon the business which constitutes such commerce or the privilege of engaging in it, or upon the receipts, as such, derived from it; or as is stated in the opinion, "As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is a type that has long been held to be an unconstitutional burden on interstate commerce."

We are constrained to quote freely from the opinion of Mr. Justice Stone in the Fisher's Blend case, because of the claim that its doctrine, long followed by that court, had been overruled, or so impaired by exceptions that this case is no longer authority on the question of whether interstate commerce can be taxed under state law. The opinion states:

"Appellant's entire income consists of payments to it by other broadcasting companies or by advertisers for broadcasting, from its Washington stations, advertising programs originating there or transmitted to them from other states by wire. Appellant 'sells time' to its customers at stipulated rates, during which it broadcasts from its stations such advertising programs as may be agreed upon. During such time as is not sold, it broadcasts, at its own expense, 'sustaining' programs, as required by the regulations of the Federal Radio Commission. The customers desire the broadcasts to reach the listening public in the areas which appellant serves, and a large number of persons, many of them in other states, listen to the broadcasts from appellant's stations.

* * * * * *

"* * * Upon the facts alleged, we see no more basis for saying that appellant's customers do the broadcasting than for saying that a patron of a railroad or a telephone company alone conducts the commerce involved in his railroad journey or telephone conversation.

"Appellant is thus engaged in the business of transmitting advertising programs from its stations in Washington to those persons in other states who 'listen in' through the use of receiving sets. In all essentials its procedure does not differ from that employed in sending telegraph or telephone messages across state lines, which is interstate commerce. * * * In each, transmission is effected by means of energy manifestations produced at the point of reception in one state which are generated

and controlled at the sending point in another. Whether the transmission is effected by the aid of wires, or through a perhaps less well-understood medium, 'the ether,' is immaterial, in the light of those practical considerations which have dictated the conclusion that the transmission of information interstate is a form of 'intercourse,' which is commerce. * * *

"* * * The essential purpose and indispensable effect of all broadcasting is the transmission of intelligence from the broadcasting station to distant listeners. It is that for which the customer pays. By its very nature broadcasting transcends state lines and is national in its scope and importance—characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause. * * *

"As appellant's income is derived from interstate commerce, the tax, measured by appellant's gross income, is of a type which has long been held to be an unconstitutional burden on interstate commerce. * * *

"* * * It is enough that the present (tax) is levied on gross receipts from appellant's entire operations, which include interstate commerce. As it does not appear that any of the taxed income is allocable to intrastate commerce, the tax as a whole must fail * * *."

As we understand, it is not held in the Fisher's Blend case that all broadcasting is interstate commerce, but that as the tax was levied on the gross income, which included that from interstate commerce, it followed that it was an unauthorized tax levied on interstate commerce.

While the trial court found that the businesses and transactions of the appellant were both interstate and intrastate commerce, no attempt was made by the taxing authorities to allocate any portion to either class. The claim of appellee is that while the tax is levied on interstate commerce, it is not an undue burden thereon; and requires it to bear only its just share of state taxes.

That no state could tax the gross receipts from interstate transportation or communication was until recently thought settled beyond controversy. It was so decided in Philadelphia & S. M. Steamship Co. v. Pennsylvania, 122 U.S. 326, 7 S.Ct. 1118, 30 L.Ed. 1200, which overruled Erie Railway Co. v. Pennsylvania, 15 Wall. 282, 21 L.Ed. 164. This was followed in innumerable decisions of that court; and reaffirmed in the Fisher's Blend Case, in which the Philadelphia & S. M. Steamship case was cited approvingly. Also in Puget Sound Stevedoring Co. v. Tax Commission, 302 U.S. 90, 58 S.Ct. 72, 74, 82 L.Ed. 68, in which it was held that a tax on the gross income of a stevedoring company was void, and disposed of the question by the statement: "The business of loading and unloading (ships) being interstate or foreign com-

merce, the state of Washington is not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. Decisions to that effect are many and controlling." The Court cited as authority the Philadelphia & S. M. Steamship Co. case, and many others.

Later, at the same term, that court decided Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L. Ed. 823, 115 A.L.R. 944, appealed from this court. See Western Live Stock v. Bureau of Revenue, 41 N.M. 141, 65 P.2d 863, and 41 N.M. 288, 67 P.2d 505.

The facts as stated by the Supreme Court are as follows [303 U.S. 250, 58 S.Ct. 547]: "Appellants publish a monthly livestock trade journal which they wholly prepare, edit, and publish within the state of New Mexico, where their only office and place of business is located. The journal has a circulation in New Mexico and other states, being distributed to paid subscribers through the mails or by other means of transportation. It carries advertisements, some of which are obtained from advertisers in other states through appellants' solicitation there. Where such contracts are entered into, payment is made by remittances to appellants sent interstate; and the contracts contemplate and provide for the interstate shipment by the advertisers to appellants of advertising cuts, mats, information and copy. Payment is due after the printing of such advertisements in the journal and its ultimate circulation and distribution, which is alleged to be in New Mexico and other states."

In stating reasons for sustaining the tax, the court said:

"In the present case the tax is, in form and substance, an excise conditioned on the carrying on of a local business, that of providing and selling advertising space in a published journal, which is sold to and paid for by subscribers, some of whom receive it in interstate commerce. The price at which the advertising is sold is made the measure of the tax.

* * * * * *

"As we have said, the carrying on of a local business may be made the condition of state taxation, if it is distinct from interstate commerce, and the business of preparing, printing and publishing magazine advertising is peculiarly local and distinct from its circulation whether or not that circulation be interstate commerce. * * *

"All the events upon which the tax is conditioned—the preparation, printing and publication of the advertising matter, and the receipt of the sums paid for it—occur in New Mexico and not elsewhere. All are beyond any control and taxing power which, without the commerce clause, those states could exert through its dominion over the distribution of the magazine or its subscribers. The dangers which may ensue from the imposition of a tax measured by

gross receipts derived directly from interstate commerce are absent."

In differentiating the Fisher's Blend case the court said: "In this and other ways the case differs from Fisher's Blend Station v. State Tax Commission, [297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956], supra, on which appellants rely. There the exaction was a privilege tax laid upon the occupation of broadcasting, which the court held was itself interstate communication, comparable to that carried on by the telegraph and the telephone, and was measured by the gross receipts derived from that commerce. If broadcasting could be taxed, so also could reception. Station WBT v. Poulnot, D.C., 46 F.2d 671. In that event a cumulative tax burden would be imposed on interstate communication such as might ensue if gross receipts from interstate transportation could be taxed. This was the vice of the tax of a percentage of the gross receipts from goods sold by a wholesaler in interstate commerce, held invalid in Crew Levick Co. v. Pennsylvania [245 U.S. 292, 38 S.Ct. 126, 62 L.Ed. 295], supra. In form and in substance the tax was thought not to be one for the privilege of doing a local business separable from interstate commerce."

It is not the reasons stated for sustaining the tax, but some general observations regarding the power of the state to tax interstate commerce that have caused much comment (see Gross Receipts Taxes and Interstate Transportation and Communication, 57 Harv.L.Review 40; Sales Tax in Interstate Commerce, 52 Harv.L.Review 617, both by Wm. B. Lockhard. Also see 28 California L. Review 168; and 36 Illinois L. Review 727); and have so divided that court that all subsequent decisions on the subject lack unanimity. We have reference to the following in Western Live Stock case, to-wit:

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way' (citations), and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce (citations) and if the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the state will be sustained. (Citations.) Net earnings from interstate commerce are subject to income tax (citations), and, if the commerce is carried on by a corporation, a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within

the state by a fair method of apportionment. (Citations.)

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited.

"On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed (citations) with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. (Citations.) The multiplication of state taxes measured by the gross receipts from interstate transactions would spell the destruction of interstate commerce and renew the barriers to interstate trade which it was the object of the commerce clause to remove. * * * Taxation measured by gross receipts from interstate commerce has been sustained when fairly apportioned to the commerce carried on within the taxing state (citations), and in other cases has been rejected only because the apportionment was found to be inadequate or unfair. (Citations.) Whether the tax was sustained as a fair means of measuring a local privilege or franchise (citations), or as a method of arriving at the fair measure of a tax substituted for local property taxes (citations), it is a practical way of laying upon the commerce its share of the local tax burden without subjecting it to multiple taxation not borne by local commerce and to which it would be subject if gross receipts, unapportioned, could be made the measure of a tax laid in every state where the commerce is carried on."

It is the appellee's contention that the effect of the Western Live Stock opinion is to hold that a state may tax interstate commerce if the tax is apportioned so that it will not discriminate in favor of intrastate commerce, and the circumstances are such that the same funds could not be subject to a similar tax by other states.

This seems to be correct, or it is in so far as transportation and communication cases are involved. But it must be noted that the Court singled out the Fisher's Blend case as one that did not come within these rules; the theory being that if broadcasting could be taxed, so also could reception, with the result that a cumulative tax burden might be imposed on interstate commerce. This reasoning was questioned by Prof. Wm. B. Lockhart, in an article in which the opinion in this case was critically analyzed, entitled "Gross Receipts

Taxes on Transportation," 52 Harvard L. Review, p. 40. It is therein stated:

"The Fisher's Blend case is not quite so simple. There the broadcasting operations were confined to the taxing state, but the programs were heard over several states. The tax was measured by the entire gross receipts. Yet in no practical sense was there any risk of a cumulative tax burden sufficient to condemn the tax. The mere fact that radio waves reach into other states would hardly give those states jurisdiction to tax the gross receipts derived from broadcasting operations conducted exclusively within the State of Washington. Even the Western Live Stock opinion did not suggest this fantastic possibility. The explanation there given was that 'if broadcasting could be taxed, so could reception,' thus causing a 'cumulative tax burden * * * on interstate communication.' This was an unrealistic and unsuccessful attempt to distinguish the Fisher's Blend case. If such an unlikely tax were imposed it would not result in a cumulative burden within the meaning of that doctrine in current cases. This is demonstrated by the Western Live Stock decision itself, where the Court sustained a tax involving a greater risk of such a cumulative burden than did the Fisher's Blend tax.

"The type of tax on reception which the Court had in mind was a privilege or license tax imposed on the ownership or operation of radio receiving sets. Such a tax would not be borne by the radio broadcasters, or their advertisers, and would have no substantial effect upon the business of engaging in interstate radio broadcasting. Only one such tax appears to have been imposed in the United States, and that had been held invalid. Station WBT v. Poulnot, D.C., 46 F.2d 671."

The statement (which has been repeated in subsequent decisions), that "it was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden," would seem to have little substance, if the decision in Fisher's Blend is controlling, and "just share of state tax burden" means an equal burden upon the same class of business taxed. How could the appellant be compelled to pay its "just share of state [taxes]," or any share, for that matter, if broadcasting cannot be taxed by the states? True, its property used in broadcasting is taxed, but so is the property used in intrastate business, which in a like class, must nevertheless pay this tax on all business transacted, although it receives no more protection from the state than appellant. But the confusion brought about by the Western Live Stock decision is apparent in all subsequent decisions of the Supreme Court on this question, none of which have the support of all the justices of that court.

The rationale of Western Live Stock, in this court and in the Supreme Court of the United States, was that the tax was levied on the pursuits of a local business; that it was not directly imposed upon receipts from interstate commerce, and could not be the subject of taxation by any other state.

The State of Washington has similar tax statutes to those here involved. A gross income tax was levied on the receipts from the business of marketing fruit shipped outside the state. The Washington Supreme Court held that the business of appellant, who was the marketing agent of fruit growers, was local, and was therefore subject to the tax. Gwin, White & Prince v. Henneford, 193 Wash. 451, 75 P.2d 1017. But the Supreme Court of the United States reversed the Washington decision (Gwin, White & Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 327, 83 L.Ed. 272), and held that as the tax was laid upon the number of boxes of fruit transported to purchasers outside the state, so that the tax though nominally imposed upon appellant's activities in Washington, the method of measuring the tax rendered appellant's activities within and without the state a direct burden upon interstate commerce. In holding that the tax was void, the Court said:

"It has often been recognized that 'even interstate business must pay its way' by bearing its share of local tax burdens * * * and that in consequence not every local tax laid upon gross receipts derived from participation in interstate commerce is forbidden. * * * But it is enough for present purposes that under the commerce clause, in the absence of congressional action, state taxation, whatever its form, is precluded if it discriminates against interstate commerce or undertakes to lay a privilege tax measured by gross receipts derived from activities in such commerce which extend beyond the territorial limits of the taxing state. Such a tax, at least when not apportioned to the activities carried on within the state * * *, burdens the commerce in the same manner and to the same extent as if the exaction were for the privilege of engaging in interstate commerce and would, if sustained, expose it to multiple tax burdens, each measured by the entire amount of the commerce, to which local commerce is not subject.

* * * * * *

"There has been left to the states wide scope for taxation of those engaged in interstate commerce, extending to the instruments of that commerce, to net income derived from it, and to other forms of taxation not destructive of it."

As we understand the decision, the tax was held to be void because (1) it undertakes to "lay a privilege tax measured by gross receipts derived from activities in

commerce which extend beyond the territorial limits of the taxing state," and (2) it would expose the interstate commerce "to multiple tax burdens, each measured by the entire amount of commerce, to which the local commerce is not subject."

The former reason for holding the tax void, the long established rule before Western Live Stock, seems to apply equally to this case.

The City of New York adopted a local law which laid a tax upon purchasers of personal property at the rate of two percent on the price of every sale made in the city, which the seller was compelled to collect. The respondent was a Pennsylvania corporation engaged in the production of coal which it shipped by rail to a dock in Jersey City, and from there delivered it by barge to purchasers in New York City, in fulfilling orders given its local agent at its office in the city. In holding that the tax did not unduly burden interstate commerce, the Supreme Court in McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 392, 84 L.Ed. 565, 128 A.L.R. 876, said:

"* * * But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing the business. * * * Not all state taxation is to be condemned because, in some manner, it has an effect upon commerce between the states, and there are many forms of tax whose burdens, when distributed through the play of economic forces, affect interstate commerce, which nevertheless fall short of the regulation of the commerce which the Constitution leaves to Congress. * * *

"Certain types of tax may, if permitted at all, so readily be made the instrument of impeding or destroying interstate commerce as plainly to call for their condemnation as forbidden regulations. Such are the taxes already noted which are aimed at or discriminate against the commerce or impose a levy for the privilege of doing it, or tax interstate transportation or communication or their gross earnings, or levy an exaction on merchandise in the course of its interstate journey.

"* * * It is true that a state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause, because the tax if sustained would exact tribute for the commerce carried on beyond the boundaries of the taxing state, and would leave each state through which the commerce passes free to subject it to a like burden not borne by intrastate commerce."

See "New Light on Gross Receipts Taxes. The Berwind case," 53 Harvard Law Review, p. 909, by Thomas Reed Powell.

Only the statement that "it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens," lends color to appellee's claim which appears to be exceedingly unsubstantial in view of the further statement that, "A state tax upon the operations of interstate commerce measured either by its volume or the gross receipts derived from it has been held to infringe the commerce clause * * *."

The Chief Justice, with the concurrence of Mr. Justice McReynolds and Mr. Justice Roberts, was of the opinion that the tax was a direct burden on interstate commerce. But the Court held otherwise, because "The ultimate burden of the tax, both in form and in substance, is thus laid upon the buyer * * * and measured by the sales price. * * * It is conditioned upon events occurring within the state, either transfer of title or possession of the purchased property, or an agreement within the state, 'consummated' there, for the transfer of title, or possession."

Iowa's use tax was held by that state's Supreme Court to be unconstitutional if applied to sales made through orders for goods mailed in Iowa to appellee's store outside the state, paid for outside the state and shipped to the purchaser from outside the state. Sears, Roebuck & Co. v. Roddewig, 228 Iowa 1273, 292 N.W. 130. But the Supreme Court of the United States held otherwise, Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 S.Ct. 586, 589, 85 L.Ed. 888, 132 A.L.R. 475. The respondent had retail stores in Iowa, as well as in other states. In holding the tax constitutional the Court said:

"Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are none the less a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts. * * *

"The fact that under Iowa law the sale is made outside of the state does not mean that the power of Iowa 'has nothing on which to operate.' Wisconsin v. J. C. Penney Co., supra [311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229]. The purchaser is in Iowa and the tax is upon use in Iowa. The validity of such a tax, so far as the purchaser is concerned, 'has been withdrawn from the arena of debate.' Henneford v. Silas Mason Co., 300 U.S. 577, 583, 57 S.Ct. 524 527, 81 L.Ed. 814."

The Supreme Court of the United States in McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S.Ct. 1023, 1026, 88 L.Ed. 1304, differentiated between a sales tax and a use tax. If it should appear, as it did to Mr. Justice Roberts in his dissent,

that the tax was a direct burden on interstate commerce, the majority did not so appraise it. We are not here concerned with a "use tax," but a "sales tax."

"They are different in conception, are assessments on different transactions, and in the interlacings of the two legislative authorities within our federation may have to justify themselves on different constitutional grounds." McLeod v. J. E. Dilworth Co., supra.

Appellee cites Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229. The tax there held valid was an income tax. The case is of no assistance to us in making a decision on the present question.

The appellee cites Northwest Airlines v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283, 153 A.L.R. 245. In that case the Supreme Court held that a Minnesota property tax laid on a fleet of air planes used in interstate commerce was constitutional. The owner was a Minnesota corporation and the home port of the fleet was in Minnesota, and all the planes were in Minnesota at some time during the year. It was held that the situs for state taxation was in Minnesota. Chief Justice Stone dissented and Justices Roberts, Reed and Rutledge joined therein. They were of the opinion that taxes on vehicles of interstate transportation should be equitably apportioned among the states in which they were used in interstate commerce. The decision is not pertinent to the present inquiry.

In some cases it is held that the local incident, or incidents, in making sales in which interstate commerce is involved is sufficient to authorize the laying of a sales tax, or use tax, consistently with the Constitution.

The question in General Trading Co. v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028, 1029, 88 L.Ed. 1309, was whether Iowa could collect a use tax from the Trading Co., a Minnesota corporation, on the basis of property bought from it in Iowa, but shipped from Minnesota to purchasers in Iowa for use and enjoyment there. The Trading Co. had a place of business in Iowa where the orders were accepted. In sustaining the tax the Court said: "The tax is what it professes to be—a nondiscriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer—the Iowa resident who is paying taxes to sustain his own state government."

A more difficult case to understand is International Harvester Co. v. Department of Treasury of Indiana, 322 U.S. 340, 64 S.Ct. 1019, 1020, 88 L.Ed. 1313. The

question is whether the Indiana gross income tax could be laid consistently with the Federal Constitution, in the following cases:

"Class C: Sales by branches located outside Indiana to dealers and users residing in Indiana. The orders were solicited in Indiana and the customers took delivery to themselves at the factories in Indiana to save time and expense of shipping.

"Class D: Sales by branches located in Indiana to dealers and users residing outside of Indiana, in which the customers came to Indiana and accepted delivery to themselves in this state.

"Class E: Sales by branches located in Indiana to dealers and users residing in Indiana, in which the goods were shipped from points outside Indiana to customers in Indiana, pursuant to contracts so providing."

The appellants were foreign corporations authorized to do business in Indiana. They were manufacturers of machinery; and had manufacturing plants in adjoining states. They sold their merchandise in Indiana and other states. The Court said: "When Indiana lays hold of that transaction and levies the tax on the receipts which accrued from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers."

Because the agreement to sell, and the delivery of Class D sales took place in Indiana, it was held that, "those events would be adequate to sustain a sales tax by Indiana." The tax on the Class E sales was held constitutional upon the authority of Allied Mills v. Department of Treasury, 318 U.S. 740, 63 S.Ct. 666, 87 L.Ed. 1120, affirming the same case, 220 Ind. 340, 42 N.E.2d 34. As to each class, it was held that the local events or transactions stated in the classifications were adequate factors upon which the Indiana sales tax might constitutionally rest. The Court in sustaining the tax said:

"The present tax, to be sure, is on the seller. But on each a local transaction is made a taxable event and that event is separate and distinct from the transportation or intercourse which is interstate commerce. In neither does the tax aim at or discriminate against interstate commerce.

"* * * The consummation of the transaction was an event within the borders of Indiana which gave it authority to levy the tax on the gross receipts from the sales. And that event was distinct from the interstate movement of the goods and took place after the interstate journey ended.

* * * * * *

"We only hold that where a State seeks to tax gross receipts from interstate trans-

actions consummated within its borders its power to do so cannot be withheld on constitutional grounds where it treats wholly local transactions the same way. Such 'local activities or privileges' (citing the Berwind-White case) are as adequate to support this tax as they would be to support a sales tax. To deny Indiana this power would be to make local industry suffer a competitive disadvantage."

It would seem that these conclusions are not different from those reached in Southern Pacific Co. v. Gallagher, 306 U.S. 167, 59 S.Ct. 389, 83 L.Ed. 586, in which the California use tax was assailed as violating the commerce clause.

At this point of time in the chronology of decisions on the question of the state's authority to tax interstate commerce, it had become a serious question whether the Supreme Court had discarded the rule that the commerce clause in itself was a bar to all direct taxation of interstate commerce. See Law Review articles cited. That rule had been reaffirmed in Di Santo v. Pennsylvania, 273 U.S. 34, 47 S.Ct. 267, 268, 71 L.Ed. 524. The court said: "The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a well-recognized part of foreign commerce. * * * A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed."

But Mr. Justice Stone in dissenting stated: "In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, 'direct' and 'indirect interference' with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached."

Later Mr. Justice Stone wrote the unanimous opinion of the Court in California v. Thompson, 313 U.S. 109, 61 S.Ct. 930, 85 L.Ed. 1219, which overruled the Di Santo decision; and held that where Congress had not acted, the states might enact police regulations that directly affected interstate commerce.

But the ancient and battered dogma was apparently resuscitated in Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 276, 91 L.Ed. —, and therein restored to its former standing as a bar to state taxation. A trustee domiciled in Indiana owned listed securities which he sent to New York to his broker to be sold on the New York Stock Exchange. They were sold for some $65,000 and the proceeds, less expense of sale, were remitted to the trustee in Indiana, upon which the State imposed a sales

tax. The reason for holding the tax void under the commerce clause was stated as follows:

"Our starting point is clear. In two recent cases we applied the principle that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. (Citation.) In so deciding we reaffirmed upon fullest consideration, the course of adjudication unbroken through the Nation's history. * * *

"State taxation falling on interstate commerce, on the other hand, can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys. But revenue serves as well no matter what its source. To deny to a State a particular source of income because it taxes the very process of interstate commerce does not impose a crippling limitation on a State's ability to carry on its local function. Moreover, the burden on interstate commerce involved in a direct tax upon it is inherently greater, certainly less uncertain in its consequences, than results from the usual police regulations. * * *

"It cannot justify what amounts to a levy upon the very process of commerce across State lines by pointing to a similar hobble on its local trade. * * *

"To extract a fair tithe from interstate commerce for the local protection afforded to it, a seller State need not impose the kind of tax which Indiana here levied. As a practical matter, it can make such commerce pay its way, as the phrase runs, apart from taxing the very sale. * * *"

There follow many illustrations of indirect taxes on interstate commerce, which may be constitutionally levied by the states; then follows:

"These illustrative instances show that a seller State has various means of obtaining legitimate contribution to the cost of its government, without imposing a direct tax on interstate sales. While these permitted taxes may, in an ultimate sense, come out of interstate commerce, they are not, as would be a tax on gross receipts, a direct imposition on that very freedom of commercial flow which for more than a hundred and fifty years has been the ward of the Commerce Clause. * * *

"Nor is there any warrant in the constitutional principles heretofore applied by this Court to support the notion that a state may be allowed one single-tax-worth of direct interference with the free flow of commerce. An exaction by a State from interstate commerce falls not because of a

proven increase in the cost of the product. What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce. * * *

"Taxes which have the same effect as consumption taxes are properly differentiated from a direct imposition on interstate commerce, such as was before the Court in the Adams case [Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365, 117 A.L.R. 429] and is now before us. The tax on the sale itself cannot be differentiated from a direct unapportioned tax on gross receipts which has been definitely held beyond the State taxing power ever since Fargo v. Michigan, 121 U.S. 230, 7 S.Ct. 857, 30 L.Ed. 888."

There are indications in the opinion and in the dissent that the Court had become worried over the fate of the commerce clause, which had been nibbled away by ingenious taxes laid by the states and held valid by that Court. The Court said: "* * * We reaffirmed (in Arizona and Virginia cases), upon fullest consideration, the course of adjudication unbroken through the Nation's history * * *" that is, the dogma that interstate commerce cannot be directly taxed. The concurring opinion of Mr. Justice Rutledge makes it quite clear that the Court could have decided the question on other grounds and that it took the occasion to return to the direct tax doctrine, if it had in fact departed from it.

It was held in Puget Sound Stevedoring Co. v. State Tax Commission, 302 U.S. 90, 58 S.Ct. 72, 82 L.Ed. 68, that the business of the company, in so far as it consisted of the loading and discharge of cargoes by longshoremen, subject to its own direction and control, is interstate or foreign commerce; that the State of Washington was not at liberty to tax the privilege of doing it by exacting in return therefor a percentage of the gross receipts. The exact question was before that court in Joseph, Comptroller v. Carter & Weekes Stevedoring Co., 67 S.Ct. 815, 819, 91 L.Ed. —. It was contended by the petitioner that the reasons which underlay the Puget Sound decision were no longer controlling in view of Western Live Stock, Berwind-White and other decisions named in the opinion; that the ship loadings were local incidents or taxable events that brought such case within International Harvester Co. v. Department of Treasury, supra, and other cases hereinbefore reviewed. But the Court thought differently, "* * * The selection of an intrastate incident as the taxable event actually carries a similar threat to the commerce but, where the taxable event is considered sufficiently disjoined from the commerce, it is thought to be a permissible state levy. This result generally is reached because the local incident selected is one that is essentially local and is not repeated in each taxing unit. * * *"

The Hewit case was cited approvingly, and Western Live Stock, Gallagher, and other cases were reviewed and distinguished. The Court said: "Stevedoring is more a part of the commerce than any of the instances to which reference has just been made. Although state laws do not discriminate against interstate commerce or in actuality or by possibility subject it to the cumulative burden of multiple levies, those laws may be unconstitutional because they burden or interfere with commerce. (Citation.) Stevedoring, we conclude, is essentially a part of the commerce itself and therefore a tax upon its gross receipts or upon the privilege of conducting the business of stevedoring for interstate and foreign commerce, measured by those gross receipts, is invalid. We reaffirm the rule of Puget Sound Stevedoring Company: 'What makes the tax invalid is the fact that there is interference by a State with the freedom of interstate commerce.'"

The questions decided in International Harvester Co. v. Evatt, 329 U.S. 416, 67 S.Ct. 444, 91 L.Ed. —, and Independent Warehouses v. Scheele, 67 S.Ct. 1062, 91 L.Ed. —, cited by counsel, are different and the decisions are not of material assistance.

A correct understanding of the legal import of any of these decisions cannot be obtained from isolated statements or reasoning found in the opinion apart from their particular facts. Thus the statement that "Interstate commerce should bear its fair share of the burden of state taxation," is no doubt correct; but the burden can only be laid through the operation of a constitutional statute. A direct tax on gross income as a means to that end is denied to the states. Any uncertainty caused from Western Live Stock and other cases herein reviewed is set at rest by the decisions in the Freeman and Joseph cases.

We conclude from these decisions:

(1) The states cannot lay a direct tax on interstate commerce or gross receipts therefrom. Fisher's Blend Station v. Tax Commission, supra; Puget Sound Stevedoring Co. v. State Tax Commission, supra; Gwin, White & Prince v. Henneford, supra; Freeman v. Hewit, supra.

(2) There are various means of taxing interstate commerce by indirection so that it will bear its just share of state taxation. Freeman v. Hewit, supra.

(3) If an intrastate incident is sufficiently disjoined from interstate commerce though indirectly a burden thereon, it may be a "taxable event," open to state taxation, if it does not discriminate against interstate commerce. Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co. supra; Nelson v. Sears, Roebuck & Co. supra; Wisconsin v. J. C. Penney Co. supra; General Trading Co. v. Tax Commission supra;

International Harvester Co. v. Department of Treasury supra; Department of Treasury v. Allied Mills supra; Southern Pacific Co. v. Gallagher, supra.

(4) A valid state tax may be levied upon intrastate communications though the facilities used are also used in interstate commerce. Ratterman v. Western Union Tel. Co., 127 U.S. 411, 8 S.Ct. 1127, 32 L.Ed. 229.

The appellant is engaged in three classes of broadcasting, two of which are described in the findings of the Court, as follows:

1. "Network programs supplied by national network broadcasting companies through the State of New Mexico on the interstate wires of the American Telephone and Telegraph Company, which wires are tapped by KOB at Albuquerque. These chain broadcasting companies programs so transmitted and tapped originate in studios maintained in other states and countries.

* * * * * *

"The program is thereupon delivered by a voice into the microphone of NBC in its studio in New York, Hollywood, or elsewhere outside the state of New Mexico. KOB receives the voice's message over interstate telephone wires from the studio outside the state, and by the turning of a switch, connects the interstate telephone wire with the mechanical facilities of KOB. The program, including the advertisers' message, goes out on the ether and is relayed and amplified and broadcast by the broadcasting facilities of KOB.

2. "National spot advertising which is a program supplied by national advertisers and reaches the studio of the plaintiff for broadcast by means of transcription from outside of New Mexico, or by phonograph records or transcriptions transmitted in interstate commerce from other states to the KOB studio for broadcasting."

These programs are thus broadcast over sixteen states and parts of Canada and Mexico. They are communications directed to all persons listening to the broadcasts wherever they may be. This business is strictly interstate and we can discover no incident in connection therewith that could be classed as a "taxable event." The idea that there are means by which the state can lay a tax on these activities so that appellant will be required to pay "its just share of state taxation" in return for the protection it receives, is either a delusion, or else we are unable to discover the means through which it may be required to respond, in view of Freeman v. Hewit. We are of the opinion that the tax so laid and collected on the gross receipts from these broadcasts must be returned to appellant.

The third class of broadcasts is described in the findings as "Local advertising broadcasts which originate locally in the studio of KOB at Albuquerque but are heard in all sixteen states." It is a matter

of common knowledge that most, if not all of such broadcasts are local advertising of merchandise or other businesses that are of interest only to local people, notwithstanding such broadcasts may be heard by people in other states not interested in the advertising. Such also are broadcasts of local political parties and candidates, addressed to the state's electorate. It is only the fact that the range of radio, unlike communications by telegraph or telephone, is limited only by the power employed in broadcasting, that it may be heard by people to whom the message is of no interest. As a practical matter this business is intrastate.

We are aware that there are authorities holding otherwise, United States v. American Bond & Mortgage Co., D.C., 31 F.2d 448; Atlanta v. Atlanta Journal Co., 186 Ga. 734, 198 S.E. 788; Whitehurst v. Grimes, D.C., 21 F.2d 787. But if they are correct, then radio broadcasting, though the receipts and business are all intrastate, cannot be taxed, whether or not it transcends state lines. After all, it is the business that is the subject of taxation, and if the receipts of local broadcasting are from local people and the business obtained from such advertising is local; then the business is intrastate. Telegraph and telephone companies may be taxed on their intrastate business (Ratterman v. Western Union Tel. Co., supra) and radio should not be an exception.

The fact that Congress has taken control of the entire field of radio communications and broadcasting does not change the intrastate character of local broadcasting. The purpose is to protect interstate communications. The states cannot by establishing local rates, or by taxation of intrastate communications, or by any other means, unduly hamper interstate commerce. Pacific Tel. & Tel. Co. v. Tax Commission, 297 U.S. 403, 56 S.Ct. 522, 80 L.Ed. 760, 105 A.L.R. 1.

"* * * The execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the national power within its appointed sphere. * * *" United States v. American Bond & Mortgage Co., D.C., 31 F.2d 448, 455

We are of the opinion that local advertising by radio for local business is subject to the tax, (1) because it is intrastate business, and (2) in any event the advertising of local business to secure local patronage is a "taxable event" open to the states. Western Live Stock v. Bureau of Revenue, supra. The appellee should be permitted to retain the receipts collected from taxes laid on appellant's intrastate

business, the amount of which can be determined at another trial. Ratterman v. Western Union Tel. Co., supra.

The judgment is reversed and cause remanded with instructions to the district court to set aside its judgment, grant appellant a new trial, and proceed therein not inconsistent herewith.

It is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

On Motion for Rehearing

BRICE, Chief Justice.

On motion for rehearing the appellant asserts that this Court's opinion "is erroneous in one respect, to-wit:

"The Court held:

"We are of the opinion that local advertising by radio for local business is subject to the tax, (1) because it is intrastate business, and (2) in any event the advertising of local business to secure local patronage is a 'taxable event' open to the states."

The appellant contends first that the question of "whether a local advertising by radio can be segregated for the purpose of levying the tax assessed was not an issue below or in this court."

The legislature levied a tax equal to two percent of the gross receipts of the business of every person engaging or continuing in the business of conducting radio broadcasting stations (Sec. 76-1404, N.M.Sts. 1941); but it was specifically provided that "none of the taxes * * * shall be construed to * * * apply to any businesses or transactions exempted from taxation under the Constitution of the United States or the state of New Mexico," Sec. 76-1405, N.M. Sts.1941.

This act segregated for taxation all broadcasting that did not come within the constitutional inhibition, from that which did. The legislature never attempted to tax the gross receipts of appellant obtained from all broadcasting; but only that business which did not unduly burden interstate commerce, or which was not otherwise constitutionally inhibited.

Appellant brought this action to recover back from appellee approximately $25,000 paid by it under protest, on account of taxes levied against its gross income as a corporation engaged in the business of radio broadcasting. The burden was upon appellant to prove that it was entitled to the return of this money; and to that end must have secured findings of fact from the trial court that would support a judgment therefor. If it failed to establish that it was entitled to any portion of the funds claimed, then its case to that extent failed.

The findings of the Court are very explicit regarding interstate broadcasting. The pleadings as well as the findings segregate

the interstate business from the local business, except as to amount. It is admitted in the complaint, and found by the Court, that the appellant was engaged in "local advertising broadcasts which originate locally in the studio of KOB." There is nothing in the findings, or in the evidence for that matter to indicate that any of this local business is interstate. To that extent the appellant's case failed of proof, unless we must say that all broadcasting is interstate business, and to this we do not agree.

The appellant complains that this Court erred in its statement: "The third class of broadcasts is described in the findings as 'Local advertising broadcasts which originate locally in the studio of KOB at Albuquerque but are heard in all sixteen states.' It is a matter of common knowledge that most, if not all of such broadcasts are local advertising of merchandise or other businesses that are of interest only to local people, notwithstanding such broadcasts may be heard by people in other states not interested in the advertising. Such also are broadcasts of local political parties and candidates, addressed to the state's electorate. It is only the fact that the range of radio, unlike communications by telegraph or telephone, is limited only by the power employed in broadcasting, that it may be heard by people to whom the message is of no interest. As a practical matter this business is intrastate."

It is said that the statement is erroneous; and purported facts not in the record are stated by appellant in an attempt to prove the interstate character of the local broadcasting. In justification of this procedure it is said that our statement, just quoted, was outside the record. We may assume for this motion that the statement was too broad, but that is beside the case. The appellant admitted, and the Court found, that a part of the business was local advertising broadcasts originating locally in the studio of KOB; and in the absence of any finding other than this regarding the "local" portion of appellant's business, it has not met the burden of proof. We have held, and still hold, that the mere fact that local advertising is heard in other states, does not necessarily establish that it is an interstate transaction. The trial court concluded that "the business in which plaintiff is engaged is in part interstate commerce and part intrastate commerce," and to this we agree.

The burden was on the appellant to show that the whole tax was void. It segregated the taxable from its non-taxable activities in its pleadings and briefs, and sufficiently presented the question, for our consideration. Under similar facts the Supreme Court of the United States reached the same conclusion. Ratterman v. Western Union Tel. Co., 127 U.S. 411, 8 S.Ct. 1127,

32 L.Ed. 229. We are of the opinion that appellant did not establish its right to the return of funds collected as taxes on local broadcasting.

Answering other contentions, we state:

The legislature did not levy a tax that would unduly burden interstate commerce. Whether the parties contended in this Court or the Court below that either Court had jurisdiction to apportion the taxes, is immaterial. No attempt is made to apportion taxes. The activities of appellant that are not local are interstate. The appellant by its pleadings and the Court by its findings have segregated the taxable from the non-taxable, except as to amount, and that may be determined upon a new trial, which will be limited to a determination of the amount paid on local broadcasting. All other funds collected by appellee must be returned to appellant.

The cases cited by appellant have reference to gross receipts taxes which impose an unconstitutional burden on interstate commerce. Such is not the law here involved. The cases cited are: Adams Mfg. Co. v. Storen, 304 U.S. 307, 58 S.Ct. 913, 82 L.Ed. 1365; 117 A.L.R. 429; Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 91 L. Ed. ——; Fisher's Blend Station Inc., v. Tax Commission, 297 U.S. 650, 56 S.Ct. 608, 80 L.Ed. 956; Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944; International Harvester Co. v. Evatt, 329 U.S. 416, 67 S. Ct. 444, 91 L.Ed. ——.

The motion for rehearing is denied, and it is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

184 P.2d 433

LANDIS v. ORMSBEE.

No. 4997.

Supreme Court of New Mexico.

Aug. 11, 1947.

James J. McNamara, of Clovis, for appellant.

Harry L. Bigbee and Louis C. Lujan, both of Santa Fe, for appellee.

BRICE, Chief Justice.

The question is whether the appellant, who operates a radio broadcasting station at Clovis, New Mexico, is liable to the emergency public school tax provided for by Art. 14, N.M.Sts.1941. This is a companion case to Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416, and Carlsbad Broadcasting Corp. v. Bureau of Revenue, 51 N.M. 360, 184 P.2d 434. The facts and questions involved are substantially identical, except that appellant's broadcasting plant is situated at the City of Clovis within nine miles of the Texas border, whereas the Albuquerque plant is situated near the center of the state and presumably the limits of the state are beyond Albuquerque's trade district. The range and power of appellant's station are not stated in the findings.

All taxes assessed against gross receipts from broadcasts by appellant, originating in other states and communicated to it by telephone or otherwise from other states, are void under our decision in Albuquerque Broadcasting Co. v. Bureau of Revenue, supra.

While the present tax is a charge against appellant as between him and the state (State ex rel. Attorney General v. Tittmann, 42 N.M. 76, 75 P.2d 701) the statute provides that "it shall be unlawful for any person engaged in any business or profession to directly advertise that any tax imposed by this act is not considered as an element of the price of property sold or service rendered." Sec. 76-1406, subd. B, N.M.Sts.1941.

This statute, while rather indefinite, indicates a policy on the part of the state to permit sellers or those performing taxa-

ble service to add the tax to the price and collect it from the purchaser or the one for whom services are performed, who are the ultimate payers.

All local broadcasts made direct from appellant's studio in Clovis under advertising contracts made in New Mexico for advertising businesses in New Mexico for local customers who ultimately pay the tax, are within Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, 115 A.L.R. 944, affirming 41 N.M. 141, 65 P.2d 863. The local incidents stated are as adequate to support the tax as those held sufficient in Western Live Stock v. Bureau of Revenue, supra; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888, 132 A.L.R. 475; Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229; General Trading Co. v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309; International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S.Ct. 1019, 88 L.Ed. 1313.

All other questions are settled by our opinion in Albuquerque Broadcasting Co. v. Bureau of Revenue supra.

The judgment is reversed and cause remanded with instructions to the district court to grant a new trial and proceed to hear said cause anew, and determine the issues not inconsistent herewith.

It is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

184 P.2d 434

CARLSBAD BROADCASTING CORPORATION v. BUREAU OF REVENUE et al.

No. 4985.

Supreme Court of New Mexico.

Aug. 11. 1947.

Rehearing Denied Sept. 10, 1947.

James W. Stagner and George L. Reese, Jr., both of Carlsbad, for appellant.

C. C. McCulloh, Atty. Gen., Thomas C. McCarty and Robert V. Wollard, Asst. Attys. Gen., Louis C. Lujan, Sp. Asst. Atty. Gen., and Harry L. Bigbee, of Santa Fe, for appellees.

BRICE, Chief Justice.

This action was brought by appellant to recover for cash paid appellee under protest, for taxes, penalties and interest assessed against it under Art. 14, N.M.Sts. 1941, known as the "Emergency School Tax Act," and for a judgment declaring that tax act to be unconstitutional if applied to gross receipts from appellant's broadcasting business; and to enjoin the appellee from assessing or collecting such taxes. This is a companion case to Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416, and Landis v. Ormsbee, Comm'r of Revenue, 51 N.M. 358, 184 P.2d 433.

The appellant is a New Mexico corporation engaged in the business of radio broadcasting with 250 watts power, at Carlsbad, New Mexico, under a license issued by the Federal Communications Commission. It broadcasts advertising programs for pay, and other programs of general interest to sustain the advertisements, for which it receives no direct remuneration. Its advertising is of two types, (1) national spot advertising, which is a program supplied by

national advertisers and reaches the studio of appellant for broadcasting by phonograph records or transcriptions transmitted in interstate commerce direct to the studio and there broadcast; (2) local advertising programs which originate in appellant's studio and consist of announcements with regard to the advertiser's business or products, made by the station's regular announcers, or speeches and announcements made personally by the purchaser of time.

There are listeners not only in New Mexico, but in the state of Texas, particularly in Culberson, Reeves, Loving, Winkler, Andrews, Ward, Gaines and Yoakum counties.

The "primary trade territory" served by appellant embraces all of Eddy county and parts of Otero and Lea counties in New Mexico, and parts of Culberson, Reeves and Loving counties in the state of Texas. The population of this territory is 35,000 in New Mexico and 500 in Texas.

The "secondary trade territory" served by appellant covers the counties of Eddy, Chaves and Lea and parts of Lincoln, Otero and Roosevelt in New Mexico, with a population of about 90,000; and all of the counties of Loving, Reeves and Winkler, and a part of the counties of Culberson, Andrews, Ward, Gaines and Yoakum in Texas, with a population of about 30,000. Many thousands of tourists who annually visit the Carlsbad Caverns National Park, located 27 miles from the city of Carlsbad, have radio receiving sets in their automobiles and listen to radio programs broadcast by appellant while they are traveling towards Carlsbad from points in Texas.

Contracts from advertisers are solicited on the basis of the primary and secondary trade territories above mentioned. The purchasers of time for radio advertising programs do so with the desire to reach all listeners in these territories.

Approximately ten percent of appellant's gross receipts are derived from purchasers of national spot advertising such as have been described; and the remaining ninety percent are derived from purchasers of advertising of a local nature hereinbefore described.

The admissions of appellee regarding the "secondary trade territory" served by appellant are not easily understood. The phrase "secondary trade territory" is not definite. We take notice judicially that the Texas state lines are about 70 miles east and 30 miles south from Carlsbad. That there are important trading points in Chaves, Lea, Lincoln and Otero counties in New Mexico, and in all the Texas counties named as being within the Carlsbad "secondary trade territory," also, that northern Eddy county's principal trading point is Artesia. The "secondary trading territory" must be of little significance to Carlsbad.

Local advertising programs originate in appellant's studio in Carlsbad, New Mexico. The contracts between appellant and its patrons, who ultimately pay the tax, and who are residents of New Mexico, are made in New Mexico. The businesses advertised are operated in New Mexico where their merchandise and products are sold. Radio speeches heard are regarding New Mexico politics, or other matter of local interest only. The only interstate feature connected with the transaction is the fact that the advertisements cross state lines, although it is evident that the listeners who are patrons of New Mexico businesses are nearly all residents of New Mexico. Those persons, whose receiving sets are in New Mexico, listening to appellant's broadcasts are listening to intrastate communications regarding intrastate business.

Interstate commerce is not burdened with the tax, nor is there discrimination against it. It would be impossible to tax the same activities in another state. In view of these conclusions, and of the local incidents mentioned, the case is brought within Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L. Ed. 823, 115 A.L.R. 944, affirming 41 N.M. 141, 65 P.2d 863; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S. Ct. 388, 84 L.Ed. 565, 128 A.L.R. 876; Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 61 S.Ct. 586, 85 L.Ed. 888, 132 A.L.R. 475; Wisconsin v. J. C. Penney Co., 311 U.S. 435, 61 S.Ct. 246, 85 L.Ed. 267, 130 A.L.R. 1229; General Trading Co. v. State Tax Commission, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309; International Harvester Co. v. Department of Treasury, 322 U.S. 340, 64 S. Ct. 1019, 88 L.Ed. 1313.

All other questions have been determined by Albuquerque Broadcasting Co. v. Bureau of Revenue supra.

In view of appellant's admission that ninety percent of its business is local, the judgment should be reformed accordingly.

The judgment is reversed and cause remanded with instructions to the District Court to set aside its judgment and enter judgment for appellee consistent herewith.

It is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

On Motion for Rehearing

BRICE, Chief Justice.

All questions raised by the appellant on motion for rehearing have been determined in our opinion on motion for rehearing in Albuquerque Broadcasting Company v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416.

The motion for rehearing is denied.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

184 P.2d 647

PITEK v. McGUIRE et al.

No. 4991.

Supreme Court of New Mexico.

Sept. 9, 1947.

[redacted]

Don G. McCormick, of Carlsbad, and Allen M. Tonkin, of Albuquerque, for appellant.

Iden & Johnson, of Albuquerque, for appellee Katherine McGuire.

On Rehearing.

PER CURIAM.

Upon rehearing the original opinion has been withdrawn and the following substituted:

BRICE, Chief Justice.

The appellant is of the opinion that the order herein granting a rehearing being general that all points and questions which were, or *might have been,* presented in the original hearing may be presented and considered on this rehearing. Whether this is correct in the absence of a contrary rule, we need not decide; but it cannot apply in this jurisdiction because of the following rule: "The motion for rehearing shall be directed to the opinion of the court, and shall distinctly specify wherein the same is erroneous; but shall not renew contentions previously argued and submitted and expressly disposed of except to invoke an earlier decision, a statute or a rule of court deemed controlling and previously overlooked. The motion may also direct the court's attention to fundamental or jurisdictional error not previously presented, and may renew any contention deemed controlling and not expressly passed upon." Sec. 1, Supreme Court Rule 18.

Necessarily the review on rehearing is limited to questions authorized by the rule, otherwise the rule would be without effect.

But the appellant has limited his attack on the opinion of the Court by his motion to two propositions, to wit:

"The Court has failed in its opinion to consider the effect of two letters written by defendant's attorney to plaintiff after the oral contract was made, which letters, together with other writings signed by defendant, constitute a complete memorandum.

"The Court, in its opinion, has overlooked a controlling rule of law in holding that the memorandum must be wholly executed subsequent to the oral agreement."

The scope of a rehearing ordinarily is limited by (1) the assignments of error, (2) the points made in the original hearing, (3) Sec. 1 of Supreme Court Rule 18, supra, (4) and the asserted errors contained in the motion. Arizona Prince Copper Co. v. Copper Queen Copper Co., 2 Ariz. 169, 11 P. 396; State v. McKnight, 21 N.M. 14, 153 P. 76; Goodeve v. Thompson, 68 Or. 411, 136 P. 670, 137 P. 744; Honea v. St. Louis, etc., R. Co., 245 Mo. 621, 151 S.W. 119; 4 C.J.S., Appeal and Error, § 1448; 3 A.J., Appeal and Error, Sec. 806.

Because of the withdrawal of the original opinion all questions presented at the original hearing will be reconsidered.

This action was brought to enforce the specific performance of a contract for the sale and purchase of real estate; and the questions are, (1) was the contract within the statute of frauds? and (2), if not, was there such inadequacy of consideration as that a court of equity should not enforce specific performance?

The facts are substantially as follows:

The appellee Katherine McGuire (hereafter called defendant) is the owner of Lots 3 to 8 inclusive, of Block 4, Mankato Place Addition to the city of Albuquerque, New Mexico, having purchased them for $1,100 in 1926. These lots front 150 feet on East Central Avenue. The record title to this property was held in the name of the defendant Kahler, an ex-service man, in order to receive the benefit of the soldier's exemption from taxation and thus defraud the state of its taxes. Defendant held an unrecorded warranty deed from Kahler. On the 14th day of August, 1945, the plaintiff wrote defendant as follows:

"Friends of ours, Mr. and Mrs. James Cusack, said you are the owner of a lot on East Central Ave., but do not know the exact location.

"Is the lot for sale? and if so, would you give us the exact location and the description?"

To this letter the defendant answered as follows: "In response to your letter, I do own two parcels of property on Central Ave., one on Mankato Place 3 x 8, or 150 ft., and the second one on Unity St., 42. I wish you would put a price on both of those. Also block on Mesa Park 9."

Answering, plaintiff wrote defendant McGuire, offering her $3,500 "for her property fronting 150' on East Central Avenue, Albuquerque, N. M." Defendant replied to this letter, stating she had more than $3,500 in these lots. Shortly thereafter plaintiff again wrote, asking defendant to put a price on the lots but defendant did not reply to this letter. Under date of October 18, 1945, plaintiff wrote to defendant as follows: "Have been waiting for a reply to my last letter in regards to the lots you own on Central Ave. Have you put a price on them? and do you still intend to sell? I would like to know—perhaps we can get together. Won't you let us know one way or another?"

Under date of November 2, 1945, defendant replied as follows: "Their was a block long frontage in the 4400 block of E. Central was purchased by Latif Hyder. The 250 ft. was about $20,000. So my half block near to town ought to be worth $12,000, Twelve Thousand Dollars."

This ended the written negotiations of the parties. On November 9, 1945, the plaintiff conferred with the defendant at her home in Chicago regarding the purchase of this property. During the conversation the defendant's son Maurice McGuire, an attorney aged 42, was present. In this conversation the plaintiff offered defendant $10,000 for the property and she countered with an offer to accept $12,000. At the suggestion of defendant's son, the conferees "split the difference" and agreed upon a price of $11,000. Plaintiff then wrote out and handed to defendant a check, as follows:

"New Mexico State Bank
Albuquerque, N. M. Nov. 9, 1945 No. ———
Pay to the Order of Katherine McGuire $500.00
Five Hundred and no/100 Dollars
To be applied on purchase of
property on E. Central Ave.
Albuquerque, N. M. Bernalillo Co.
Leaving balance of 10,500 dollars Albert Pitek"

The plaintiff asked to see a deed or tax receipt or some other evidence of title. He was informed that no taxes were being paid on the property. He was shown an unrecorded deed from defendant Kahler to defendant McGuire, in which the property was conveyed to the latter, but plaintiff was not permitted to take it away. The following morning defendant McGuire's son gave plaintiff a prior recorded deed in which the property in suit was described; and was also given a note to be delivered to W. A. Keleher, defendant's attorney, the contents of which are not disclosed by the record.

The defendant received the above described check for $500 as part payment on the property she sold to plaintiff, and advised him that her attorney W. A. Keleher of Albuquerque, would prepare all necessary papers to close the deal. The plaintiff requested that the check be held a few days until he verified the location of the lots. The plaintiff verified the location of the lots and thereafter on the 26th of November defendant endorsed the $500 check and deposited it in a Chicago bank. It was duly cleared and charged to plaintiff's account.

Thereafter and prior to December 8, 1945, defendant signed and acknowledged a warranty deed from herself as grantor to plaintiff and his wife as grantees in joint tenancy, correctly describing the property involved herein, which deed she mailed, together with an unrecorded deed from defendant Kahler to herself, to her attorney, W. A. Keleher. On December 8, 1945, W. A. Keleher wrote plaintiff as follows: "Please be advised that I have now received the abstract of title to the McGuire property which you are purchasing. If you will call at the office, I will be glad to hand you same for examination. I am holding for recordation Warranty Deed from Kahler to Katherine McGuire and deed from Katherine McGuire to you and your wife as joint tenants. These will be taken care of at the time of closing the transaction with you."

In response to this letter, plaintiff called at the office of W. A. Keleher and was informed by him that something had happened and that plaintiff would hear from him, Keleher, in a few days. On December 12, 1945, W. A. Keleher wrote plaintiff, as follows:

"Dear Mr. Pitek:
A letter today from Mr. Maurice McGuire of Chicago advises that Otto Kahler refuses to permit the sale to you to go through. He has asked that I return to you the enclosed check for $500 drawn on the Merchants National Bank in Chicago, signed by Katherine McGuire."

No direct representations as to the value of the property involved were made by plaintiff to defendant. Defendant was pleased and satisfied with the transaction until she learned about December 11, 1945, that the property was worth a great deal more than $11,000.

Plaintiff is 45 years of age, with a sixth grade education. Defendant is the owner of five improved parcels of real estate in Chicago, rented to business concerns, the dwelling where she resides, in addition to the property owned by her in and near Albuquerque, New Mexico.

She is 76 years of age and is possessed of all her mental faculties. She had not been in Albuquerque for four years preceding this transaction. One sister and her son-in-law, defendant Kahler, resided in Albu-

quierque, with both of whom she corresponded.

In Albuquerque, New Mexico, real estate values generally have advanced greatly during this period. On East Central Avenue, in the area of the property involved, there had been great activity and building, the most spectacular advances in the price of real estate occurring during the summer and fall of 1945. The actual market value of the McGuire property on November 9, 1945, was $25,000, and plaintiff, on the said date, well knew that the McGuire property was worth a great deal more than $11,000.

Plaintiff is able, ready, and willing to pay the balance of $10,500 on the contract and to close the transaction.

Defendant owned no property in Mankato Place Addition to the city of Albuquerque, except that in suit. It is within the city limits of Albuquerque, and lies in the 3900 block on East Central Ave. It is nearer to the business district of Albuquerque than the 4400 block referred to by defendant in one of her letters as having been purchased by one Latif Hyder. The only other property owned by defendant on East Central Avenue is one full block in Unity Addition, which lies about three miles east of the Mankato Place Addition and outside the city limits of Albuquerque, although within the Albuquerque post office zone.

The trial court concluded that the defendant was the owner of the property in question; that the contract was void and unenforcible because within the statute of frauds of the states of New Mexico and Illinois. That by reason of the unconscionable conduct of the plaintiff and the gross inadequacy of the consideration, the plaintiff is not entitled to specific performance of the contract alleged in the complaint, or to damages; and that the contract sued on should be cancelled. A decree was thereupon entered for defendant.

The foregoing findings of the trial court are stated in 31 paragraphs, substantially all of which are statements of evidence or evidentiary facts. A half dozen or so findings of ultimate facts would have stated the essentials for a decision. The testimony is not in the record, but the parties agree that the facts stated are correct, and we have concluded to review the case as thus presented.

The findings of the trial court satisfy us that the plaintiff has established all facts necessary to a recovery, if a memorandum of the contract was signed by the defendant that satisfies the requirements of the statute of frauds.

The trial court concluded that the agreement in suit is within the fourth section of the English Statute of Frauds and Perjuries (29 Charles II, C. 3) which has been adopted in this jurisdiction. Section Four thereof is as follows: "No action shall be brought upon any contract or sale of tene-

ments or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person therewith by him lawfully authorized."

This conclusion of the trial court is assigned as error, as follows:

"A check given by purchaser of land to seller as down payment, and indorsed and cashed by seller, containing a notation as follows:

"To be applied on purchase of property on E. Central Ave. Albuquerque, N. M. Bernalillo Co. leaving balance of $10,500." is a sufficient memorandum to satisfy the statute of frauds, where: a. Previous letters signed by seller had substantially described and identified property. b. Seller owned no other real estate which could fit the description on the check and in the signed letters. c. Seller executed and acknowledged a deed to purchaser, containing correct legal description, which deed was sent by seller to her attorney with instructions to deliver to purchaser, but which instructions were later countermanded."

To satisfy the statute of frauds the contract itself must be in writing; or if verbal, then there must have been some writing subsequently made however informal, stating each of its essential elements, signed by the person to be charged, or by his authorized agent acting for him.

The essentials of such contracts have been stated as follows:

"A memorandum, in order to make enforceable a contract within the statute, may be any document or writing, formal or informal, signed by the party to be charged or by his agent actually or apparently authorized thereunto, which states with reasonable certainty, (a) Each party to the contract either by his own name, or by such a description as will serve to identify him, or by the name or description of his agent, and (b) the land, goods, or other subject-matter to which the contract relates, and (c) the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made." Restatement of Law of Contracts, Sec. 207.

"Generally speaking, a memorandum in writing meets the requirements of the statute of frauds that certain contracts shall be evidenced by writing if it contains the names of the parties, the terms and conditions of the contract, and a description of the property sufficient to render it capable of identification." 49 A. J. "Statute of Frauds" Sec. 321.

The only writings signed by defendant having reference to the oral contract were the deed sent to her attorney, and that on the check which was endorsed by her.

That the description of the land written on the check is inadequate to satisfy the statute of frauds is conceded by plaintiff. He states his contention as follows: "Plaintiff contends that the check given by him to defendant McGuire as a down payment on the property, aided by the previous correspondence and aided by the fact that defendant McGuire executed a deed containing the exact legal description, constitutes a sufficient memorandum to satisfy the Statute of Frauds."

The only land defendant owned in the City of Albuquerque situated on East Central Avenue at the time the check was endorsed by defendant, was lots 3 to 8 inclusive, of Block 4, Mankato Place Addition to the city of Albuquerque, which consisted of six contiguous lots fronting 150 feet on that avenue. She did own property beyond the city limits of Albuquerque, fronting on an extension of East Central Avenue, but the description excludes that property. It is evident that the memorandum had reference to the Mankato Place property, or some part of it. One or more of the lots would come within the description. If the description had been "all of payee's property fronting on East Central, etc.;" or "property fronting 150 feet on East Central, etc.," the description would have been sufficient. But, while the property is in one tract, it is divided into lots, any one or more of which is "property on East Central Avenue, etc."

A very similar case is Durkin v. Machesky, 177 Wis. 595, 188 N.W. 97, 98. The memorandum was an endorsed check. The Wisconsin court said:

"On October 10, 1918, plaintiff gave defendant a check for $100, on which was the following indorsement: 'Southwest corner 28th and Meinecke, purchase price, $1,800, deposit $100, balance $1,700 to be closed in October 17, 1918.'

"The check was indorsed and cashed by Machesky.

* * * * * *

"But we are satisfied that the description was too vague and uncertain to constitute a binding contract. It does not appear whether one lot or more was intended. Counsel for defendant cite cases where parol evidence has been received to identify the land, but they are cases where some language was expressed in the writing to which parol evidence could be linked and the property identified with reasonable certainty.

"If the writing had contained in addition to that used such words as 'my property,' or 'the property in my possession,' and if defendant had owned no other property, or had possession of none other at the place in question, or if some similar language had been used as a foundation for the parol evidence, a different situation would be present, and the rule, 'That is certain which can be made certain,' might be invoked. Both the civil and the circuit judge found

the description insufficient, and we are of the same opinion."

See Corrado v. Montuori, 49 R.I. 78, 139 A. 791; Pope v. Myers, 218 Ky. 731, 292 S.W. 318; Shy v. Lewis, 321 Mo. 688, 12 S.W.2d 719; Lente v. Clarke, 22 Fla. 515, 1 So. 149; Lehman v. Pierce, 109 Ind.App. 497, 36 N.E.2d 952 and Annotations 20 A. L.R. 363 and 153 A.L.R. 1112. This memorandum standing alone is not sufficient.

The plaintiff asserts that the memorandum written on the check, supplemented by previous correspondence and a description of the property contained in an undelivered deed executed by the defendant after she received the check, satisfied the statute of frauds.

A question is whether the correspondence between the parties antedating the making of the oral agreement may be used as evidence to supplement the description of the property written on the check.

The fourth section of the statute of frauds does not prohibit the making of an oral contract for the sale of tenements, etc. Such a contract may be in writing or oral, but unless it is in writing (that is, if oral) then "some memorandum or note thereof shall be in writing," etc., to legally prove it.

There is a difference between a contract in writing and a memorandum of a parol contract as contemplated by the statute of frauds. The former may be made up of letters and telegrams or any other character of writing or writings, which together will constitute a contract, or it may be a formal contract. But if the contract made is oral, it is written evidence to prove that the particular contract was made that must be produced. The writings need not in themselves amount to a contract or be addressed to the other party. It is sufficient as evidence if the person to be bound signs any statement or document in which he admits that the parties made the oral contract, sufficiently stating therein its essential terms (2 Williston on Contracts (Rev.Ed.) Secs. 567, 579(a); no matter what may be his purpose in making the writing, or to whom it is addressed. 2 Williston on Contracts (Rev.Ed.) Sec. 579, 568; 1 Restatement of Law of Contracts, Sec. 209.

If the description on the check can be supplemented by the letters written prior to the time the parties entered into the oral contract of sale and purchase, then the description of the property is adequate. The contents of these letters consist of negotiations for the sale and purchase of the property in suit. The plaintiff offered the defendant $3,500 for the six lots, which offer she rejected, and that is the substance of these negotiations. Thereafter all negotiations and the agreement itself were oral.

It is commonly said that a memorandum may be made at any time *subsequent* to the making of the oral contract and prior to suit. Williston on Contracts (Rev.Ed.) Sec. 590. But appellant insists that the memorandum required by the statute of frauds may be made prior to the making of a contract. There are statements in text books to that effect. 49 A.J. "Statute of Frauds" Secs. 317 and 335; 2 Williston on Contracts, Sec. 590. But each of these texts has reference to contracts resulting from a written offer orally accepted. The offer bound the offerer when so accepted by the offeree, but the contract thus made was not oral. We have reference to contracts in which the offer and acceptance are oral.

Appellant cites Restatement of Law of Contracts, Sec. 214, as follows: "A signed memorandum that correctly states the terms of a contract satisfies the statute, whether the memorandum is made before or at the time of the formation of the contract, or at any subsequent time during its existence."

This text is supported by the following illustration: "A and B, in January, 1925, enter into an enforceable written contract within the statute, for one year's employment. In January, 1926, they agree orally to enter into another contract 'on the terms expressed in our contract of last year.' There is a sufficient memorandum of the new contract." Illus. 1, Sec. 214.

We do not agree that this illustration correctly states the law and we have found no supporting cases. The assumed agreement stated as an illustration, had expired by its terms; and being within the statute of frauds, it could not be revived and extended by parol. No contract within the statute of frauds that has expired by its terms can be revived and extended by parol. Reason and authority are against it. Thompson v. Robinson, 65 W.Va. 506, 64 S.E. 718, 17 Ann.Cas. 1109; Smith v. Taylor, 82 Cal. 533, 23 P. 217, 220; 49 A.J. "Statute of Frauds" Sec. 7; 37 C.J.S., Frauds, Statute of, § 113. See Annotation 17 A. & E. Ann.Cas. 1111.

We are of the opinion that a contract wholly oral, and within the statute of frauds, may not be proved by a writing made prior to the meeting of the minds of the parties. Handy v. Barclay, 98 Conn. 290, 119 A. 227; Massie-Wilson Grocery Co. v. Carroll, Brough, Robinson & Humphrey, 105 Okl. 56, 231 P. 1084; Jacobson v. Perman, 238 Mass. 445, 131 N.E. 174; Mead v. Leo Sheep Co., 32 Wyo. 313, 232 P. 511; Rabe v. Danaher, 2 Cir., 56 P.2d 758; 37 C.J.S., Frauds, Statute of, § 171.

But this does not necessarily mean that a sufficient memorandum may not

consist partially of writings made prior to the making of the oral agreement. If such prior writings are referred to in, and thereby made a part of, a memorandum or writing subsequently made so it can be said that the prior writings are incorporated therein, it is not objectionable on that account.

A memorandum may consist of several writings, such as letters, telegrams, etc. (Restatement of Law of Contracts, Sec. 208), but it is a general rule that collateral papers must be referred to in the faulty memorandum itself before they can become a part of it. It is stated by high authority: "Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective it cannot be supplied by parol proof, for that would at once introduce all the mischief which the statute was intended to prevent." Williams v. Morris, Ex'r, 95 U.S. 444, 24 L. Ed. 360.

There is authority to the effect that where documents show that they each relate to the transaction to be proved, though they contain no express reference to each other, may be taken together to constitute a memorandum of a sale. 2 Williston on Contracts, Sec. 582; Annotation 85 A.L.R. page 1195. But the correspondence in evidence does not and could not contain any reference to a transaction that was yet to transpire.

We are of the opinion that the letters in evidence cannot be resorted to to aid the faulty description of the property in the memorandum written on the check.

The finding of the trial court regarding the execution of the undelivered deed is as follows: "Thereafter and prior to 8 December 1945, defendant McGuire signed and acknowledged a warranty deed from herself as grantor to plaintiff and his wife as grantees in joint tenancy, correctly describing the property involved herein, which deed she mailed, together with an unrecorded deed from defendant Kahler to herself, to her attorney, W. A. Keleher."

Presumably this deed is in the usual form of a warranty deed commonly used in this state. Whether it was introduced in evidence we are not advised. Its terms are not mentioned. If it contains the substance of the oral contract, any reference to it, or to the memorandum on the check it does not appear in the findings. We know only that the defendant is grantor therein, that the plaintiff and his wife are grantees therein, and that the land purported to be conveyed by it is that in suit.

Ordinarily an undelivered deed in the possession of the grantor or his attorney, that does not contain, or refer to, the terms of an oral agreement to sell and purchase real estate; *or which does*

not refer to a writing made in pursuance thereof, or in which writing it is not referred to, cannot be used as evidence to prove the identity of the particular property that was the subject of an oral contract or complete an insufficient description thereof contained in the memorandum. Carr v. Mazon Estate Inc., 26 N. M. 308, 191 P. 137; Swain v. Burnette, 89 Cal. 564, 26 P. 1093; Day v. Lacasse, 85 Me. 242, 27 A. 124; Hartenbower v. Uden, 242 Ill. 434, 90 N.E. 298, 28 L.R.A.,N.S., 738; Bruns v. Huseman, 266 Ill. 212, 107 N.E. 462. See authorities pro and con in Annotations 100 A.L.R. page 196 et seq.

We did not hold in Carr v. Mazon Estate, Inc., 26 N.M. 308, 191 P. 137, 139, as interpreted by defendant, that an undelivered deed could never, under any circumstances, be treated as a memorandum that would satisfy the statute of frauds. To the contrary, we held that if a deed is made in pursuance of the contract and *referring to it,* that it would be sufficient for such purpose. The facts in that case are too complicated to review, but we held therein that there was no contract, oral or otherwise, between the parties. We stated: "The author (Page in his work on Contracts) states that the weight of authority is that an undelivered deed, or a deed in escrow, is not a sufficient memorandum to take the contract out of the statute of frauds. Upon principle this must be correct, although there is great conflict in the cases. Of course, *if there is a contract in fact made* with authority by an agent, a deed executed in pursuance of the contract *and referring to it* would be a memorandum sufficient to satisfy the statute. But where no contract exists independent of the deed, an undelivered deed can create no contract and is not evidence of a contract; there being none. When the deed is delivered, it becomes the contract, and of course evidences the same." (Our emphasis).

This deed was sent by defendant from Chicago to her attorney in Albuquerque who wrote plaintiff regarding it: "I am holding * * * a deed from Katherine McGuire to you and your wife as joint tenants," and this is all that is stated regarding it. If defendant or her attorney had sent plaintiff the deed for examination, or to close the transaction, with a statement that it had been executed for such purpose or purposes, it could have been considered as supplementing the memorandum written on the check. Ryan v. United States, 136 U.S. 68, 10 S.Ct. 913, 34 L.Ed. 447; Bayne v. Wiggins, 139 U.S. 210, 11 S.Ct. 521, 35 L.Ed. 144. But there is nothing in the letter to indicate the contents of the deed, and particularly whether its terms included those of the oral contract made by the parties, or even that it purported to convey the property in suit. It cannot be resorted to as a memorandum for a descrip-

tion of the property involved in the oral agreement.

It is true that a memorandum of an oral sale of real estate need not be made with the formality of a deed; but it must contain a sufficient description of the land, or furnish the means or data within itself which points to evidence that will identify it, and no such memorandum was signed by defendant. Heron v. Ramsey, 45 N.M. 483, 117 P.2d 242; Swiss Oil Corp. v. Eastern Gulf Oil Co., 6 Cir., 297 F. 28; Redemeyer v. Cunningham, 61 Cal.App. 423, 215 P. 83; Gordon v. Perkins, 108 Cal.App. 336, 291 P. 644; Martinson v. Cruikshank, 3 Wash.2d 565, 101 P.2d 604; Gendelman v. Mongillo, 96 Conn. 541, 114 A. 914; Frabiicatore v. Negyesi, 105 Conn. 412, 135 A. 441; Richardson v. Stuberfield, 168 Ark. 713, 271 S.W. 345; Justice v. Justice, 239 Ky. 155, 39 S.W.2d 250; Kentucky Counties Oil Co. v. Cupler, 204 Ky. 799, 265 S.W. 334; Shy v. Lewis, 321 Mo. 688, 12 S.W.2d 719; Smith v. Griffin, 131 Tex. 509, 116 S.W.2d 1064; Taylor v. Sayle, 163 Miss. 822, 142 So. 3; 37 C.J.S., Frauds, Statute of, § 184; 49 A.J. "Statutes of Frauds" Sec. 394; Annotations in 20 A.L.R. page 363 et seq., and 73 A.L.R. p. 1383 et seq.

The rule in Alabama is not so strict. It was said in Kyle v. Jordan, 196 Ala. 509, 71 So. 417, 418: "While the rule has probably been relaxed, in this state, to the extent that there need not be an express reference in the deed, will, or other writing to the separate extrinsic document, yet we hold that there must be internal evidence of the identity and unity of the two writings as constituting a single transaction."

The decree of the district court should be affirmed, and it is so ordered.

LUJAN and SADLER, JJ., concur.

McGHEE and COMPTON, JJ., did not participate.

185 P.2d 298

STALCUP v. RUZIC.

No. 5024.

Supreme Court of New Mexico.
Aug. 18, 1947.

Rehearing Denied Oct. 4, 1947.

Richard F. Rowley, of Clovis, for appellant.

Gore & Babbitt, of Clovis, for appellee.

LUJAN, Justice.

Appellee recovered a verdict and judgment of $15,000 against Stanton Lewis and S. S. Hamilton, a partnership, d/b/a The Clovis Transit Company, and James V. Ruzic, for injuries sustained by her while riding as a guest in an automobile owned and operated by Ruzic which collided with a bus leased and operated by the defendants Lewis and Hamilton.

James V. Ruzic, sole appellant, varying the order of presentation, contends, that (1) there was not sufficient evidence of acts or omissions on his part upon which to base a finding that appellee's injuries were intentional or caused by his heedlessness and reckless disregard of the rights of others; (2) the court erred in allowing counsel for appellee to ask each member of the jury panel on voir dire examination whether he or any member of his family owned stock or had any interest in the two named companies; and (3) the court erred in overruling his motion to stay the proceeding, thus forcing him to defend at a time when he was in Germany as a member of the United States Army.

The accident in question happened at the intersection of Seventh and Hull streets, at about 11:25 o'clock the night of February 4, 1946. Seventh street extends east and west and measures 56 feet 6 inches from curb to curb. Its center is paved 18 feet in width. On either side of the paved portion of the street lie four feet of oil surfacing and the rest up to the curb is dirt or caliche. It represents an extension through the City of Clovis of a federal highway known as Highway No. 60, which normally carries heavy traffic, especially between the business section of the city and the Army Air Base then nearby, lying to the west thereof. The area where the accident occurred was both business and residential in its makeup, each side of the highway being flanked with buildings consisting of residences, stores, tourist courts and gasoline stations. Hull street extends north and south and measures 30 feet from curb to curb.

At the time of the collision, appellant was driving his eight cylinder 1940 Oldsmobile sedan in an easterly direction on Seventh street, having with him at the time Merle Clements, sitting in the front seat, as also Lt. Frank Schooley and Theresa Stalcup, occupying the back seat. At the same time and on the same street, one Darlene Athey was driving codefendants' city bus, with three passengers aboard, in a westerly direction. The collision was caused by the left side of appellant's car catching the left front end of the city bus, causing the car to spin around and finally come to a stop against the curb. The headlights of both vehicles were burning. The driver of each vehicle saw the other approaching approximately three blocks away, and kept

an eye on the other to the point of collision. They were fully aware of the presence of each other on the street for an appreciable time prior to the impact.

Appellant entered the city limits traveling at a high rate of speed, ranging between 65 and 90 miles per hour, in violation of both city and statutory speed laws. When within three blocks of it, he observed a city bus approaching from the opposite direction. Within 200 feet of same, the appellant applied his brakes, as the bus driver momentarily, as it seemed to him, entered his lane of traffic. The appellant released his brakes almost as soon as applied, believing himself to have clear passage, and still continued at the same high and dangerous rate of speed. When within about 30 or 40 feet of the bus, he again applied his brakes, suddenly, and collided with it, having thought it to be once more swerving into his lane of traffc as he testified. Actually the bus had already stopped a mere foot across the center line of the highway preliminary to executing a left-hand turn into Hull street. Testimony as to position of the *bus on coming to rest after the collision,* based on measurements made shortly thereafter, placing it 6 feet 10 inches across the center line of the street and in appellant's lane of traffic, and slightly over 33 feet east of the east boundary of Hull street, or about 48 feet from center of the intersection, does not contradict unimpeached testimony of the bus driver that the bus was at a dead stop only one foot over the center line *at the moment of impact;* nor her testimony and that of still another that it had reached the intersection, before the collision occurred. The appellant's car was skidding as shown by physical marks on the pavement, from a point 97 feet west of point of collision to a point 90 feet east thereof.

The foregoing ultimate facts all are within the verdict of the jury as permissible inferences deducible from the evidence.

There being substantial evidence in the record to support the finding of the jury that the appellee's injuries were proximately caused by the act of the appellant in operating his automobile in a heedless and reckless disregard for the safety of his passengers, under our well-established rule, we will not disturb the verdict. This disposes of appellant's first claim of error.

We come now to a consideration of the second question. In the examination of prospective jurors on voir dire, in cases of this kind, counsel may, if acting in good faith, question them with respect to their or their family's possible interest in, or connection with, any particular insurance company, for the purpose of ascertaining their fitness to serve, and of enabling counsel to exercise his right of peremptory challenge, though plainly such a line of questioning must necessarily tend to lead

to the belief that the defendant is insured and that the company referred to is defendant's insurer.

The matter rests largely within the sound discretion of the trial court. If, under the circumstances of the case, the question is calculated to prejudice the defendant before the jury, the trial court should exercise its discretionary power so as to remove the prejudice and insure a fair trial. This must be left largely to the presiding judge, who has ample power to prevent injustices to the parties litigating before him, and whose power should be used soundly for this purpose. His ruling will not be disturbed unless there has been an abuse of such discretion and such does not appear. See Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585.

The last claim of error is based on the court's denial of appellant's motion to stay proceedings. The motion was filed under the Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix, § 521, and prayed that "all further proceedings be * * * stayed for the period of his military service * * * and for three months thereafter * * *." The cited section of the above Act provides that: "At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter *may, in the discretion of the court* in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in the Act, *unless, in the opinion of the court,* the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service." (Italic ours.)

On this issue the record discloses the following: On February 23, 1946, the case was filed. On March 1, 1946, a motion was filed by appellee to take the depositions of appellant. On the same day the Court signed and filed an order granting said motion and set March 6, 1946, as the day for taking the same. Appellant was represented by his attorney at this hearing. During the trial they were introduced and read to the jury. On March 25, 1946, appellant through his attorney filed a motion to make more definite and certain. On August 5, 1946, appellee filed his bill of particulars. On August 16, 1946, appellant filed his answer. On August 10, 1946, the court set the case for trial as of September 11, 1946. On September 7, 1946, approximately six months after the filing of the case, appellant filed his motion for stay of proceedings. Appellant was within the jurisdiction of the court from February 23, 1946 until August 23, 1946, when he left the United States.

The motion did not show that any attempt had been made to procure leave for appellant so that he could be present at the trial. In fact, any showing of diligence on his part is wholly lacking, and we cannot say that the trial judge abused the discretion lodged in him by the Soldiers' and Sailors' Relief Act, supra. It therefore follows that this assignment is without merit. Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 1231, 57 L.Ed. 1587. See also Johnson v. Johnson, 59 Cal.App.2d 375, 139 P.2d 33; Koons v. Nelson, 113 Colo. 574, 160 P.2d 367; Miller v. Miller, 26 Cal. 2d 119, 156 P.2d 931; People ex rel. Flanders v. Neary, 113 Colo. 12, 154 P.2d 48.

Finding no error, the judgment will be affirmed and the cause remanded, with direction to the District Court to enter judgment against the surety on appellant's supersedeas bond, and to enforce the same. It is so ordered.

SADLER and McGHEE, JJ., concur.

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

BRICE, C. J., did not participate.

HENSLEY, District Judge (dissenting).

I cannot concur in the foregoing opinion and my statement of dissent follows:

The first proposition relied upon by counsel for appellant is that the court erred in allowing counsel for plaintiff-appellee to ask each member of the jury panel on voir dire examination certain questions relative to insurance companies.

The case at hand discloses that counsel for appellee asked each juror individually, (a) "Do you have any interest or stock in the Continental Casualty Company?" (b) "Do any immediate members of your family have any stock in or direct interest in the Continental Casualty Company?" (c) "Do you have any interest, or stock, in the State Automobile Insurance Company of Columbus, Ohio?" and (d) "Do any members of your family have any interest or stock in the State Automobile Mutual Insurance Company of Columbus, Ohio?" Each prospective juror answered each question in the negative. Thereafter each question just quoted was again asked by counsel for appellee to the jury panel collectively. It will be remembered that the appellant, James V. Ruzic, then in military service, was from Cleveland, Ohio, as was disclosed by the plaintiff in the deposition of the defendant James V. Ruzic. The appellant objected to each question at the time and the trial court overruled the objection.

The primary objects of voir dire examination are to secure a fair trial and a just verdict. The examiners are entitled to know if the jury is qualified, that is, if the jury is free from prejudice or bias. In Faber v. C. Reiss Coal Company, 124 Wis.

554, 102 N.W. 1049, it was said that such examination is proper so long as it is conducted in an honest effort to discover the status of mind of jurors regarding the matter at hand or any matter likely to unduly influence them. In other words, the latitude is granted for the protection of the rights of litigants to an unbiased jury.

The almost universal rule permits the plaintiff to interrogate jurors on voir dire as to their, or their relatives', possible connection with or interest in liability insurance companies in actions for personal injury and death actions, where the questions are propounded in good faith. The general rule was followed by this court in Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585. To the rule just noted there are two conditions attached; first, the amount of damages awarded by the jury must not be disproportionate to that which the evidence reasonably justifies and, second, the defendant's liability under the evidence must not be a close question. To these conditions this court has given approval in the case just cited. It will be noted that both of these conditions will not be apparent to the trial judge at the time of the voir dire examination and consequently counsel must proceed with caution lest an unbiased jury, by reason of the suggestion of the presence of an insurance company, thereby become prejudiced. To further relax the rules of voir dire examination by the medium of apparent good faith will only circumvent the rules of evidence that render testimony relative to the presence of an insurance company inadmissible.

The formula indicated in Avery v. Collins, 171 Miss. 636, 157 So. 695, 158 So. 552, and noted in 105 A.L.R. 1333, if followed, would for all practical purposes preclude the question of good faith from arising, if there was in fact an insurance company directly involved. In that case it was pointed out that the proper means of ascertaining the qualifications of a tendered juror in respect to his insurance connection, is to ask him what business he is engaged in and if he answers, for instance, that he is a farmer, the further precautionary question may be put to him of whether he has any other business or business connections. If he answers he has not, that usually ought to end the privilege as far as inquiry into his insurance connections is concerned. If that method should not be sufficient in a given case then counsel might go further, if the trial judge is first satisfied that a necessity therefor exists. By following such a standard counsel for plaintiff could generally secure an unbiased jury. On the other hand, the formulating, propounding, and constantly repeating questions relative to insurance companies will result only in leading the jury to believe that an insurance company, and not the defendant, will pay for the damages, a belief that may or may not be true. This would be greatly prejudicial to a defendant. The court

should guard the substantive rights of both parties litigant. One party should not be permitted to use as a weapon against another that which is furnished him as a shield. The examination of prospective jurors on voir dire by the plaintiff in the instant case was improper and prejudicial. The trial court, in permitting the repetition of questions over and over again to each juror individually, and finally to the jury panel collectively, naming specific companies in each question, abused its discretion.

The second assignment of error relied upon by appellant is that the evidence was insufficient to establish that plaintiff's injuries were intentional, or caused by the appellant's heedlessness or his reckless disregard of the rights of others.

To analyze this proposition requires an examination of Section 68-1001 of the New Mexico Statutes, 1941 Anno., being the so-called "Guest Statute" and in words as follows: "No person transported by the owner or operator of a motor vehicle as his guest, without payment for such transportation, shall have a cause of action for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of said owner or operator or caused by his heedlessness or reckless disregard of the rights of others."

The undisputed evidence discloses that the collision occurred on appellant's side of the street. The statement of facts recited in the opinion, in that "actually the bus had already stopped a mere foot across the center line of the highway preliminary to executing a left-hand turn into Hull street * * *" are not concurred in by the writer. The uncontradicted proof submitted by appellee discloses that the bus was actually six feet and ten inches across the center line of the street and in appellant's lane of traffic, by actual measurement. Further, the driver of the bus, a witness called by appellee, stated that the bus had stopped and that it did not go forward or backward after the collision, but that it might have moved some to the south. The uncontradicted proof further shows that the point of impact occurred 33 feet and 5 inches east of the east boundary of Hull street, or a total of 48 feet and 5 inches from the center of the intersection of Hull street and Seventh street. A left-hand turn could not be made before reaching the intersection. The appellant was in his proper lane of traffic. The side of appellant's vehicle came in contact with the left front corner of a bus owned by a codefendant. The vehicle of the codefendant was not in its proper lane of traffic. The only evidence against the appellant was on the question of speed. This evidence was widely divergent and the witnesses who testified as to

appellant's excessive speed admittedly base their estimates on the fact that they watched the approaching headlights of appellant's vehicle as the witnesses rode in a lighted bus owned by a codefendant. The weight that this estimate should be given is problematical. That it lacks probative force is shown in Andrews v. Armour & Co. et al., 119 Conn. 651, 178 A. 359, at page 360, and Thrash v. Continental Casualty Company, La.App., 6 So.2d 75. The plaintiff and another occupant of appellant's vehicle testified that nothing about appellant's driving or speed attracted their attention.

Assuming for the moment that the apellant was speeding, that alone is not sufficient. Vanderkruik v. Mitchell, 118 Conn. 625, 173 A. 900, 901; McDonald v. Dodge, 231 Iowa 325, 1 N.W.2d 280; McLeod v. Dutton, 13 Cal.App.2d 545, 57 P.2d 189; Hart v. Hinkley et al., 215 Iowa 915, 247 N.W. 258; Bowman v. Puckett, 144 Tex. 125, 188 S.W.2d 571. All being cases involving "Guest Statutes." Hence, the conclusion is unavoidable that the only evidence in support of the verdict against the appellant was on the question of speed and that evidence lacked probative force. Finally, even if excessive speed had been admitted, it would not have met the requirements of the statute quoted. In view of the foregoing the trial court should have sustained appellant's motion for a directed verdict.

The third assignment of error raised by appellant is without merit.

On Motion for Rehearing

PER CURIAM.

The appeal is before the court on motion for rehearing filed by the appellant. Examination and consideration thereof satisfy us that all questions argued in appellant's brief have been passed upon and correctly resolved in the opinion heretofore filed, with one exception. Counsel reminds us that there was no supersedeas bond filed in connection with this appeal. Hence, the direction that upon remand judgment be entered against the surety on appellant's supersedeas bond is erroneous and the direction as to the entry of judgment against the surety on a supersedeas bond contained in the original opinion should be withdrawn. The judgment will simply stand affirmed. Except for this correction, the opinion as written and filed remains unchanged and the motion for rehearing is denied.

It is so ordered.

BRICE, C. J., and COMPTON, J., did not participate.

HENSLEY, D. J., dissents.

185 P.2d 508

McDONALD v. DENISON et al.

No. 4972.

Supreme Court of New Mexico.

Dec. 31, 1946.

Rehearing Denied Oct. 31, 1947.

Scott H. Mabry and Robert W. Reidy, both of Albuquerque, for appellant.

Simms, Modrall, Seymour & Simms, of Albuquerque, for Walter L. Denison & Mountain States Mut. Casualty Co.

Dailey & Rogers, of Albuquerque, for A. E. Beaver.

HUDSPETH, Justice.

Appellant filed this action under the provisions of the Workmen's Compensation Act, 1941 Comp. § 57-901 et seq., for the loss of an eye, and from an adverse judgment prosecutes this appeal.

The trial court found that appellee, Denison, in the month of September, 1944, was engaged in the performance of a contract he had with the New Mexico Highway Department to build a highway near Springer, New Mexico; that appellee, Beaver, had the subcontract for hauling the sand and gravel on the project; that appellant went to work with his truck on the project hauling sand and gravel for the compensation of 8¢ per cubic yard mile; that out of said 8¢ per cubic yard mile appellant was required to service his truck; keep the same

in repair and pay for all gasoline and oil used by him; that on or before the week ending Saturday, September 9, 1944, while working on the project, a spring of plaintiff's truck got in bad repair, but did not cause an emergency and the truck did not break down on the job and appellant continued to use the truck; that on the following Monday morning, September 11, 1944, appellant reported at the rock crusher to begin hauling material to the road under construction, but found the rock crusher shut down for repairs; that he thereupon decided to repair his truck and drove his truck to the nearest public repair shop, which was situate in Springer some twenty-two miles from the project; that the taking of his truck to the public repair shop was of appellant's own volition and was not ordered by defendants or any of them; that the repair shop is not premises occupied, used or controlled by defendants; that appellant's presence in said repair shop was not required by virtue of his employment by defendants; that while appellant and a mechanic in said repair shop were working upon the springs of his truck, and as the result of work being done by appellant, a small piece of steel flew off and lodged in appellant's left eye causing him to lose said eye by enucleation; that at the time of the accident appellant was not performing services arising out of and in the course of his employment; that the injury was not received by appellant as a result of his employment while at work in or about the premises occupied, used, or controlled by his employers, or a place where his employers' business required his presence; that the proximate cause of the injury was not the negligence of the employers, and "that at all times material hereto plaintiff, McDonald, was an employee of the defendants, Walter L. Denison, and A. E. Beaver".

The New Mexico Highway Department requires road contractors to make weekly reports showing all workmen engaged on road projects, including truck drivers who are being paid by the yard or ton mile. Appellant reported his own time and signed the payroll—in effect, paid himself wages.

Appellant contends that the facts require the conclusion that the injury arose out of and in the course of the workman's employment and urges that appellant was within the scope of his employment and on the business of his employers when he was engaged in repairing his truck at the nearest available place. He does not claim that either employer was negligent. We considered paragraph (*l*), Section 57-912, Comp.1941, in Cuellar v. American Employers' Insurance Co. of Boston, Mass., 36 N.M. 141, 9 P.2d 685, 687, where the paragraph of the statute is set out and held "that the Workmen's Compensation Act is remedial and should be liberally construed, but not unreasonably or contrary to legis-

lative intent". The paragraph was also considered in Caviness v. Driscoll Const. Co. et al., 39 N.M. 441, 49 P.2d 251, and in Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585; but the precise question at issue herein is one of first impression before this court.

Appellant cites Southwestern Portland Cement Co. et al. v. Simpson, 10 Cir., 135 F. 2d 584 and other cases, but strongly relies upon the case of MacKay v. Department of Labor and Industries, 181 Wash. 702, 44 P.2d 793. Appellees cite a later Washington case, that of McGrail v. Department of Labor and Industries, 190 Wash. 272, 67 P.2d 851, 854, in which the MacKay case is discussed and distinguished, from which we quote:

"In the case before us here, the contract was dual in its nature. One part of the contract had reference to the personal services of the employee, and the other had reference to the hiring of his truck. So far as compensation was concerned, the two elements had no connection with each other. For his personal services, McGrail received exactly the same wage as that received by those workmen who did not furnish trucks. For the use of his truck, McGrail was paid on a basis of the time of its operation, whether driven by him or by some other employee of the highway department. Although McGrail was required to make repairs and keep the truck in proper operating condition, those duties were to be performed by him at times when he was off shift, and strictly as a part of his contract to furnish and maintain the truck. In that respect, he was in no different situation than he would have been had he not been otherwise employed by the highway department, nor in any different situation from that occupied by one who simply rented trucks to that department for use by it on the job.

"Moreover, McGrail's truck was never out of commission, but was continuously in operation. An emergency was not presented requiring immediate attention in order to prosecute the work. The grinding of the valves involved an errand with which we are not now concerned, inasmuch as that errand had been completed. In any event, the valves were not ground until after the job had ended. The tires, which occasioned this controversy, were a part of the equipment which McGrail was obviously required to replace from time to time, thus suggesting the necessity of having extras conveniently at hand. In this instance, at least, the tires had not suddenly collapsed or been rendered utterly useless, but were simply in the final stages of deterioration, calling for replacement at the earliest convenience. Their immediate condition, however, did not interrupt the use of the truck, nor lessen the compensation paid therefor.

"The two cases are thus clearly distinguishable in several points of fact, and

those distinctions, in our opinion, call for different results. But we rest our conclusion herein more particularly and with complete decisiveness upon the ground that the furnishing of the tires was related to a contract of truck hiring and not to a contract of employment, and that, when McGrail undertook the journey to Wenatchee to procure tires, he was not doing so in furtherance of his employer's interests, but solely in furtherance of his own interests as the owner and hirer of the truck. He was, therefore, not a workman in the course of his employment, within the meaning of the statute."

Another case in point is McKay v. Crowell & Spencer Lumber Co. et al., La.App., 189 So. 508, 510, and in which the court said: "With reference to the second question, we feel that the lower court correctly held that the accident did not arise out of plaintiff's employment, nor in the course of his employment. It is shown by the facts that the accident occurred at a time when the plaintiff was not engaged in his employment, but, on the contrary, was on the personal mission of having his own truck repaired. It is shown that the place of the accident was on a public highway several miles from the premises where the logging work was being done and entirely disconnected from such premises. (Citing cases.)" See also Jarman v. Trucking, Inc., 286 Mich. 492, 282 N.W. 218; State Highway Commission v. Koon, 185 Okl. 161, 90 P.2d 889; Pettet v. Monroe County Emergency Work Bureau, 248 App.Div. 797, 289 N.Y.S. 29; Kneeland v. Parker, 100 Vt. 92, 135 A. 8, 48 A.L.R. 1396; King's Case, 133 Me. 59, 173 A. 553.

Appellant in his brief says he will argue a single point; "The facts require the conclusion that the injury arose out of and in the course of the workman's employment."

It is unnecessary to consider other possible contentions which might have been made. Hernandez v. Border Truck Line, 49 N.M. 396, 165 P.2d 120.

Under the findings of the trial court that appellant was required to keep his truck in repair, that the injury was received twenty-two miles from the place of work in a repair shop with which appellees had no connection, and where the business of appellees did not require the presence of appellant, we must conclude that appellant's injury did not arise out of and in the course of his employment by appellees, Denison and Beaver.

It follows that the judgment of the trial court should be affirmed.

It is so ordered.

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

BRICE and LUJAN, JJ., dissenting.

185 P.2d 975

HERRERA et al. v. ZIA LAND CO. et al.

No. 4978.

Supreme Court of New Mexico.

Oct. 14, 1947.

Rodey, Dickason & Sloan, Frank M. Mims and Gilberto Espinosa, all of Albuquerque, for appellants.

Hugh B. Woodward and Lawson K. Stiff, both of Albuquerque, for appellees.

Opinion on Rehearing

PER CURIAM.

Upon consideration of appellants' second motion for rehearing, the opinion on re-

hearing heretofore filed herein is withdrawn and the following substituted therefor.

McGHEE, Justice.

The appellants, plaintiffs below, joined in an action to quiet title to two tracts of land in the Town of Atrisco Grant, conveyed to them as "heirs" of the grant, against the appellees, defendants below, who also claim title through the grant, although they do not ask any relief.

The deeds to the plaintiffs were dated July 8, 1939, and were on the regular printed forms used by the grant. They recite that they were issued pursuant to a regular quarterly meeting of the Board of Trustees of the Town of Atrisco on June 10, 1939, and that the Board acted in pursuance of Sec. 7, Chapter 3 of the 1917 Session Laws, (1941 Comp. § 9-207).

The statutes provide that conveyances may be made by the Board of Trustees of the common lands to "heirs" of the grant only at a regular meeting of the board, which shall be held on the first Saturdays of January, April, July and October, and the board is not bound by a sale not made at a regular meeting. Provision is made for special meetings, but sales at such a meeting are prohibited.

The parents of plaintiffs were direct descendants and heirs at law of deceased inhabitants of the grant and were alive at the time of the issuance of the deeds. The plaintiffs were minors and were not then residing on the grant.

Three defenses were interposed.

1. That the deeds to plaintiffs were not issued pursuant to a resolution adopted at a regular quarterly meeting of the Board of Trustees, and that they are therefore void.

2. That the plaintiffs were "non-heirs" and the sale to them was not authorized by a mass meeting of the heirs of the grant as provided by Sec. 9-202, 1941 Comp., being Chapter 3, Sec. 2, Laws of 1917.

3. That the description in the deed to Isabel Herrera referred to as tract 52-A is so vague and indefinite that it renders the conveyance void as to it.

The trial court upheld defenses numbered 1 and 2 as to both plaintiffs and defense numbered 3 as to Isabel Herrera.

The corporation has not attempted cancellation of the deeds on these grounds and is not a party to this case.

May the defendants, who base their right on deeds of a later date, on the facts in the record, urge defenses numbered 1 and 2, supra?

The date on which the issuance of the deeds was authorized was not one provided by statute, but the law presumes that public officials perform their duties

until the contrary is shown. Daughtry v. Murray, 18 N.M. 35 (42), 133 P. 101. A regular meeting once convened may adjourn to a later date. McQuillin on Municipal Corpus. (Rev.Ed.) Sec. 632:

"If a regular meeting is adjourned, any business which would have been proper for the body to consider at that meeting may be considered and acted upon at the adjourned meeting * * *. An adjourned meeting of either a regular or stated or special or called meeting is but a continuation of the same meeting."

McQuillin on Municipal Corp. (Rev.Ed.) Sec. 633:

"The application of the presumptions of regularity and validity of the acts of officers of a municipal corporation has been uniform and is to be found in a multitude of decisions on almost every point presented by the ramification of the law relating to them."

1 Jones Commentaries, 2d Ed., pp. 239, 240:

"We find the presumption of frequent application to acts of the governing body of the municipality in connection with the enactment of ordinances or resolutions."

The burden was on the defendants to show that the June, 1939, meeting was not in fact an adjourned session of a regular quarterly meeting. They did not offer any proof on this point, but relied solely on the date of the meeting, and this defense therefore fails.

We will now proceed to a consideration of the second defense.

The trustees were the governing body of the corporation and before the deeds were ordered issued to the plaintiffs in June, 1939, they necessarily had to determine that the plaintiffs were heirs and entitled to them. The deeds under which the defendants claim having been issued after the delivery of plaintiffs' deeds, they may not collaterally attack the determination of the board in this action.

City of Socorro v. Cook, 24 N.M. 202, 173 P. 682; Board of Trustees of Town of Torreon Land Grant v. Garcia, 32 N.M. 124, 252 P. 478; Fixico v. Frank, 108 Okl. 163, 235 P. 619.

To allow collateral attacks on the deeds of land grant officials years after their issuance by outsiders who may have subsequently acquired adverse interests would lead to intolerable mischief. These land grants were made by the sovereign to provide homes and a means of livelihood for the inhabitants of the grants and their descendants. Left alone their officials seem to do very well in parceling out these lands to the people for whose benefit they were originally granted.

We now proceed to a consideration of the description of tract 52-A in the deed of Isabel Herrera, which reads simply:

Measure on the	North	283	feet
" " "	East	253	"
" " "	South	200	"
" " "	West	253	"

This description is so vague, indefinite and inconclusive that it is void and of no effect.

That part of the decree dismissing the complaint as to tract 52-A claimed by Isabel Herrera is affirmed. The remainder of the decree is reversed with directions to enter a decree in favor of the respective plaintiffs as to the other real estate involved in the suit in accordance with the views expressed in this opinion, and it is so ordered.

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

185 P.2d 977

STATE v. VALDEZ et al.

No. 5045.

Supreme Court of New Mexico.

Oct. 22, 1947.

Frazier & Quantius, of Roswell, for appellants.

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

LUJAN, Justice.

The appellants appealed from a judgment entered against them in the district court of Chaves County, by which they were sentenced to ninety days imprisonment in jail and assessed fines of $250 each. The information to which they pleaded guilty, omitting the formal part thereof, reads: "* * * did unlawfully operate a game of chance, to-wit: poker and dice, contrary to the form of statute in such cases made and provided, and against the peace and dignity of the State of New Mexico."

On April 1, 1947, appellants were arraigned in the district court and entered their respective pleas of guilty. They were not represented by counsel although the court advised them of their rights in that respect. On April 2, 1947, appellants, through counsel filed a motion praying leave to withdraw their pleas of guilty, which was denied.

This information was undoubtedly attempted to be drawn under Section 41-2201, 1941 N.M.Comp., which provides, in part: "It shall hereafter be unlawful to play at, run, or operate any game or games of chance such as * * * poker * * * or any other game or games of chance played with dice * * * *for money or anything of value* * * *." (Emphasis ours)

Appellants contend, and we think rightly so, that the information does not charge a public offense, and, further, that although their pleas of guilty are equivalent to a conviction, yet, if the acts charged do not constitute a public offense, their pleas confess nothing. The omission is of matter of substance, and not a defect or imperfection in the matter of form only within the meaning of the statute and the fact that the information charged them with "unlawfully" operating a game of chance did not alter the situation. State v. Newton, 16 N.D. 151, 112 N.W. 52, 14 Ann.Cas. 1035; see, also 22 Corpus Juris Secundum, Criminal Law, § 424, on page 658.

The pleader, by omitting the allegation that the operation of such game was "for money or anything of value" failed to charge them with any offense. State v. Gray, 38 N.M. 203, 30 P.2d 278; State v. McMath, 34 N.M. 419, 283 P. 51; State v.

Newman, 29 N.M. 106, 219 P. 794; United States v. Medina, 15 N.M. 204, 103 P. 976. The mere playing or operating of a game of chance, unless it be for money or something of value, does not violate the provisions of the Act. Ex parte Hamm, 24 N.M. 33, 172 P. 190, L.R.A.,N.S., 1918D, 694.

The District Court of Appeals (criminal), Third District, California, in the case of Ex parte Capanna, 45 Cal.App. 501, 187 P. 1077, 1078, which involved the same question before us under a similar statute, said:

"* * * But it appears from said section that, to make the conducting of a banking or percentage game a crime, it must be played 'for money, checks, credit, or other representative of value,' and it is equally apparent that in the complaint before us there is no allegation that the percentage and banking game was so played, nor is there any equivalent words used in said complaint. It is thus to be seen that there is an entire omission to state an essential element of the crime contemplated by said section of the Penal Code; in other words, defendant was charged with a perfectly innocent act, since it is no crime to merely conduct a percentage or banking game. The situation is not changed by the fact that the term 'unlawful' was used as a modifier in said complaint or that the game was designated as a gambling game. These terms constitute mere conclusions that do not change the force or effect of the facts set forth in said complaint." See, also Ex parte Clark, 54 Cal.App. 507, 202 P. 50.

The sufficiency of the information was not challenged in the court below. However, appellants' counsel are entitled to the explanation that they were not employed in the case until after appellants had entered pleas of guilty. Where the challenge to the information is based upon an omission in the averments of an essential element of the crime, jurisdiction of the subject matter cannot be conferred by consent, as in this case by pleas of guilty, and hence objections to the jurisdiction may be made for the first time in the Supreme Court. State v. City of Albuquerque, 31 N.M. 576, 249 P. 242; State v. Diamond, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527; Sais v. City Electric Co., 26 N.M. 66, 188 P. 1110. See, also, 24 Corpus Juris Secundum, Criminal Law, § 1671, page 274, and cases cited.

In as much as the information failed to state an offense, the appellants were not placed in jeopardy, and the district attorney may file a new information if he so desires. State v. Grayson, 50 N.M. 147, 172 P. 1019. It is unnecessary to pass upon the other assignment of error.

The judgment will be reversed, and the cause remanded with a direction to the district court to quash the information and

discharge the appellants. And it is so ordered.

SADLER, McGHEE, and COMPTON, JJ., concur.

BRICE, C. J., did not participate.

185 P.2d 979

BARBER v. SOUTHERN PAC. CO.

No. 5047.

Supreme Court of New Mexico.

Oct. 14, 1947.

E. R. Wright, of Santa Fe, and Norman Hall, of El Paso, Tex., for appellant.

M. A. Threet, of Albuquerque, for appellee.

McGHEE, *Justice.*

The plaintiff shipped nine boxes of household goods from Harlingen, Texas, to Deming, New Mexico, under the terms of the uniform bill of lading prescribed by the Interstate Commerce Commission to govern interstate shipments. The customary route for the shipment was via the

line of the Texas & New Orleans Railroad Company from Harlingen to San Antonio, thence to El Paso, Texas, and from El Paso to Deming, New Mexico, via either the rail line of the Southern Pacific Company, or its affiliated subsidiary, Pacific Motor Trucking Company. When the shipment was being transferred in transit from one car to another at San Antonio, one item of the shipment, a crated sofa weighing 240 pounds, was by the negligent mistake of the carrier's employees, placed in a car moving to St. Louis, Missouri, over the line of the Cotton Belt route. The agent there discovered the sofa as an "over" or "astray" shipment without billing and thereupon returned it to San Antonio by the route over which it had been received, and it was from that point carried by the T. & N. O. Railroad Company to El Paso, and then by Pacific Motor Trucking Company to Deming where it arrived in bad condition and was refused by the shipper.

Claim was seasonably filed by the plaintiff for the value of the sofa in the sum of $137.50, but the defendant declined to pay more than $24, which was the value declared by his representative when the sofa was tendered for shipment at Harlingen, plus $5.83 freight charges it had collected.

On April 15, 1946, the plaintiff filed a conventional action to recover the value of the sofa, and the defendant answered admitting the goods were shipped as alleged, and that the sofa arrived in a damaged condition; it further pleaded the mistake in sending the sofa via St. Louis, and then pleaded the uniform bill of lading, that the shipper had declared a value of $10 per hundred weight on the shipment and received a reduced freight rate on account thereof, and tendered damages based on such reduced rate. It further pleaded that the suit was barred by limitations, in that it had not been filed for more than two years after it had on January 31, 1944, declined to pay more than $24.

On the trial the court below held against the defendant on its plea of limitations, and concluded that the carrier's mistake in loading the sofa into the St. Louis car instead of the El Paso car constituted a common-law "deviation," which had the effect of breaching the shipping contract, rendering the carrier liable as for conversion, and estopping it from relying upon the provisions of the uniform bill of lading as a defense to the action. Judgment was rendered for the plaintiff in the sum of $137.50, together with interest and costs of suit.

The uniform bill of lading under which this shipment moved contains a provision that suit must be instituted within two years and one day after the carrier has declined liability as authorized by Sec. 20 of the Interstate Commerce Act, 49 U.S.C.A. § 20. This provision was held reasonable in

Leigh Ellis & Co. v. Davis, 260 U.S. 682, 43 S.Ct. 243, 67 L.Ed. 460, and is not open to question.

The plaintiff seeks to avoid limitation by the fact that after the receipt of the letter of January 31, 1944, the defendant company continued to negotiate with him, and that the suit was brought in less than two years after negotiations were finally terminated on June 5, 1944. The letter of January 31, 1944, stated, among other things:

"Mr. Barber, we are anxious to serve you and give you the best repair job that is possible. We have our limitations as to material and as to cost of repairs as well. We can under no circumstances pay more than $24.00 for the repairs. The exact cost cannot be determined until it is known the quality of material that is to be used on covering the back. We feel sure though the total cost will not be more than $30.00.

"This shipment could have been released to 20¢ 50¢ or even $2.00 a pound but the rates would have been increased depending on the declared valuation. The U. S. Supreme Court has ruled that a common carrier may not accept liability greater than the declared basis when rates are assessed depending on value; to do so would be nothing less than a rebate."

Thereafter and in response to certain letters and communications passing between the plaintiff and the defendant, the question of the liability of the defendant company under the common-law deviation rule was discussed between the plaintiff and representatives of the defendant, which included an exchange of legal authorities, and continued until the 5th of June, 1944, when the claim agent of the defendant at El Paso wrote the plaintiff advising him that the claim filed had been received by him that day from his superior officer in San Francisco, with the advice that he, the claim agent, would not be permitted to pay more than the declared valuation of 10 cents a pound.

We begin a consideration of the question of limitation with the knowledge that this court in Mersfelder v. Atchison, T. & S. F. Ry. Co., 24 N.M. 518, 174 P. 989, 990, held that the defense of limitation of time in which a suit may be brought for damage to an interstate shipment may not be waived, even though the delay be caused by the carrier treating with a claimant for settlement and thereby leading him to believe his claim would be settled without suit. It is there said:

"The scope and exact effect of the federal law will be ascertained best from the construction placed upon it by the court intrusted with its interpretation. In the case of A. J. Phillips Co. v. Grand Trunk Western R. Co., 236 U.S. 662, 667, 35 S.Ct. 444, 446, 59 L.Ed. 774, the court said:

"'* * * To permit a railroad company to plead the statute of limitations as against some, and to waive it as against others, would be to prefer some and discriminate against others, in violation of the terms of the Commerce Act, which forbids all devices by which such results may be accomplished. The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments, or the waiver of defenses open to the carrier.'"

The Phillips case has been consistently followed by the Supreme Court of the United States and the various state courts as will appear from the annotation in 135 A.L.R. at page 612, following the case of Kirkpatrick Co. v. Illinois Central Railroad Co., 190 Miss. 157, 195 So. 692, 693, 135 A.L.R. 607. In the Kirkpatrick case it is said: "The outstanding purpose of the Commerce Act was to absolutely uproot and destroy all discriminations in interstate commerce regardless of how conceived or by what plan, scheme or device they may be sought to be accomplished. To that end, the carrier is without power to waive any valid provision of the contract constituting a defense. * * * The carrier cannot by conversations, letters and negotiations extend the time for suit beyond that limited by the bill of lading and the Commerce Act."

The latest expression of the Supreme Court of the United States on the limitation provisions of the Interstate Commerce Act that we have been able to find is contained in Midstate Horticultural Co. v. Pennsylvania Railroad Co., 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed. 96. The carrier sued to recover the full amount of freight charges on 21 carloads of grapes shipped from California. The court stated, in part:

"The ultimate question is whether the action was brought in time under Section 16(3) (a) of the Interstate Commerce Act. This provided:

"'All actions at law by carriers subject to this Act for recovery of their charges, or any part thereof, shall be begun within three years from the time the cause of action accrues and not after.'

"In the application presented by this record, the question turns on whether the section's limitation can be waived by express agreement made before the period ends. The agreement was made, at petitioner's request, three days before the term expired for suing on account of the first shipment. By its terms, in consideration of respondent's forbearance to sue for a specified time, petitioner undertook not to 'plead in any such suit the defense of any general or special statute of limitations.' Two months later, but within the extended time, petitioner finally declined to pay and respondent began this action.

"In all stages of the litigation petitioner has contended that the statute prohibits maintenance of the action, notwithstanding its agreement. Respondent has taken the contrary view, as have the California District Court of Appeal, one judge dissenting (124 P.2d 902), and the California Supreme Court (21 Cal.2d 243, 131 P.2d 544). We think petitioner's position must be sustained."

At page 363 of 320 U.S., at page 132 of 64 S.Ct., 88 L.Ed. 96, the court further said:

"With a single exception, Pennsylvania R. Co. v. Susquehanna Collieries Co., D.C., 23 F.2d 499, the federal courts have not decided squarely whether an agreement such as is presented here is valid. In that suit to recover demurrage charges the court sustained and gave effect to the contract. But we think this is contrary to the general course of decision which has construed the section and predecessor limitations.

"With the one exception, the decisions have fixed the pattern, in respect to a variety of issues relating to application of the limitations, that lapse of the statutory period 'not only bars the remedy, but destroys the liability.' That is true of this Court's decisions and those of the inferior federal courts. It is true of suits by shippers against carriers and of suits by carriers against shippers. It is true with respect to every limitation imposed by Section 16, unless that of subdivision (a) in favor of the carrier is to be excepted when its suit is for the full amount of its charges, though not when it is for only part of them.

"The purport of the decisions is that Congress intended, when the period has run, to put an end to the substantive claim and the corresponding liability. The cause of action, the very foundation for relief, is extinguished."

The action of the California courts in upholding the contract was reversed.

In Chicago, R. I. & P. Ry. Co. et al. v. Black, Sivalls & Bryson, Inc., 194 Okl. 130, 147 P.2d 455, it was held that the limitation of time for bringing action by the shipper against the carrier for the enforcement of an order of the Interstate Commerce Commission for payment of money does not merely bar the remedy, but extinguishes the right after the fixed period has ended, and that, therefore, such time limit cannot be waived by express agreement made before the period ends.

Did limitations start running with the letter of January 31, 1944, or the letter of June 5, 1944?

In American Railway Express Co. v. Shideler, 88 Ind.App. 645, 165 N.E. 336, claim was made for loss occasioned by delay in the transportation of a carload of tomatoes. The bill of lading contained the same limitation provision as in the case

before us. The claim agent of the carrier wrote a letter to the shipper dated Oct. 28, 1921, in which it was stated, among other things, "We respectfully decline the claim." Upon receipt by the appellee of the carrier's written notice of declination of the claim, the shipper refused to take "No" for an answer, and continued to write the carrier for more than a year in an effort to show that he had a just claim. Letters passed both ways between the parties, as in this case, but at no time did the carrier agree to pay the claim or recede from the statement made in the letter of October 28, 1921. The action was filed on January 7, 1944, more than two years and one day after October 28, 1921. It was claimed by the shipper that by answering his letters he was lulled to sleep, and that the carrier was estopped to assert any right of contractual limitation. The court held that the carrier did not and could not under the Commerce Act waive the limitation of time in which the action must be begun, citing a long list of cases.

In Atlantic Coast Line R. Co. v. Wauchula Truck Growers' Association, 95 Fla. 392, 118 So. 52, 53, the claim adjuster of the carrier wrote the claimant a letter on July 9, 1923, which, after reviewing the whole matter of the claim, concluded as follows: "Without prejudice to any party concerned, and strictly in view of a compromise adjustment, I am willing to pay $300 in full settlement of this claim. If this offer is accepted, it will be necessary that you furnish me with the original paid freight bill, which you failed to send in with the other papers."

Suit was not filed until October 27, 1925, more than two years and one day after the date of the letter, and the Florida court held that the letter quoted above started the period of limitation running, and that the action was barred.

Kirkpatrick Co. v. Illinois Central Railroad Co., supra, was brought to recover damages for delay in transporting three carloads of tomatoes in interstate commerce, and the same contract and law as to limitations were involved in that case as in the one before the court. Claim was filed on October 2, 1934. On February 19, 1935, the carrier declined in writing to pay the claim, and again declined payment in writing on October 19, 1935. The action was brought more than two years after both the first and second declination. However, within two years and a day after such declination, appellee agreed to reconsider the claim of the shippers and thereupon proceeded to do so. After such further consideration, the carrier again notified the shippers that it stood upon its prior refusal to pay the claim. The action was brought within two years and a day after the giving of that notice. It was contended by the shipper, that by such agreement to recon-

sider, the carrier waived the period of limitation that had already run. In the instant case the plaintiff contends the defendant waived the time between January 31, 1944, and June 5, 1944, when he was advised the defendant would not pay more than offered January 31, 1944.

The Mississippi court, after an exhaustive citation of authorities, held that the agreement to reconsider the case did not toll the limitation provision of the contract which was placed there by authority of the Congress and the approval of the Interstate Commerce Commission. The court then said [190 Miss. 157, 195 So. 694]:

"These decisions mean that under the provisions of the Commerce Act, and the uniform bill of lading provided by the Interstate Commerce Commission, the time fixed within which claim for loss shall be filed, as well as the time fixed within which suit must be brought, are conditions precedent to liability.

"In other words, after the lapse of such time, both the right and the remedy are barred. And, they mean further that neither period of time can be waived by the carrier. Otherwise, the door would be opened to discriminations in favor of one class of shippers over another. The Commerce Act sought as far as possible to bring about not only uniformity and equality in rates but uniformity and equality in all services and practices of common carriers in interstate commerce. In considering this question, it should be borne in mind that this is not exclusively private litigation—the result affecting alone the parties to this cause. In a large measure, it is public litigation—the result of affecting the public generally, as well as the parties to the particular cause. The question as to what rights can be waived by a party to a transaction affected with a public interest, is very different where the rights of the parties alone are involved."

By virtue of the limitation period fixed by the bill of lading and the construction placed upon it by the court entrusted with its construction, the Supreme Court of the United States, as well as the state courts which are bound thereby, an iron curtain has been suspended across the path a litigant must take to the courthouse, and when it has been set in motion there is no known method of stopping its descent. The detours usually available under the doctrine of waiver seem to be also effectively blocked, so we are unable to hold that because the defendant reopened negotiations we may lift the curtain in this case and decide the controversy on its merits.

Instead of postponing the chore from day to day, a party who feels that he has a just cause of action under the Commerce Act would be well advised to file suit immediately following the rejection of his claim, to the end that he too may not

find his passage to the courthouse blocked by the same iron curtain that barred the way of the plaintiff in this case.

We feel we must hold that the trial court erred in failing to sustain the plea of limitations.

What we have said prevents our disposing of the case on its merits and the interesting question that would be decided. The doctrine of deviation had its origin in the maritime law. The defendant contends that the doctrine applies only where there has been a voluntary deviation as distinquished from one caused by its negligence. Our attention has not been called to any land carriage cases directly in point, but the admiralty case of Niles-Bement-Pond Co. v. Dampkiesaktieselskabet Balto, 2 Cir., 282 F. 235, directly supports the contention of the plaintiff. The following admiralty cases also indicate support of his position. The Citta Di Messina, D.C., 169 F. 472; Sidney Blumenthal & Co., Inc., v. United States, D.C., 21 F.2d 798; Calderon v. Atlas S. S. Co., 170 U.S. 272, 18 S.Ct.588, 42 L.Ed. 1033, and S. S. Willdomino v. Citro Chemical Co., 272 U.S. 718, 47 S.Ct. 261, 71 L.Ed. 491. See also Carver on Carriage of Goods by Sea, 8th Ed., Sec. 288 et seq.

The foregoing citations are recorded with the thought that they may be useful to shippers and members of the bar residing in this landlocked, arid state, who may have a similar question arise.

The judgment will be reversed and the case remanded to the District Court with instructions to set aside its judgment and render one for the defendant, and it is so ordered.

LUJAN, SADLER, and COMPTON, JJ., concur.

BRICE, C. J., not participating.

186 P.2d 382

SPRUNK v. WARD, Mayor, et al.

No. 5031.

Supreme Court of New Mexico.

Nov. 3, 1947.

Woodbury & Shantz, of Silver City, for appellants.

Carl P. Dunifon, of Silver City, and R. C. Garland, of Las Cruces, for appellee.

SADLER, Justice.

The question for decision is whether the Town of Silver City, with the maximum number of retail liquor establishments authorized by ordinance already licensed and operating therein, may be compelled in mandamus to issue still another local license to the holder of a state license issued by the Chief of Division of Liquor Control over the Town's protest following the hearing on such an application provided by L.1941, c. 80, 1941 Comp. § 61-516.

The facts are not in dispute. The plaintiff who is appellee in this court applied for and was granted retailer's state license No. 989 by the Division of Liquor Control on August 13, 1946, for carrying on the business of a retail liquor dealer in the Town of Silver City. Subsequently, in due season, she tendered to the Clerk of the Town $300 cash as payment for the quarter ending December 31, 1946, and requested issuance of a so-called local license (in effect nothing more than a receipt for the municipal license tax) to retail alcoholic liquors upon premises owned by her within said Town. The Clerk and town council, relying upon certain municipal ordinances Nos. 182 and 201, especially the latter, limiting the number of local licenses for the retail of alcoholic liquors which can be issued by the Town, refused to issue plaintiff the local license sought.

Thereupon the plaintiff instituted in the District Court of Grant County a mandamus

action against the municipality, its governing body and Town Clerk to compel the issuance of the local license to which she was entitled unless the ordinances named debarred her of the right thereto. Upon final hearing the trial court held with the plaintiff by ordering a preemptory writ of mandamus against defendants compelling the issuance of the local license sought by the plaintiff. This appeal followed.

The Town of Silver City is a municipal corporation created by special act of the legislature known as Chapter 38, Laws of 1878, approved on February 15, of that year. There can be no question but that section 10, Article 4 of the enabling act delegates to the Town the power to license, tax and regulate the sale of intoxicating liquors and that ordinance No. 182, effective from its passage until July 1, 1946, when it was superseded and repealed by ordinance No. 201, which has continued in effect since, if controlling, both sustain the defendants in their unwillingness and refusal to issue plaintiff the local license sought by reason of a limitation contained in each ordinance on the number of local licenses for the retail of alcoholic liquors which can be issued by the Town. Thus it is that we face squarely and inescapably a determination whether at any time prior to issuance by the Division of Liquor Control of plaintiff's license to conduct a retail liquor business, the state through its legislature withdrew the authority otherwise existing by virtue of the defendants' town charter and ordinances enacted thereunder, as well as under certain prior liquor control acts, to exercise binding control in such a matter. A decision of the question involves the consideration of pertinent statutes.

The first liquor control act to be adopted in New Mexico following the abandonment of federal prohibition as a matter of national policy, was L.1933, c. 159. Under section 5(a) thereof, authority to issue licenses for the sale of alcoholic liquors in organized municipalities and counties was vested expressly in County Commissioners and town or city councils, subject only to approval of the State Board of Liquor Control composed of the Secretary of State, Attorney General and Director of Public Health. And under Section 5(c) of said act, as the issuing authority, these governing boards could cancel such licenses for any violation of the provisions of the act.

The foregoing act was superseded by L. 1935, c. 112, which created a State Board of Liquor Control composed of three members, to be appointed by the Governor by and with the consent of the Senate, not more than two of whom should be members of the same political party and none of whom should be the holder of any other office—state, county or municipal.

Section 1002 of Article X of this act, although requiring the retail dealer to secure a license from the State Board, also

authorized municipal corporations in local option districts to exact licenses and to impose license fees therefor and to exercise other broad powers of regulation and control. The section reads:

"In addition to retailer's, dispenser's and club's licenses herein required to be secured from and provided to be issued by the State Board of Liquor Control, municipal corporations within local option districts are hereby vested with power and authority to provide by ordinance for the full and complete regulation of the sale by retailer's, dispenser's and club's of alcoholic liquors, with full power and authority to prescribe the terms under which such licenses may be issued, the amounts of license fees to be paid to such municipalities by each class of licensee, the days of the week or month on which such licensees may or may not sell intoxicating liquors, and the hours of day during which such licensees may or may not sell intoxicating liquors; Provided that each such ordinance shall provide that no license shall be issued by the municipality enacting the same to any person who shall not as a condition precedent thereto secure a license from the State Board of Liquor Control as herein provided; and, provided, further, that each such ordinance shall prescribe rules and regulations consistent with the provisions of this Act and not in conflict with any thereof. Each such ordinance may provide that alcoholic liquors shall not be sold or dispensed on Sundays, election days, or during any certain prescribed hours of any such days and they shall provide that no dispenser or club shall sell or dispense alcoholic liquors during the hours between 1:00 o'clock A.M. and 8:00A.M. of any day. Each such ordinance may further provide a lesser or lower rate of license fee for licensees dispensing only beer and wine, than from licensees selling or dispensing all alcoholic liquors."

Somewhat similar powers are conferred by the act on Boards of County Commissioners in respect of retail licenses to operate in counties where local option prevailed, outside the corporate limits of towns and cities. See L.1935, c. 112, § 1003.

The period following abandonment of prohibition as a national policy appears for some years to have been one of experimentation in the legislative field for a safer and sounder method of handling the traffic in alcohol beverages. Not a regular session of the legislature convened, for four successive sessions, that did not try out its hand at making over the law on the subject. So it was that when the legislature convened for its Thirteenth Regular Session in 1937, Chapter 130 of the laws enacted, was a new Liquor Control Act. Administration of the liquor traffic was transferred to Bureau of Revenue into the hands of a Chief of Division of Liquor Control. As under L.1935, c. 112, both a state license, to be secured from Chief of Division and a

local license, to be secured from the municipal corporation in which the retail dealer proposed to operate, were necessary. The power of regulation and the authority to license in the county, city or town, were as broad under this act as under the two previous enactments, L.1933, c. 159, and L.1935, c. 112. The pertinent section of L.1937, c. 130, is 1102 and it reads:

"In addition to retailer's, dispenser's and club's licenses herein required to be secured from and provided to be issued by the Bureau, municipal corporations within local option districts are hereby vested with power and authority to provide by ordinance for the full and complete regulation of the sale by retailers, dispensers and clubs of alcoholic liquors, with full power and authority to prescribe the terms under which such licenses may be issued, the amounts of license fees; provided that only one class of license governing the sale of all alcoholic liquors shall be issued; provided that each such ordinance shall provide that no license shall be issued by the municipality enacting the same to any person who shall not as a condition precedent thereto secure a license from the Bureau as herein provided; and, provided, further, that each such ordinance shall prescribe rules and regulations consistent with the provisions of this Act and not in conflict with any thereof."

This brings us up to the Fourteenth Regular Session of the legislature which convened in the capitol in Santa Fe on the 10th day of January, 1939. Still not satisfied with the state of the law on the subject, there emerged from the legislative deliberations a new Liquor Control Act, L.1939, c. 236. It is this act, either standing alone, or as amended in 1941, L.1941, c. 80, § 1; 1941 Comp. § 61-516, which will prove decisive of the question presented on this appeal. Both the 1939 act and the 1941 amendment were in force at all times material to the controversy provoking the present mandamus proceeding. So far as material, the section of the 1939 act conferring regulatory powers on municipalities reads as follows:

"Any municipality which has, or any municipality within any county which has, adopted the local option provisions of this act [or described previous acts] shall have the power, by ordinance duly adopted, to regulate the sale of alcoholic liquors by retailers, dispensers and clubs within the limits of such municipality in any manner consistent with, but not inconsistent with, the provisions of this act;" § 1102.

Section 1103 of this act, 1941 Comp. § 61-402, authorizes municipalities and section 1104, § 61-403 of 1941 Comp., authorizes counties "to impose an annual, nonprohibitive municipal license tax upon the privilege of persons holding state licenses" to operate within the limits of such political sub-divisions as retailers. It is further provided by

the next succeeding section that the state license shall not authorize the holder who has not paid the municipal license tax to operate therein without having paid the same and provision is made for closing establishments for which the license tax has not been paid. Strangely, although significantly, no authority is extended the town or city to issue a license in exchange for the amount of the license tax—something expressly provided for in prior liquor control acts.

In this connection it is to be noted that under the provisions of 1941 Comp. § 61-204, L.1939, c. 236, § 302(d), it is made the duty of the Chief of Division to issue or refuse to issue the licenses and permits provided for in the act and in the exercise of such authority, to investigate into the qualifications of all applicants to engage in manufacture or sale of alcoholic liquors. In a similar vein, L.1939, c. 236, § 801, 1941 Comp. § 61-501, provides:

"It is hereby declared to be the policy of this act that the sale of all alcoholic liquors in the state of New Mexico shall be licensed, regulated and controlled so as to protect the public health, safety and morals of *every community* in this state; and it is hereby made the responsibility of the chief of division to investigate into the legal qualifications of all applicants for licenses under this act, and to investigate into the conditions existing *in the community* wherein are located the premises for which any license is sought, before such license is issued, to the end that licenses shall not be issued to unqualified or disqualified persons or for prohibited places or locations." (Emphasis ours.)

In 1941 by section 1 of Chapter 80 of the Session Laws of that year the legislature amended L.1939, c. 236, § 703, by again fixing the expiration of all licenses as June 30th of each year and providing for their renewal and for the issuance to all licensees in good standing at the expiration of any license year of a new annual "state license" for the succeeding year. The amendment then proceeds:

"Provided, however, that at the beginning of any new license year (July 1), and throughout the new license year, the chief of division of liquor control shall have the authority to limit, in his discretion, the number of additional New Mexico wholesaler, rectifier, winer, wine bottler, retailer, club or dispenser licenses to be issued within the state and every political subdivision thereof, and the chief of division, in his discretion, may refuse to issue any such additional licenses."

There follows the provision for notice to governing boards of counties and municipalities of the application for license and for recommendations from them and hearings, if desired, with a statement of the factors to be considered in passing on the

application, such as population, number of existing licenses in the locality or area and the public health, safety and morals.

Thus the law stood at the time the plaintiff as holder of a state license as a retailer made a tender to the Town Clerk of a quarterly municipal license tax imposed by the town on retail liquor dealers under the authority of L.1939, c. 236, by an ordinance which, at the same time, limited to nine the number of such dealers premitted to operate within the town limits. One has only to compare the provisions of the corresponding sections of the 1939 and previous acts, especially the 1935 and 1937 acts, conferring on municipalities powers of regulation of the liquor traffic to note the revolutionary change wrought in respect thereof. Under each of the two earlier acts mentioned they were given express authority to provide by ordinance for the *"full and complete regulation"* of retailers within the municipality, "with *full power and authority* to prescribe the terms under which such licenses may be issued." (Emphasis ours.) In addition, several other specific powers of regulation as to number of hours for keeping open and the days on which sales could take place were expressly conferred by L. 1935, c. 112.

Not only does the 1939 act fail to confer "full and complete" powers of regulation, as did the previous acts, but it omits granting authority to towns and cities "to prescribe the terms" under which retail licenses shall be issued. Indeed, it makes no specific provision for exacting licenses by municipalities at all, although authorizing them "to impose an annual, non-prohibitive municipal license tax upon the privilege of persons holding state licenses * * * to operate within such municipalities as retailers, dispensers or clubs." As said in Brackman's, Inc., v. City of Huntington, infra: "The distinction may not be important but it exists."

The broad powers conferred on the Chief of Division of Liquor Control in the sections of the act quoted above and throughout the act as a whole, considered in connection with the significant omissions from the 1939 act of powers granted previously by express language unto municipalities in the matter of regulation of retail dealers, all combine in disposing us strongly to the view, even without considering effect of the amendment accomplished by L. 1941, c. 80, § 1, 1941 Comp. § 61-516, that the power claimed by the Town of Silver City and its governing board to limit the number of retail dealers within its corporate limits cannot be sustained. When the effect of the amendment is considered all doubt on the subject disappears. To what purpose, may we ask, is the Chief of Division to call upon the governing board of a city or county for its recommendation in the premises and grant a hearing, if asked, "for * * * determining whether or not such new additional

license should be granted," if after such hearing, he is powerless to grant the same where in excess of a limit fixed by town ordinance? Obviously, to no purpose whatever.

We do not attach the significance urged upon us by counsel for defendants to the omission of retailers from the list of dealers over which the Chief of Division is vested with exclusive control under L. 1939, c. 236, § 1101, 1941 Comp. § 61-519. The pertinent provisions of said section of the law read:

"The chief of division is vested with exclusive control over the issuance of, and the collection of license fees for, distiller's, brewer's, rectifier's, winer's and wholesaler's licenses, and, also of, and for, public service licenses, wine bottler's licenses, nonresident licenses and salesman's identification cards; and no additional license fee, occupation license or tax shall be imposed or collected on account thereof by any municipality or county."

Plainly, the legislature could not have included retailers in the list of dealers enumerated, as to whom there was added a prohibition against the imposition of an additional license fee by any municipality or county, without defeating a declared purpose expressed elsewhere. One need only refer to L. 1939, c. 236, §§ 1103 and 1104, 1941 Comp. §§ 61-402 and 61-403, to find that express authority is there given unto municipalities and counties to impose an additional license tax upon holders of state retail dealer's licenses.

We are forced to conclude that the ordinance relied upon by defendants as defeating power in the Chief of Division of Liquor Control to grant the license in question is ineffective for such purpose under L. 1939, c. 236, as amended by L. 1941, c. 80, § 1. The wisdom of the policy which would take from municipalities and counties in the state the element of home rule so long associated with control of the liquor traffic is not ours to determine. Wide diversity of opinion on the subject prevails. The legislature alone possesses power to fix the policy. It has done so in unmistakable language to which we must give effect in interpreting the same. We are supported in the conclusion reached by the courts of several sister states where like questions have been presented and determined under liquor control acts much like our own. Brackman's, Inc., v. City of Huntington, 126 W.Va. 21, 27 S.E.2d 71, 76; Singer v. Scarborough, 155 Fla. 357, 20 So.2d 126; City of Miami v. Kichinko, 156 Fla. 128, 22 So.2d 627; Stephens v. City of Great Falls, Mont., 175 P.2d 408; Spisak v. Village of Solon, 68 Ohio App. 290, 39 N.E.2d 531.

The judgment under review is correct and should be affirmed.

It is so ordered.

BRICE, C. J., and LUJAN, McGHEE, and COMPTON, JJ., concur.

186 P.2d 386

STEVENS et al. v. MITCHELL.

No. 5037.

Supreme Court of New Mexico.

Oct. 14, 1947.

As Modified Nov. 10, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

O. O. Askren, of Roswell, for appellant.

G. T. Watts, of Roswell, for appellees.

COMPTON, Justice.

This is a suit by appellees to recover the purchase price of certain cattle, as a first cause of action, and for damages resulting from breach of contract to move the cattle out of the state as a second cause of action. The jury found for appellees and judgment was entered pursuant thereto. From the judgment on the second cause of action appellant brings this appeal and assigns as error: "The Court erred by giving to the jury Instruction No. 5, and submitting to the jury the issue of the alleged damage under the Second Cause of Action, over the objection of the defendant, because there was no substantial evidence in the case to furnish any measure of damage; all the testimony on the subject was purely speculative and not sufficient to support the verdict."

Appellees were engaged in ranching in New Mexico, with ranches in Lea and Chaves Counties. On or about September 20, 1945, appellees sold to appellant about 650 head of cattle, consisting of cows, calves, yearlings and bulls, for a designated price. It was agreed at the time that appellant would move all of the cattle out of the State of New Mexico, so as to avoid confusion by commingling with cattle which appellees retained upon their ranches. Appellant not only failed to move the cattle, as agreed, but on the contrary, placed them upon a ranch about 30 or 35 miles from the ranch of appellees. At the time of trial, however, all of the cattle had been moved out of the state, except about 15 head. There is no evidence that this remnant commingled in any manner with the cattle of appellees.

The evidence as to damages is the testimony of appellees, John Stevens and Jessie W. Stevens, and the witnesses, Carl Sams and Albert Buchanan.

John Stevens testified as follows:

"Q. How long did they remain on that ranch before they were taken out? A. I could not say just exactly; they were there a few months, however; several months.

"Q. How much have you been damaged by these cattle being left in this country, Mr. Stevens? A. We have estimated it at least—we said we would not have sold them for less than $10,000.00 more; it would have made that much difference.

"Q. Except from hearsay, you don't know where these cattle are? A. No.

"Q. Whether they are in the state or out of the state? A. No; I don't know.

"Q. How have you been damaged $10,000.00 by reason of the fact—you see, you have sued us on a counter claim for $5,000.00; how have you been damaged? A. Any cowman can tell you what damage that will do to a man.

"Q. What is your best judgment now on your second cause of action, regardless of the price of these cattle, how much have you been damaged by reason of the fact that cattle were not moved out of the state? A. I have been damaged plenty.

"Q. $10,000.00? A. That much anyhow."

Jessie W. Stevens testified as follows:

"Q. At the time Mr. Mitchell was negotiating, was there anything said by you or Mr. Stevens to Mr. Mitchell in your presence about where the cattle were to be taken? A. Yes; I told him two or three times 'I have had this brand all my life and I would not have the stuff scattered in the state for $10,000.00."

Carl Sams testified as follows:

"Q. If cattle were worth $85.00 a head for a cow and calf to be shipped out of the State, what would they be worth in the state? A. Well, it would make right smart difference with me. I could not say the value because I don't sell my cattle to stay in the State. There is a different practice; some people do sell in the State.

"Q. What is the difference in price where they go out and stay in the State?

"Q. Do you know what difference it makes among the livestock dealers in this state, Mr. Sams? A. I could not say exactly; I would think $5.00 or $10.00 but I don't sell that way.

"Q. You sell all yours to go out of the state? A. Yes, sir.

"Q. If they were to stay in the state, what difference would it make in your price? A. That would depend on who they went to and where they wound up, or how close they were to be.

"Q. That all has a bearing? A. Yes, sir.

"Q. If within a course of a few months these cattle were sold and moved out of the state, you would not know what the damage would be. A. The value?

"Q. If they actually got out of the state and were moved out. A. Well, if I knew all those cattle were gone, it would not make so much difference.

"Q. I say, it would be nothing, wouldn't it? A. I don't know.

"Q. If they are gone? A. There might be a little sleep lost there between times because they are supposed to go out when I sell them."

Albert Buchanan testified as follows:

"Q. Mr. Buchanan, are you familiar with the practice in New Mexico of livestock dealers who are dealers in cattle of any ranch of any size requiring cattle to be shipped out of the state when they are sold? A. I know lots of people wants it done.

"Q. Why is that? A. If they are sold in the state, the brands get scattered.

"Q. What difference does it make? A. You are not sure whether it is your stock or somebody elses; it causes a lot of trouble to find out about it.

"Q. Does it cause expense to the people who originally sold those cattle? A. Yes, sir.

"Q. Are you familiar with the difference in prices ranchers require on the cattle if they are to be sold out of the state and in the state? A. Different prices, I don't know about higher prices or lower prices; sometimes it is in the contract to be taken out of the state.

"Q. Does it make a difference in those prices? A. I would not know for sure about the difference in prices."

This testimony conclusively proves the contract in question and its breach as alleged by appellees. But it is self-evident that it fails to prove those elements essential to the right of recovery, viz., actual loss and resultant damages, both of which must be established by a preponderance of the evidence.

In 15 Am.Jur. "Damages", Section 356, the author states the rule as follows: "As a rule, however, actual or compensatory damages are not to be presumed, but must be proved. To warrant their recovery, the actual detriment occasioned must be shown by competent evidence and with reasonable certainty, for the recovery is limited to such damages as are established by the evidence. * * * *The evidence must afford data, facts, and circumstances reasonably certain from which the jury may find the actual loss; and the plaintiff must show by a preponderance of evidence the damages caused by the injury complained of.* * * * There must be proof that the dam-

age sought to be recovered *had occurred,* that it was caused by the wrong of the defendant, and was of the extent and amount thereof." (Emphasis ours.)

Under what circumstances the verdict of a jury will be disturbed by the courts has been variously stated. But it has long been the rule of this court that its verdict will not be disturbed when supported by substantial evidence.

The witness Buchanan testified that it would cause trouble and expense to the owner of the brand by having the cattle commingled or placed in close proximity. The witness Sams testified in his opinion that a seller possibly would be damaged as much as $10 per head. Not only is this evidence uncertain and speculative, but is rendered immaterial, as it fails to show any actual loss sustained by appellees. If the evidence had shown assessable loss resulting from the breach, a different case would be presented. As we appraise the testimony, appellees were merely estimating or rather characterizing possible results. The verdict is not supported by substantial evidence.

The question now presented is whether appellees, having established their cause of action, but having failed to establish that they are entitled to compensatory damages, may recover nominal damages.

Appellees have owned the brand in question for many years. Appellant agreed to protect appellees by shipping the cattle out of the state, which he admittedly failed to do. Appellees are confronted with annoyances and possible loss. Consequently, the breach of contract is such injury to the rights of appellees entitling them to nominal damages. Chaffin v. Fries, etc., Co., 135 N.C. 95, 47 S.E. 226.

It is stated in Restatement of Law of Torts, Sec. 907: "'Nominal damages' are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages."

Such nominal damages ordinarily carry the costs because of the breach of contract. Batson v. Higginbothem, 7 Ga.App. 835, 68 S.E. 455; Lund v. Lachman, 29 Cal.App. 31, 154 P. 295; Crystal Dome Oil & Gas Co. v. Savic, 51 Idaho 409, 6 P.2d 155; Press v. Davis, Tex.Civ.App., 118 S.W.2d 982; City of Rainier v. Masters, 79 Or. 534, 154 P. 426, 155 P. 1197, L.R.A.1916E 1175; Stanton v. New York & E. Ry. Co., 59 Conn. 272, 22 A. 300, 21 Am.St.Rep. 110.

It was error to submit to the jury the issue of actual damages. The jury should have been instructed to return a verdict of nominal damages in the amount of one cent or one dollar, and the motion sustained on the question of actual damages. The judgment should be, and is, reversed with directions to the lower court to reinstate the

case upon its docket and enter judgment for plaintiff for a nominal amount, together with costs, and it is so ordered.

BRICE, C. J., LUJAN, and SADLER, JJ., and CARMODY, District Judge, concur.

Opinion Modifying Direction as to Costs.

PER CURIAM.

Now, on the eve of issuing mandate herein, it having been called to the attention of the court that there is omitted from the opinion heretofore filed, any direction as to costs taxable here and incurred in connection with this appeal; and it appearing that the defendant below as appellant here has secured a reversal of the judgment rendered against him on the second cause of action and is, therefore, entitled to judgment for his costs on appeal; the clerk, accordingly, will tax in his favor the costs on appeal, prior to issuance of mandate herein. The plaintiffs will recover their costs below upon entry of nominal judgment in their favor as directed in the former opinion.

It is so ordered.

BRICE, C. J., and LUJAN, SADLER and COMPTON, JJ., and CARMODY, District Judge, concur.

McGHEE, J., did not participate.

186 P.2d 390

TELLEZ v. TELLEZ et al.

No. 5001.

Supreme Court of New Mexico.

Oct. 15, 1947.

Rehearing Denied Nov. 24, 1947.

W. A. Sutherland, of Las Cruces, for appellants.

James H. Paxton, of Las Cruces, for appellee.

COMPTON, Justice.

This is a suit by appellee, Guadalupe Diaz Tellez, seeking relief in the nature of spec-

ific performance of an oral ante-nuptial contract. From an adverse judgment, appellants bring this appeal.

Eusebio Tellez, now deceased, in July, 1940, orally proposed marriage to appellee, then Guadalupe Diaz, now his widow, promising that if she would marry and care for him, as his wife, until death, that he would give her all his property, both real and personal. The proposal was first declined until the consent of her mother was obtained. Subsequent meetings resulted in the renewal of the proposal, and the mother's consent having been obtained, she accepted his offer according to its terms. Pursuant to the agreement, the deceased executed a will on or about August 1, 1940, whereby all his property was devised and bequeathed to appellee. In consideration of his promise, the marriage took place August 8, 1940.

Thereafter, while the parties were living together, and without the knowledge or consent of appellee, Eusebio Tellez conveyed the real estate here involved, to his children and grandchildren by a former marriage. This was a voluntary conveyance. Eusebio Tellez suffered a paralytic stroke on August 11, 1943, which required the constant care and attention of a nurse and other assistants. For convenience he was moved from his home to the home of a daughter, where he lived until his death, November 7, 1944. Soon after being taken to the daughter's home, difficulties arose between appellee and his children by the former marriage, causing appellee to leave the home of the daughter. She did not see her husband for about a year prior to his death.

The court made the following findings of fact, which we deem necessary to a decision:

"1. That in the latter part of July, 1940, the wife of Eusebio Tellez had died and that he had divided up what he considered his deceased wife's share with his children and claimed whatever he had left was his own. He was lonesome, had no one to look after him and wanted a companion. He talked to Joaquin Rodriguez and he told Eusebio Tellez that he knew a woman and Mr. Tellez asked for an introduction. Mr. Tellez found the woman was agreeable to him and he proposed to marry her and leave her all his property if she would marry him and take care of him as his wife until his death.

"2. This was agreeable to both parties and he made his will at the time in writing, duly attested, leaving all of his property to this woman, Guadalupe Diaz.

"7. That on the 8th of November, 1943, the said Eusebio Tellez executed a deed to his heirs named in the said deed covering all his real estate, which said deed is recorded in Book 105, page 608 of the Records of Dona Ana County, New Mexico.

That there was no consideration given for the execution and delivery of the said deed to his said children except the love and affection of the father for his children."

And then concluded as law:

"5. That fraud is not imputed to the conveyance of real estate by a father to his children, without further circumstances establishing such fraud.

"15. That the said Eusebio Tellez, by disposing of his said will without plaintiff's knowledge or consent during the time he was living with her and by deeding by gift all his real estate to the defendants was fraud upon the rights of plaintiff."

The question is whether the oral antenuptial contract stated in the findings may be enforced against the appellants who are the heirs at law of the deceased and grantees in a deed made by him after appellee and deceased married, by which he conveyed to them all of his property.

The deceased's agreement to leave his property to appellee for the consideration stated, implied that his property would be devised and bequeathed to her, in consideration of her marrying him and caring for him until his death. Teske v. Dittberner, 70 Neb. 544, 98 N.W. 57, 113 Am. St.Rep. 802. This was substantiated by the fact that before he married appellee deceased made his will and testament as he had agreed.

The English Statute of Frauds, Sec. 4 St. 29 Charles II, which is in force in this state, provides: "No action shall be brought * * * to charge any person upon any agreement made upon consideration of marriage, or upon any contract or sales of land, tenements or hereditaments, or any interest in or concerning them * * * unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged herewith, or some other person thereunto by him lawfully authorized."

Also, the legislature of New Mexico has enacted the following statute: "All contracts for marriage settlements and contracts for separation, must be in writing, and executed and acknowledged or proved in like manner as a grant of land is required to be executed or acknowledged or proved." Sec. 65-208, N.M.Sts.1941.

The contract was within the fourth section of the English Statute of Frauds, in that it was an oral contract made upon consideration of marriage. The contract was not complete until the parties married, and the subsequent marriage was in no sense a part performance. The marriage itself was a necessary part of the agreement made upon its consideration. Brought v. Howard, 30 Ariz. 522, 249 P. 76, 48 A.L.R. 1347; Hughes v. Hughes, 49 Cal.App. 206, 193 P. 144. Likewise, the

contract was within the fourth section of the statute of frauds in that it was an oral contract for the sale of land. Quirk v. Bank of Commerce & Trust Co., 6 Cir., 244 F. 682; 4 Page on Wills, Sec. 1716.

The contract is within Sec. 65-208, N.M. Sts.1941, which requires that "All contracts for marriage settlements * * * must be in writing," etc. This statute was adopted in its exact language from California. In Hughes v. Hughes, supra, the California court held that a similar contract was within the statute of frauds, also within the California statute requiring marriage settlements to be in writing.

The trial court did not find that there was performance, or part performance, on the part of either of the parties that would free the agreement from the operation of the statute of frauds. The mere making of the will by deceased, prior to the marriage of the parties, was not a sufficient part performance of the marriage contract that would relieve it from the operation of the statute of frauds. Zellner v. Wassman, 184 Cal. 80, 193 P. 84; Hughes v. Hughes, supra.

The contract is void because it is against public policy. It was not only a contract in consideration of marriage, but the wife under the agreement was to receive compensation for caring for her husband "as his wife until his death;" what part of the consideration was for marriage and what part was for her care of him is not stated. But the latter must have been the principal consideration. It is certainly not divisible. A contract whereby the husband agrees to pay his wife for his care, which is a part of her duties as a wife, is without consideration, against public policy, and void. Such an agreement made after marriage would contravene 65-212, N.M. Sts.1941, as follows: "A husband and wife cannot by any contract with each other alter their legal relations, except of their property, and except that they may agree in writing, to an immediate separation, and may make provisions for the support of either of them and of their children during their separation." (Emphasis ours)

This statute states a public policy that cannot be annulled by an ante-nuptial agreement. But in the absence of a statute such contracts are generally held to be void for want of consideration, or against public policy. Bohanan v. Maxwell, 190 Iowa 1308, 181 N.W. 683, 14 A.L.R. 1004; In re Callister, 153 N.Y. 294, 47 N.E. 268, 60 Am.St.Rep. 620; Michigan Trust Co. v. Chapin, 106 Mich. 384, 64 N.W. 334, 58 Am.St.Rep. 490.

Nothing said here conflicts with our holding in McDonald v. Lambert, 43 N.M. 27, 85 P.2d 78, 120 A.L.R. 250, in which an alleged parole ante-nuptial contract was considered. The question of whether the contract violated the public policy of the

state was not presented, considered, or passed upon by this court.

The judgment of the district court is reversed with directions to the trial court to reinstate the case upon its docket and enter an order dismissing appellee's complaint, and it is so ordered.

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

186 P.2d 512

LOPEZ v. CHEWIWIE et al.

No. 5040.

Supreme Court of New Mexico.

Nov. 7, 1947.

Robert Hoath LaFollette and Joe L. Martinez, both of Albuquerque, for appellant.

H. O. Waggoner and Edward E. Colby, both of Albuquerque, for appellees.

McGHEE, Justice.

According to the complaint the defendants left their thirteen year old son at home unattended during their absence, and he procured a high-powered rifle kept by them on the premises with which he killed plaintiff's intestate. The gist of the complaint as to the claimed negligence of the defendants reads: "That the defendants, and each of them, were guilty of gross negligence which was the proximate cause of the death of said Albert Lopez, in that they left said Joe Diaz, a minor of thirteen years of age, * * * untended at their residence, the defendant, Joe R. Chewiwie, being absent at his regular employment, and the defendant, Elisa Chewiwie, being absent from the city on a trip to Las Cruces, New Mexico, while then and there maintaining on the premises, without precaution for the safety of others, and without taking any steps to prevent said minor child, Joe Diaz, from having access thereto, said dangerous and loaded high-powered rifle."

The trial court sustained a motion to dismiss the complaint for failure to state a cause of action, and as the plaintiff refused to amend, judgment was entered for the defendants, so we have only to determine whether the complaint states a cause of action against the parents.

The plaintiff concedes that it is the general rule that parents are not responsible for the torts of their minor child, but contends that his case comes within the exception that a parent whose negligence makes it possible for his child to gain control of an agency which, in the child's incompetent hands, may become dangerous to others, may be held liable for the resulting injuries.

We have held a parent liable for the injury of another while a son was operating the family automobile under the family use doctrine, Boes v. Howell, 24 N.M. 142, 173 P. 966, L.R.A.1918F, 288, but this is the first case to come to this court where it is sought to hold a parent in a firearms case. Many of the cases relied on by the plaintiff are automobile cases.

We begin the consideration of this case with the knowledge that loaded fire arms are kept in a great many homes in this state. The general policy of our state relative to firearms is found in our constitution and statutes. Article 2, Sec. 6, of our Constitution provides: "The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons."

Section 41-1701, 1941 N.M.S.A., makes it an offense to carry deadly weapons, but

permits them to be carried in the residence of the carrier or on his landed estate. Section 41-1708, 1941 N.M.S.A., allows travelers to carry arms for their protection.

The first majority opinion in Parman v. Lemmon, 119 Kan. 323, 244 P. 227, 231, 44 A.L.R. 1500, is relied on by the plaintiff. In that case a father had furnished his fourteen year old son a shotgun and allowed him to use the family automobile to take another boy hunting. A glancing shot fired by the defendant's son blinded his companion, and damages were awarded against the father for furnishing the boy the gun, the court holding that it was in violation of a statute prohibiting the sale or furnishing to a minor a pistol, derringer or any other dangerous weapon, and that, therefore, the negligence of the father was the proximate cause of the injury. In the dissenting opinion on the first hearing (which was, in effect, later adopted as the opinion of the majority) Mr. Justice Dawson said:

"The fathers of our republic believed that a well-regulated militia was necessary to the security of a free state, and that the right of the people to keep and bear arms should never be infringed. Have we ceased to believe that doctrine? I refer to this, not because it is a provision of the federal Constitution and restricts the power of Congress over this subject, but because it is a basic principle of statecraft of deep concern to all who are clothed with authority and who feel their responsibility to hand on undiminished to future generations those liberties which are our proud American heritage.

"From the landing of the Pilgrims in 1620 until the last Indian menace on the Kansas frontier in 1885, the rifle over the fireplace and the shotgun behind the door were imperatively necessary utensils of every rural American household. And it was just as imperative that the members of such household, old and young, should know how to handle them. And it was almost equally true that, unless a man were trained in the use of the rifle and shotgun in his boyhood, he seldom learned to use them. The American Civil War was largely fought by boys. Half of the Union armies were made up of lads in their teens."

We know that the World Wars I and II were largely fought for us by boys in their teens. Indeed, in World War II boys of eighteen were drafted, and boys of seventeen were enlisted in the navy when their parents consented. We know that a large proportion of the members of our own militia who rendered such valiant service at Corregidor and Bataan were teenagers.

The plaintiff relies strongly on Dickens v. Barnham, 69 Colo. 349, 194 P. 356, 12 A.L.R. 809, but the facts in that case were that the father permitted his fourteen year old son to keep a rifle where an eight year

old brother could have access to it. The younger brother shot a person and the father was held liable. We do not consider this case controlling here

The plaintiff also relies on Charlton v. Jackson, 183 Mo.App. 613, 167 S.W. 670, but in that case the father knew that the minor son was reckless in the handling of a gun, and this fact was pleaded and proven at the trial. To the same effect is Souza v. Irome, 219 Mass. 273, 106 N.E. 998.

We think the better rule is that absent knowledge on the part of the parent that a child of the age of the one involved here is indiscreet or reckless in the handling of firearms, that the mere keeping of a loaded gun on the premises and leaving the boy there alone, does not make the parent liable for torts committed by the minor. See Hagerty v. Powers, 66 Cal. 368, 5 P. 622, 56 Am.Rep. 101; Lacker v. Ewald, 11 Ohio Dec. 337; Swanson v. Crandall, 2 Pa.Super. 85; Frellesen v. Colburn, 156 Misc. 254, 281 N.Y.S. 471, and Parman v. Lemmon, supra.

The plaintiff urges that a jury should have been permitted to determine whether the acts of the defendants constituted negligence, and that, therefore, the court erred in sustaining the motion to dismiss. As the plaintiff could not by the proof of facts admissible under the complaint have recovered damages, the action of the trial court was correct. Ritter v. Albuquerque Gas & Electric Co., 47 N.M. 329, 142 P.2d 919, 153 A.L.R. 273.

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

LUJAN, SADLER, and COMPTON, JJ., concur.

BRICE, C. J., not participating.

186 P.2d 514

McCABE v. WHITEHILL.

No. 5036.

Supreme Court of New Mexico.

Nov. 3, 1947.

Rehearing Denied Dec. 5, 1947.

W. A. Sutherland, of Las Cruces, for appellant.

E. Forrest Sanders, of Lordsburg, for appellee

McGHEE, Justice.

The appellee procured a decree against various defendants quieting title to mining claims, and Mary B. Whitehill alone appeals.

The case is before us on motion to dismiss the appeal on the following grounds:

1. Because the order granting the appeal was signed by Judge A. W. Marshall after he had recused himself and the case had been heard and a judgment signed by Hon. Albert R. Kool, then Judge of the Second Judicial District, under a designation reading as follows:

"I, A. W. Marshall, District Judge of the Sixth Judicial District of the State of New Mexico, do hereby request the Honorable Albert R. Kool, Judge of the Second Judicial District of New Mexico, to preside and act for me and in my place and stead in all matters in relation to the above entitled cause, and in the trial and final disposition thereof, as to him may seem meet and proper."

2. (a) The statement of facts as contained in said brief is not that as contemplated by Rule 15.

(b) No assignment of errors is contained in said brief.

(c) The alleged points set forth in said brief do not comply with said rule and its interpretation.

The first question for determination is whether Judge Marshall was performing a ministerial or a judicial act when he granted the appeal, for we held in State v. Chavez, 45 N.M. 161, 172, 113 P.2d 179, that even though an affidavit of disqualification has been filed a judge may perform ministerial acts. On the other hand, where

a judge voluntarily calls in another judge and designates him to act in his behalf in all matters in connection with a cause, he has no more power left than if he had been disqualified by affidavit. State ex rel. Moser v. District Court, etc., 116 Mont. 305, 151 P.2d 1002.

There is a surprising lack of authority on the question under consideration. It is stated in Jordan v. Hanson, 49 N.H. 199, 204, 6 Am.Rep. 508:

"The remaining question is, whether this protection (immunity from suit on account of the performance of a judicial act) extends to the case of granting or refusing an appeal by a justice of the peace. In discharging this duty, the magistrate must determine whether the right of appeal exists; whether it is demanded in due time; and whether the security offered is, in form and substance, sufficient; and these acts are judicial in their nature. In many, and indeed most cases, the right of appeal may be clear; but in some instances the question is difficult, and requires the exercise of a sound judicial discretion and judgment; * * *"

This case followed State v. Towle, 42 N.H. 540, 546, where it was held that the granting of an appeal was a judicial act. See also Tichenor v. Hewson, 2 J.S. Green, N.J., 26, where the same reason is given as in Jordan v. Hanson, supra, for holding the granting of an appeal is a judicial act.

This court has not passed directly upon the point, but in State v. Capital City Bank, 31 N.M. 430, 246 P. 899, 900, where the question involved was the effective date of an order granting an appeal, we find the following statement by then Chief Justice Parker:

"The order of allowance in this case, as before seen, was obtained on January 16, but was filed for record in the clerk's office on January 18. The ultimate question then is as to when this order of allowance of the appeal became the judgment of the court, when it was signed by the judge, or when it was filed by the clerk for entry on the record. It may be stated generally that the rendition and entry of the judgment are two separate acts, and different in their nature. 'The rendition of the judgment is a judicial act; the entry upon the record is merely ministerial.' " (citing authorities)

Certainly, the signing of a judgment is a judicial act.

Under our rules when a motion for an appeal is presented to a district judge he must determine whether an appeal may be taken from the judgment, as well as whether the application is timely, and, if the granting of a supersedeas be discretionary, whether he will grant it. Also, unless the judgment is for a fixed sum the amount of the supersedeas bond is left to his discretion.

We hold that in granting an appeal a district judge is performing a judicial act, and when the order designating Judge Kool was entered of record and he heard the case, Judge Marshall could not thereafter perform any judicial act in the case, and his action in signing the order granting the appeal was a nullity. Lacking a valid order granting an appeal we are without jurisdiction in this case, and the appeal must be dismissed. Cook v. Mills Ranch-Resort Co., 31 N.M. 514, 247 P. 826.

The motion of the appellee to dismiss the appeal will be granted, and it is so ordered.

LUJAN, SADLER, and COMPTON, JJ., concur.

BRICE, C. J., not participating.

187 P.2d 387

The STATE of New Mexico, Plaintiff-Appellee, v. Albert MITCHELL, Defendant-Appellant.

No. 5072.

Supreme Court of New Mexico.

Dec. 9, 1947.

W. D. Girand, Jr., and C. M. Neal, both of Hobbs, for appellant.

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

PER CURIAM.

There is involved on this appeal a criminal information of the same form and allegation as that presented by the appeal in the case of State v. Valdez, 51 N.M. 393, 185 P.2d 977. On the authority of the decision in that case the Attorney General has confessed error on behalf of the State. Accordingly, the judgment of the trial court is reversed and the cause remanded to the District Court of Lea County for further proceedings, if any, in conformity with the views expressed in the opinion in the Valdez case cited.

It is so ordered.

187 P.2d 387

FISHER v. TERRELL et al.

No. 5057.

Supreme Court of New Mexico.

Dec. 1, 1947.

Joseph L. Smith, of Albuquerque, for appellant.

Quincy D. Adams, of Albuquerque, for appellees.

McGHEE, Justice.

This action was brought to recover damages sustained by Jimmie Carl Fisher, a minor, caused by the claimed negligence of the defendants in the operation of their automobile in New Mexico.

It was alleged that the defendants were nonresidents of the State of New Mexico and had been operating their automobile on the public highways of this state, and by reason thereof had made our Secretary of State their agent for the service of process, as provided by Sec. 68-1003, 1941 N.M.S.A. An order was procured from a district judge for service of process upon the Secretary of State and upon the defendants out of the state as provided by Sec. 68-1004, 1941 N.M.S.A., and such service was made.

Each of the defendants filed a motion to dismiss upon the ground that they were in fact residents of this state at the time of the accident and attached supporting affidavits.

The trial court held a hearing on the motion as provided by Rule 43(e), Civ. Proc., 1941 Comp. § 19-101, on the affidavits and the oral testimony of two witnesses, and thereupon without making find-

ings of fact or conclusions of law, entered an order sustaining the motions and quashing the service. Such findings and conclusions were waived by failure of the parties to make request therefor, or to tender specific findings and conclusions. Rule 52(B) (a) (6), Civ.Proc.

Although not set out in the order sustaining the motions, it was a necessary prerequisite that the trial court find that the defendants were actually residents of the state at the time of the accident, and not nonresidents. We have a well-established rule that upon a doubtful or deficient record, every presumption is indulged in favor of the correctness and regularity of the decision of the trial court, and we indulge such presumption in support of the order entered. See Loftus v. Johnson, 22 N.M. 302, 161 P. 1115; Sandoval v. Unknown Heirs of Vigil, 25 N.M. 536, 185 P. 282; Cassell Motor Co. v. Gonzales, 32 N. M. 259, 255 P. 636; Hobbs v. Town of Hot Springs, 44 N.M. 592, 106 P.2d 856; Consolidated Placers, Inc., v. Grant, 48 N.M. 340, 151 P.2d 48.

Although, as above stated, findings of fact or conclusions were not requested, we have examined the affidavits and the testimony and must say that the finding necessarily made, although not expressed in the order, that the defendants were residents of New Mexico at the time of the accident, is supported by substantial evidence, and under our well-established rule we will not disturb it.

This accident occurred on February 22, 1947; suit was filed on February 28, 1947, and the defendants abandoned their employment and place of residence and left New Mexico on March 3, 1947, before service of summons could be obtained. It is unfortunate that we do not have a statute like Montana where service may be had on the Secretary of State when a resident is involved in a motor car accident and leaves the state before suit is filed, or process is served upon him, or where after diligent search he cannot be found in the state even though he does not leave. See State v. District Court, 108 Mont. 362, 91 P.2d 422, for an example of the benefit of such a statute.

Our statute, Sec. 68-1003, supra, makes the Secretary of State the agent for the service of process against a nonresident, growing out of any accident or collision in which his motor vehicle may be involved, while it is being operated in this state by him or his agent. For such service to be valid the defendant must have been a nonresident at the time of the accident or collision and not at the time suit is filed. Suit v. Shailer, 18 F.D.C., Supp. 568; Welsh v. Ruopp, 228 Iowa 70, 289 N. W. 760; Carlson v. District Court, Colo., 180 P.2d 525; Wood v. White, 68 App.D. C. 341, 97 F.2d 646.

The action of the trial court will be affirmed, and it is so ordered.

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

187 P.2d 540

STATE v. SIFFORD.

No. 5039.

Supreme Court of New Mexico.

Dec. 10, 1947.

J. S. McGarry, of Carlsbad, for appellant.

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

COMPTON, Justice.

On September 24, 1946, appellant and his companion, a girl of the age of 16 years, occupied a room together for the night at a tourist court near the city of Carlsbad. While there, on several occasions, appellant gave her intoxicating liquor. The girl lived in Carlsbad with her mother, and the unexplained absence from her home caused a search to be made to locate her. When found, about 5 o'clock the following morning, she was in an intoxicated condition.

From the judgment imposing sentence he brings this appeal, assigning the following as error:

"The court erred in refusing to direct a verdict for the appellant upon the ground that the appellant is charged with the offense of serving or giving liquor to a minor under the 1945 Statutes of the Laws of New Mexico."

Chapter 95, Laws of 1945, N.M.Sts., upon which the information is based, reads as follows:

"Section 1. That Section 61-1012 be amended to read as follows:

"61-1012. Selling or giving liquor to minors—'Minor' defined—(a) It shall be a violation of this act for any club, retailer, dispenser, bar-tender, waiter or servant or employee of any club, retailer or dispenser, or for any taxi driver, hotel employee or any other person, except the parent or guardian or spouse of any minor, or adult person into whose custody any court has committed such minor for the time, outside of the actual, visible personal presence of such minor's parent, guardian, spouse or the adult person into whose custody any court has committed such minor for the time, to do any of the following acts:

"(1) To sell, serve or give any alcoholic liquor to a minor."

Appellant seeks to clarify his position by contending (1) that Chapter 95, supra, is unenforceable as no penalty is provided and (2) that the subject of the act is not clearly expressed in its title, and is, therefore, void as violative of Section 16, Article 4, Constitution of New Mexico.

The title to Chapter 95 reads as follows:

"An Act Enacting 61-1012 of the 1941 Compilation, New Mexico Laws Relative to the Sale of Liquor to Minors."

It is, therefore, clear that Chapter 95, supra, amends Section 1202(a) Chapter 236, Laws of 1939, New Mexico Stat-

utes (Section 61-1012, 1941 Comp.) This amendment was effected by merely adding the word "spouse" following the word "guardian", thereby exempting the spouse from its provisions. This being an amendment, we must look to the original Act to determine whether there is a compliance with constitutional provision. The title to Chapter 236 reads as follows:

"An Act to codify and revise the laws prohibiting * * * sale of alcoholic liquor within the State of New Mexico; * * * Prescribing offenses" (Emphasis ours.)

Section 1202(a), Sub-section 1, of the original Act, prescribes the offense here prohibited, to wit:

"Serving, selling and giving intoxicating liquor to minors."

Thus it appears that the subject of the Act (Chapter 236), supra, is clearly embraced in the title. The penalty for the offense is found in Section 1707(a) of the original act. (61-1019, 1941 Comp.)

Appellant further contends that Chapter 236, supra, Sec. 1202(a) is unenforceable, as the minor was in the custody of an adult at the time of the alleged offense; hence, exempt from its provision.

In this contention appellant is mistaken. The statute makes it a criminal offense for named persons and all others except the parent or guardian or spouse of any minor, or adult person into whose custody any court has committed such minor for the time, outside the "actual, visible personal presence" of the persons excepted, to sell, serve or give any alcoholic liquor to a minor. It is not claimed by appellant that he sustains such legal relation to the minor as to come within these exceptions. There is no merit to this contention.

We have reviewed the record and find the verdict supported by substantial evidence.

The judgment is affirmed, and it is so ordered.

(Signed) J. C. Compton, Justice.

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

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

187 P.2d 947

BRITT v. COLLUM et al.

No. 5056.

Supreme Court of New Mexico.

Dec. 23, 1947.

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

E. Ray Phelps, of Clayton, for appellees.

McGHEE, Justice.

The parties will be referred to as they appeared in the trial court.

The plaintiff sought an injunction against the defendants to prevent their claimed violation of an agreement to take his cattle for pasture.

A temporary restraining order was issued ex parte and the defendants were directed to show cause on May 26, 1947, why it should not be continued in force. The defendants filed an answer to the order to show cause in which they questioned the legal sufficiency of the complaint. This answer was treated as a motion to dismiss and sustained by the court, whereupon the plaintiff recited the filing of the motion and the action thereon, and then offered testimony to prove certain facts to cure the defects in the complaint. He did not ask for leave to amend or tender an amended pleading. After hearing his tender the trial judge stated that under the complaint the plaintiff was not entitled to an injunction. The plaintiff then offered further testimony in support of his complaint.

Our rules relating to pleadings are very liberal and we have gone a long ways in holding pleadings amended where testimony not admissible under the pleadings was admitted without objection, but we are hardly prepared to hold that when

tested by a motion to dismiss a plaintiff may aid his complaint by a tender of testimony.

The assignments of error relate to the refusal of the court to admit the testimony offered, and it is not claimed that the complaint in fact stated a cause of action.

The ruling of the trial court was correct. The judgment is affirmed.

LUJAN, SADLER and COMPTON, JJ., concur.

BRICE, C. J., not participating.

187 P.2d 947

WHITFIELD et al. v. CITY BUS LINES, Inc., et al.

No. 5034.

Supreme Court of New Mexico.

Dec. 9, 1947.

George A. Shipley, of Alamogordo, and Donovan Hoover, of Santa Fe, for appellants.

J. B. Newell and Edwin Mechem, both of Las Cruces, Bert Newland, of Deming, and H. A. Kiker, of Santa Fe, for appellees.

C. C. McCulloh, Atty. Gen., and Robert V. Wollard, Asst. Atty. Gen., amici curiae.

PER CURIAM.

Upon consideration of appellees' motion for rehearing, we have withdrawn the original opinion and substituted the following as the opinion of the court.

COMPTON, Justice.

Appellants and others instituted this proceeding to restrain appellees from unlawfully engaging in the business of transporting passengers for hire over routes covered by appellants. From an adverse judgment

appellants W. E. Whitfield, Jr., Hugh C. Whitfield and Mary E. Whitfield, individually and as joint executors of the estate of W. E. Whitfield, deceased, bring this appeal.

Appellants asserted that they were operating local passenger service by means of motor busses between Las Cruces, State College, Mesilla Park and Mesilla, in Dona Ana County over U. S. Highway 80 and State Road 28, under authority of a certificate of public convenience and necessity issued to them by the State Corporation Commission of New Mexico. They further allege *as a fact* that appellees, without a certificate of convenience and necessity, wrongfully and unlawfully, *and in violation of the rights of appellants,* operated busses and motor vehicles, in the transportation of passengers for hire, over highways and routes and between points covered by the schedules and transportation business of appellants, and "that the defendants in the operation of said vehicles, as aforesaid, are engaged in the business of 'Common Motor Carrier' as defined by the New Mexico Motor Carrier Act."

By a general denial, issue was joined. At the conclusion of the trial the court made its findings of fact and conclusions of law, except those deemed unnecessary to a decision, as follows:

"1. The plaintiffs W. E. Whitfield, Jr., Hugh C. Whitfield and Mary E. Whitfield, individually and as joint executors of the estate of W. E. Whitfield, deceased, at all times material were and now are engaged in the transportation business under the style of 'W. E. Whitfield and Sons,' and in the operation of said business are the holders of a certificate of Public Convenience and Necessity, duly issued by the State Corporation Commission of the State of New Mexico, authorizing the transportation of passengers for hire between Las Cruces in Dona Ana County, New Mexico, and Mesilla (commonly known as Old Mesilla), Mesilla Park, and State College, all in said county, over U. S. Highway No. 80, State Road No. 28 and State College Road."

"2. At all of the times material hereto the said W. E. Whitfield and Sons have been and now are engaged in the business of transporting passengers for hire to and fro between Las Cruces, Mesilla (commonly known as Old Mesilla), Mesilla Park and State College, all in Dona Ana County, New Mexico, by means of motor buses."

"4. The defendants, C. G. Newland, Jesse B. Lydick and Robert Y. McMillin, at all of the times material hereto, since about the 3rd of September, 1946 and until restrained from so doing, by preliminary injunction herein, have been engaged in the transportation of passengers for hire, under the style of 'City Bus Lines,' by means of motor vehicles or motor buses, to and fro between Las Cruces, Mesilla, (commonly

known as Old Mesilla), Mesilla Park and State College, all in Dona Ana County, New Mexico, over U. S. Highway 80, State Road No. 28 and State College Road. The said roads and highway are public highways of the State of New Mexico."

"5. The defendants Newland, Lydick and McMillin have not been granted Certificate of Public Convenience and Necessity by the Corporation Commission of New Mexico and are not holders nor in possession of any Certificate of Public Convenience and Necessity authorizing them or permitting them to transport passengers for hire over the public highways of the State of New Mexico between Las Cruces, Mesilla Park and State College."

"10. That at the time of the institution of this suit and prior thereto the defendants, Jesse B. Lydick, C. G. Newland and Robert Y. McMillin, were engaged in operating passenger buses for hire over a route lying partly within the City of Las Cruces and partly within the area adjacent thereto, including Mesilla, Mesilla Park and State College.

"11. That said route covered 91,787 feet, of which distance 50,479 feet were within the corporate limits of the City of Las Cruces, and 41,308 feet were outside the City limits.

"12. That said route is a fixed route, the operation of the same being confined to certain designated streets in the City and certain designated roads and highways outside the City."

and then concluded as law:

"2. The plaintiffs, Whitfield and Sons, are lawfully engaged in the business of operating a common motor carrier to and fro between the points of Las Cruces, Mesilla, (commonly known as Old Mesilla), Mesilla Park and State College, in Dona Ana County, New Mexico, over U. S. Highway 80, State Road No. 28 and State College Road, under authority of a certificate of Public Convenience and Necessity issued by the State Corporation Commission of New Mexico."

"4. That the operation of the defendants come within Exemption (f) Section 68-1325, N.M. Statutes, 1941 Annotated."

"5. That plaintiffs are not entitled to the relief sought in their Complaint, and that the preliminary injunction heretofore issued in this cause should be dissolved and this cause should be dismissed."

Appellants urged twelve assignments of error, which they argue under the following points:

"1. By failing to plead affirmatively the facts relied upon as relieving them from the necessity of complying with the provisions of the 'New Mexico Motor Carriers' Act,' Chapter 154 of the Laws of 1933, as amended, the defendants thereby waived this defense."

"2. The accumulated distances traveled by the defendants' buses over several fixed routes within the corporate limits of Las Cruces cannot be used as a basis for exempting the defendants from the provisions of the New Mexico Motor Carriers' Act."

The evidence shows that appellees, under a franchise from the City of Las Cruces, New Mexico, commenced their daily operation at 7:00 A.M., at a point in the northwest part of the City of Las Cruces, proceeding therefrom in a southeasterly direction to the intersection of Griggs and Main Street, near the center of the city, thence south and southwesterly to State College; then reversing the route in a northwesterly direction to Main Street; thence north on Main to the intersection of Las Cruces Avenue and Main Street; thence east on Las Cruces Avenue to Church Street; thence south on Church Street, several blocks, then making a circular loop to the left; thence northerly to the northeast part of the city; thence south to Las Cruces Avenue; thence west to the intersection of Main Street; thence south to the city limits, and southeasterly to Mesilla; thence south and westerly to Mesilla Park; thence northerly to the city limits; thence north on Main Street passing Las Cruces Avenue; thence northerly and westerly to the point of beginning. Other busses commence operation at different points on the route, so as to enable appellees to furnish service to its passengers at thirty-minute intervals, from 7:00 A. M., to 11:00 P. M. Each bus covers the entire route throughout the daily operation.

It is therefore, claimed by appellees that they come within the exemption provision of the act which reads as follows:

"68-1325. Exemptions.—Neither this act nor any provisions hereof shall apply or be construed to apply to any of the following:

"* * * (f) Busses traveling a *fixed route,* the greater portion of which lies within the boundaries of any one (1) city." (Emphasis ours)

It is first contended by appellants that the defense of operating under a franchise from the city cannot be raised because this defense was not specifically pleaded; that such defense in effect, is one of confession and avoidance, and they cite Moore v. Dresden Investment Company, 162 Wash. 289, 298 P. 465, 77 A.L.R. 1258, 1271, and 41 Am.Jur. Par. 158–160, as supporting their position.

We are in accord with the rule announced by appellants that when an exception is included and forms a necessary part of the enacting clause of a statute, the party relying theron must negative the exception; but where an exception appears in a subsequent section or division, or appears in another statute, it is unnecessary to do so, such being matters of defense to be raised by the opposite party. Authorities support-

ing this rule are assembled in annotations in 130 A.L.R. 440 et seq. But this rule has no application here. Under the issues presented, the question is whether appellees were operating in violation of the rights of appellants and consequently were engaging in the business of Common Motor Carrier.

The burden of stating and proving a cause of action was upon appellants, who now claim more was alleged than was necessary, and that the use of the words "unlawfully" and "wrongfully" were mere legal conclusions and that a denial presented no issue. Appellants also claimed surprise when the court admitted testimony showing that the operation of appellees was under a franchise from the city. This cannot be taken seriously, as no effort was made to delay the hearing so appellants might meet this unexpected issue.

Even if we concede, although we do not decide, that the use of the words "wrongfully" and "unlawfully" are mere conclusions, it can make no difference. In our opinion, the appellants, by tendering the aforesaid issue in their complaint, denied by appellees in their answer, namely, that appellees were operating motor busses in the transportation of passengers for hire, in violation of the rights of appellants, and, especially, in alleging that in the operation of said vehicles the appellees were engaged in the business of a "common motor carrier" *as defined* by the New Mexico Motor Carriers' Act, assumed the burden of proving what they alleged. This they could not do without excluding appellees from the exception, and unless excluded, they are not brought within the definition of a "common motor carrier." The appellants consistently have sought escape from the burden assumed in their pleadings by claiming the allegations, although products of their own draftsmanship, are mere conclusions of the pleader. Under such circumstances we are not disposed to be too strict in differentiating allegations.

Appellants next contend that appellees operate three or more routes, and not *a fixed route* as contemplated by the statute; that appellees' operation within the city was merely a sham so arranged as to duplicate distances so the greater portion of the route operated by them would lie within the boundary of the city of Las Cruces. They base their conclusion on the fact that appellees' busses pass the intersection of Las Cruces and Main Street on three separate occasions in completing the circuit. And from the further fact that passengers at this point may transfer to other sections of the route.

We have before us a map covering the route of appellees. From it we conclude that the city of Las Cruces, apparently, is well served by appellees and that the transfer point at Las Cruces and Main Street

is for the convenience of passengers. A passenger is not compelled to transfer. He may ride the entire route or transfer at the intersection for quicker service. We find no merit in this contention.

The Act gave the city authority to grant the franchise and establish its route. See City of Cleveland v. Public Utilities Commission of Ohio, 130 Ohio St. 503, 200 N.E. 765; Cleveland Railway Co. v. Public Utilities Commission of Ohio, 137 Ohio St. 302, 28 N.E.2d 638.

In our consideration of the case we seem to find no exact definition of the words "fixed route" as used in the act. By statute, "regular route" is defined in Missouri Truck and Bus Act, Section 5720, Missouri Revised Statutes Annotated, in subsection (h) as follows:

"The term 'regular route,' when used in this article, means that portion of the public highway over which a motor carrier usually or ordinarily operates or provides motor transportation service."

Webster's Unabridged Dictionary defines the word "fixed" as: "settled; established; firm; fixed; stable;" and defines the word "regular" as: "Established; initiated; * * * customary, ordinary; normal."

We therefore conclude that the terms "regular route"; "established route"; and *fixed route,* as used in this Act, are synonymous, and that appellees were operating a fixed route as contemplated by the statute. 36 C.J.S., Fix, page 886, State v. Blair, 347 Mo. 220, 146 S.W.2d 865.

Whether the appellees were engaged in transporting passengers for hire unlawfully, or whether they were operating a fixed route, the greater portion of which lies within the municipality of Las Cruces, was a question to be determined by the trier of the facts.

We have examined the record, and the findings are supported by substantial evidence.

Finding no error, the judgment is affirmed, and

It is so ordered.

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

McGHEE, J., did not participate.

188 P.2d 160

FOWLER v. W. G. CONST. CO. et al.

No. 4963.

Supreme Court of New Mexico.

Aug. 14, 1947.

Rehearing Denied Jan. 6, 1948.

George L. Reese, Jr. and Lon P. Watkins, both of Carlsbad, for appellant.

Seth & Montgomery, of Santa Fe, Jones, Hardie, Grambling & Howell, of El Paso, Tex., and John R. Brand, of Hobbs, for appellees.

SADLER, Justice.

This appeal presents two major questions for decision. They are (1) whether following entry of a judgment awarding compensation for disability under our Workmen's Compensation Law in which the court declined to suspend or reduce compensation unless the employee should undergo a surgical operation calculated to reduce the percentage of disability, the court can reopen the matter and modify the judgment in this respect more than 30 days after entry, even though the right so to do be expressly reserved therein; and (2) may an employee, otherwise entitled to compensation by reason of having incurred a compensable injury, be compelled to suffer reduction or suspension of compensation unless he consents to undergo an operation which does not endanger his life and is reasonably calculated to reduce the percentage of disability from the injury? Of course, a negative answer to the first inquiry will render unnecessary a decision of the second one. Hence, we seek immediately the true answer to the question first propounded.

The claim for compensation arose by reason of an injury suffered in the course of employment by the plaintiff (appellant) on June 23, 1943, in the collapse of a scaffold

on which he was standing thereby dropping him to the ground and resulting in the fracture of his left heel. Following the injury, medical and surgical treatment were furnished the plaintiff by his employer, W. G. Construction Company, one of the defendants, and he was paid compensation for a short time. Some question arising whether his disability might be substantially reduced by a surgical operation, concerning which misunderstanding developed, the defendants, stopped the payment of compensation after having paid same from date of injury until February 24, 1944, as for total disability at the rate of $18 per week.

Thereupon, on March 3, 1944, the plaintiff filed his claim for compensation to which an answer was interposed by the defendants, followed by an amended answer filed June 13, 1944. They pleaded payment of compensation as aforesaid, and offered to resume payments, tendering $252, the amount accruing from date payments were suspended to date of filing the answer. They further offered to continue these payments until relieved of the obligation by order of the court. The defendants then alleged that competent medical authority had recommended an operation which would reduce disability to a 10 per cent. loss in the use of his left foot but that plaintiff had declined to undergo the operation.

The day upon which the foregoing amended answer was filed, a hearing took place, in the course of which it was stipulated that plaintiff might accept the $252 tendered as compensation accrued and unpaid to date, without prejudice to his rights in the case. On the day of the hearing, which appears to have been very informal, with only the pleadings and a deposition of Dr. T. W. Bywaters, an orthopedic physician of Dallas, Texas, before the court, the defendants filed with the papers in the case a demand for physical examination by two Dallas physicians, the one named next above and Dr. P. C. Williams, his partner, all expenses to be paid by the defendants. No formal order seems to have been entered following this hearing.

The matter came on for further hearing on August 9, 1944, before the court at Lovington. The deposition of Dr. Bywaters, above mentioned, again was put in evidence. The plaintiff, in the meantime having submitted to the physical examination requested by defendants, the report of such examination, dated July 10, 1944, prepared by Dr. Bywaters of the medical firm of Williams and Bywaters of Dallas, Texas, was read in evidence; also a report by another orthopedic physician of Dallas, Dr. Sim Driver. It was agreed, both by the court and by all counsel, that the condition of plaintiff's foot was no different at the time of this hearing from what it was at the time of the former hearing on June 13, 1944.

At some time after this hearing, a judgment was prepared and signed by the judge, bearing the date of the hearing, namely August 9, 1944, although not filed for entry until December 12, 1944. Formal findings were not requested by either side and the court made none, although the judgment contains a finding that plaintiff was, at the date thereof, totally disabled by a compensable injury of a nature indicated above, and proceeding further, reads:

"It Further appearing that the medical authorities who have examined the claimant are not in agreement as to whether or not an operation should be performed upon claimants ankle at this time and that such operation might or might not be advisable in the future.

"It Further appearing that at this time the defendants are in default in payment of compensation without reasonable cause or excuse and that Claimant should be paid compensation during the continuance of his disability and that his attorney's fees should be allowed in the sum of $500.00 which sum the Court finds to be reasonable, for services performed to and including the hearing of August 9th, 1944.

"It Is Therefore Ordered, Adjudged And Decreed that the Defendants pay to Claimant compensation at the rate of $18.00 per week, commencing seven days after the date of his injury on June 23, 1943, during the continuance of his total disability but for not more than five hundred fifty (550) weeks, less compensation previously paid him, and that they also pay to his attorney, C. Melvin Neal, the sum of $500.00 as his fees in this matter, to and including the hearing of August 9th, 1944.

"It Is Further Considered And Ordered By the Court that this Judgment is subject to the right of defendants at any future date to reopen the same for the purpose of determining whether Plaintiff should be required to submit himself to a surgical operation."

A few days prior to entry of the foregoing judgment and on December 4, 1944, the defendants filed formal written motion, reciting salient historical facts touching the plaintiff's injury, treatment, negotiations looking to an operation, the recommendation therefor by certain physicians alleged to be competent, the furnishing to plaintiff by defendants of a certain type shoe recommended by Dr. Driver but that the plaintiff had failed to discard his crutches and that he still used them. The motion set up the plaintiff's refusal to undergo the operation, notwithstanding the defendants' expressed willingness to pay all expenses incident thereto. It alleged further that the proposed operation would correct the plaintiff's condition to a point where not more than 10 to 15 per cent. disability would remain. The prayer was that the plaintiff be required to undergo the

operation or suffer a reduction in his compensation to that appropriate for the disability likely to remain following the operation proposed. The plaintiff's answer to this motion denied that he should be required to submit to the operation, or that competent medical opinion would approve the operation.

The next step in the proceedings took place on January 10, 1945. On that date, a hearing was held at Lovington, New Mexico, apparently on the issues raised by the aforesaid motion and the plaintiff's answer thereto, the parties and the court seemingly unmindful of the fact that the motion had not been refiled after entry of judgment on December 12, 1944. Again the reports of Drs. Williams and Bywaters and of Dr. Sim Driver were introduced in evidence and, in addition, a report of Dr. W. E. Badger of Hobbs, New Mexico, dated November 27, 1944. It should be recalled that the reports of Drs. Williams and Bywaters, dated July 10, 1944, and of Dr. Sim Driver of Dallas, dated June 29, 1944, were before the court at the August 9, 1944 hearing. There was then a divergence of opinion between Dr. Driver, on the one hand, and Drs. Williams and Bywaters on the other, as to the wisdom of an operation at the time. Dr. Driver recommended that plaintiff try out a certain type of shoe, with a progressively increasing use of the foot over a period of three months, before resorting to an operation. He agreed and advised, however, that if at the end of that time, satisfactory progress had not been made, the operation presently advised by Drs. Williams and Bywaters should be performed. At this hearing in January, 1945, the defendants took the position that, the three months waiting period advised by Dr. Driver having elapsed and the improvement expected not materializing, this physician would himself now join in recommending the operation.

Dr. Badger's report of November 27, 1944, discouraged hope for further improvement from use of the shoe suggested by Dr. Driver. Testifying at this hearing, Dr. Badger joined in approving the same kind of operation recommended by Dr. Bywaters of Dallas. Dr. Badger is the physician who first treated plaintiff and advised that he be taken to Dr. Bywaters in Dallas for examination and diagnosis. As a witness at this hearing, he agreed that it could not be said with any assurance that Dr. Driver would now join with Drs. Williams and Bywaters in recommending the operation without an opportunity to re-examine the plaintiff following the three months trial use of the shoe advised by him. The hearing apparently closed in an agreement by all parties with the court's approval for another examination of plaintiff by Dr. Driver in Dallas.

The next and final hearing occurred on February 13, 1945. The plaintiff had returned to Dallas pursuant to the under-

standing reached at the close of the hearing immediately preceding on January 10th and was there again examined by Dr. Driver and also by Dr. Bywaters. The report of each physician, based on the latest examination, was read in evidence. They were in entire agreement that the operation now offered the only hope for substantial relief promising ony appreciable reduction in the plaintiff's disability.

Accordingly, based upon these reports and other opinion evidence contained therein, at the conclusion of the hearing on February 13, 1945, the court signed an order modifying the previous judgment bearing date August 9, 1944, although not actually filed for entry until December 12, 1944. Briefly, the court again found in its latest order or judgment that plaintiff's disability was total and made the additional finding that it would be permanent unless and until the operation was performed on his foot. The operation was described in the order and a finding made therein that it would reduce plaintiff's permanent disability to not in excess of 25 per centum and that maximum recovery from the operation could be expected at the end of 11 months from its date. The order contained the further finding that defendants had offered to pay all expenses incident to such operation and that the same was essential, but that plaintiff, nevertheless, had refused to undergo the same and that his refusal was unreasonable. After these findings, the adjudicating portion of the order, entered August 14, 1945, reads: "It Is, Therefore, Ordered That the Defendants continue to pay compensation to Claimant at the maximum rate for a period of eleven months following January 19, 1945, and that after the lapse of such eleven months they be permitted and authorized to pay Claimant compensation at the rate of $4.50 per week for an additional period of 100 weeks; that having made such payments, they be relieved of the obligation to pay any further amounts of compensation; that in the event Claimant elect to undergo such operation not later than 60 days from March 13, 1945, the offer to have such operation performed at Defendant's expense being still in force, the Defendants shall receive credit for 75 per cent of the compensation paid by them to Claimant after January 19, 1945, and shall also receive credit for the sum of $40.00 furnished to Claimant to defray the expenses of his last trip to Dallas for examination."

It will be recalled that the judgment of December 12, 1944, also contained a finding that the plaintiff was totally disabled and awarded him compensation at the rate of $18 per week during continuance of his disability but not to exceed 550 weeks (the appropriate award of compensation for total permanent disability). It declined to order the compensation reduced in the event of

plaintiff's unwillingness to undergo the operation at that time recommended by certain physicians testifying for defendants.

Was the trial court authorized thus to amend and modify the order or judgment theretofore made and entered by it on December 12, 1944, even though incorporating in the judgment express reservation of jurisdiction so to do? This question presents the first consideration and a decisive one, if it should be ruled in favor of the defendants who vigorously challenge the court's jurisdiction to make the changes it did at the time it did.

Although persuasive argument is presented in support of the plaintiff's contention on the jurisdictional question, a review and study of controlling statutes satisfies us that the trial court was not without jurisdiction to reopen the judgment entered December 12, 1944, and suspend payment, as ordered, of compensation previously awarded the plaintiff thereby, unless and until he should undergo the operation proposed. The judgment itself contained an express reservation of jurisdiction to reopen the judgment for further consideration of this matter. However, this reservation of jurisdiction would have been without force or effect unless applicable statutes gave the court power to amend or modify the judgment in the manner it did after the 30 day period during which a district court holds jurisdiction over its judgments generally. 49 C.J.S., Judgments, § 230, page 444 and Hill v. St. Louis, 20 Mo. 584; Williams v. Williams, 107 Ky. 496, 54 S.W. 716.

The language in the act relied upon to sustain the right to modify the original judgment in the respect indicated is 1941 Comp., § 57-920, reading: "If any workman shall persist in unsanitary or injurious practice which tends to imperil or retard his recovery or shall refuse to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the court may in its discretion reduce or suspend his compensation."

It is found in the second paragraph of a section the first part of which imposes upon an injured employee, upon written request of his employer where the right to compensation under the act exists, from time to time, to submit to a physical examination by a competent physician, to be selected and paid for by the employer, or one selected by the court, with the right in the employee to have present a physician selected and paid for by him. The defendants would place this language on a practical parity with, or make it analogous to, that to be found in 1941 Comp., § 57-925, giving unto the employer the right to require any employee awarded compensation for disability under the act to submit himself to medical examination by a duly licensed physician for the stated purpose of

determining whether the workman has so far recovered that his earning power at any kind of work is restored. The section mentioned reads: "Any workman awarded compensation for disability under this act (§§ 57-901—57-931) shall, previous to the falling due of any instalment of compensation provided for in the judgment therefor upon the order of the court if requested by his employer, or any other person bound by judgment therefor, submit himself to medical examination by a physician licensed to practice medicine in this state, at a place within this state designated by the person so demanding and which shall be reasonably convenient for the workman, and said workman may have a licensed physician present of his own selection. 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, and the court shall be empowered to hear evidence upon such issue and hearing. If it be discovered by such examination and hearing that diminution or termination of disability has taken place the court shall order diminution or termination of payment of compensation as the facts may warrant. If the workman in such case refuses to submit to such examination or obstructs the same, his right to monthly payments shall be suspended until such examination has taken place, and no compensation shall be payable during such period of refusal."

The plaintiff urges upon us a construction that will limit the application of the language quoted above from § 57-920 to cases or claims for compensation prior to trial and judgment and the language of the later section to cases where the claim for compensation, either by agreement or pursuant to trial in the event of a contest, has been placed in judgment. There is support in the language of the later section for this construction as to it. The condition under which the workman may be compelled to submit to a medical examination, or suffer a suspension in the payment of his compensation upon his refusal, is that he must have been "*awarded compensation* for disability" and the right to make the request for medical examination is to be exercised by the employer "previous to the falling due of any instalment of compensation provided for *in the judgment therefor,*" etc. (Emphasis ours).

Plaintiff mainly relies on the New Mexico cases of Norvell v. Barnsdall Oil Co., 41 N.M. 421, 70 P.2d 150, Garcia v. Anderson, 41 N.M. 517, 71 P.2d 686, and Hudson v. Herschbach Drilling Co., 46 N.M. 330, 128 P.2d 1044, in support of his claim that the trial court was without jurisdiction to modify the judgment of December 12, 1944, as it did when it did. For cases from other jurisdictions he cites us to Gray v. Hercules Powder Co., 160 Kan. 767, 165 P.2d 447; United Fruit Co. v. Pillsbury, D.C., 55 F.2d 369; Crane Enamelware Co.,

v. Dotson, 152 Tenn. 401, 277 S.W. 902; Crane Enamelware Co. v. Dotson, (2nd Appeal) 159 Tenn. 561, 20 S.W.2d 1045, and Kline v. Industrial Insurance Commission, 101 Wash. 365, 172 P. 343. See, also, extensive annotations in 165 A.L.R. 9.

In Hudson v. Herschbach Drilling Co., supra [46 N.M. 330, 128 P.2d 1045], we quote from 1941 Comp., § 57-916, relating to judgments in compensation cases, as follows: "Any and all such judgments rendered and executions issued hereunder shall have the same force and effect and be governed by the laws of this state as judgments or executions in civil cases."
and then observe:

"We must look to the statutes and general law for authority to set aside a judgment in compensation cases if the applicant is the workman, but if the employer or his surety is the applicant, then provision is made therefor by the act itself.

"Workmen's compensation statutes are sui generis and create rights, remedies and procedure which are exclusive. They are in derogation of the common law and are not controlled or affected by the Code of procedure in suits at law or actions in equity except as provided therein. Pound v. Gaulding, 237 Ala. 387, 187 So. 468; Smith v. Kiel, Mo.App., 115 S.W.2d 38. But the New Mexico act provides that we must look to the code of procedure and general law for authority to set aside such judgments."

Garcia v. Anderson, supra, is cited to support the plaintiff's contention that the motion of defendants filed a few days prior to the entry of the judgment of December 12, 1944, if treated as refiled subsequent to the entry of such judgment and on January 10, 1945, when the issues raised by the motion were heard, would stand denied by operation of law because not ruled upon within 30 days after such filing date.

Nothing said by us in the Hudson case controls the decision here, if we can find in the act itself language retaining jurisdiction in the district court to modify the judgment of December 12, 1944, as it did.

We believe the two sections of the act dealing most directly with the question confronting us, namely, §§ 57-920 and 57-925, complement each other and when read in pari materia confer authority on the trial court to reopen its previous judgment awarding compensation to the plaintiff. Section 57-916 on judgments, authorizing executions for future instalments provided for in the judgment upon affidavit of the workman that same is unpaid and that his disability continues, adds: "Unless application shall have, previous to the issuance of such execution, been made and filed with said clerk by some one of the parties against whom said judgment has been ren-

dered for the appointment of a physician, *in accordance with section 19 (§ 57-920) hereof,* for the purpose of examination of said workman, in which event the issuance of such execution shall await the further order of the court in the premises." (Emphasis ours).

It is worthy of note that the limitation on the right to an execution on judgment already entered for compensation is an application for physical examination made in accordance with the very section, 57-920, which contains the provision authorizing reduction or suspension of compensation for refusal by workman to submit "'to such medical or surgical treatment as is reasonably essential to promote his recovery." The act did not affix the limitation on right to execution to an application for medical examination of the workman made in accordance with § 57-925, the sole purpose of which is to ascertain whether he has so far recovered that his earning power at any kind of work is restored.

The sections of the statute, as stated, complement each other. Under § 57-916, even though judgment has been entered, execution may be denied if application has been made for physical examination in accordance with § 57-920. What is the purpose of the examination, if not to determine the extent of the workman's disability in the one case, or, in another, to determine what medical or surgical treatment will best promote recovery? Due to circumstances, the ascertainment of the latter may be as important after judgment as before due to new discoveries and rapid advancement in medical and surgical science. In other words, the examination authorized in § 57-920 is for the purpose of discovering and devising means best calculated to bring about recovery. The physical exmination mentioned in § 57-925 is for the purpose of ascertaining to what extent the means employed have succeeded. This claim of error must be denied.

We turn now to a consideration of the second question, namely, whether the trial court erred in reducing the plaintiff's compensation from an amount appropriate to total permanent to an amount appropriate to total partial disability. In its order reducing plaintiff's compensation, signed February 13, 1945, and entered on August 14, 1945, the court incorporated pertinent findings, as follows:

"That Claimant is totally disabled as a result of his injury, which disability will be permanent unless and until an operation is performed on his foot; that such disability consists principally of pain in the foot due to an arthritis condition in the joint between the heel and the ankle bone;

"That heretofore the Defendants requested Claimant to submit to an operation on his foot, the same being known as a triple

arthrodesis designed to stabilize the subastragalar joints, which operation Claimant declined to undergo; that competent medical authority, namely, Doctors W. E. Badger of Hobbs, New Mexico, and Doctors Sim Driver and T. W. Bywaters of Dallas, Texas, after having examined Claimant on January 19, 1945, concurred in the recommendation that claimant undergo such operation, which contemplates the removal of cartilage from between the heel bone and the ankle bone, thus forcing these bones into close contact with one another so they would thus be fused and grow together stating that such an operation would result in partially correcting and curing Claimant's present disability; that such operation would restore the normal functions of the foot except for a permanent disability thereto of not in excess of .25 per cent of the foot, due to loss of motion, and

"The Court further finds that the proposed operation is reasonably essential to promote and effect Claimant's recovery from his present disability and that his disability can thereby reasonably be expected to be reduced to not more than 25 per cent in the use of the foot; that Defendants, after such doctors had advised that the same be performed, tendered such operation to Claimant and agreed to defray all the expenses incident thereto and to pay compensation for so long *as* period of time as Claimant was entitled thereto, following the operation, and to pay compensation for the resulting partial permanent disability following recovery from such operation; that Claimant has refused to undergo such operation and that his refusal so to do is unreasonable; that Claimant owes Defendants the duty of submitting to such operation in order to reduce the amount of his disability; that had Claimant submitted to such operation when last tendered him on January 19, 1945, he could reasonably have been expected to have attained his maximum recovery therefrom within a period of eleven months from the date of the operation."

The adjudicating portion of the order already has been set out. Under its terms the plaintiff was to be paid compensation for total permanent disability for 11 months from January 19, 1945, the date upon which he was tendered and refused the operation recommended by the physicians. This period of 11 months represented the time estimated by the physicians for bringing the plaintiff maximum recovery from the operation. While medical testimony spoke of the procedure as a major operation of an orthopedic type, one of the physicians testifying, continued: "We do not ordinarily think such an operation is dangerous. The dangers that one would encounter in any operation are those of giving an anesthetic or secondary infection. Those things happen occasionally. * * *

It probably is as safe as any major operation of an orthopedic type that we do."

The three physicians testifying, Dr. Bywaters, Dr. Driver and Dr. Badger, all concurred in recommending the operation as a means of substantially reducing the plaintiff's disability. His own attorney urged that he undergo the operation. The plaintiff explained why he did not want the operation performed by expressing the view that the outcome would be doubtful and he did not think it would benefit him. He summed up by stating: "The two main reasons are because I do not know whether my heart would stand the ether and the gas that would have to be put to me to undergo the operation, and the main reason I do not want to have it done is because I do not think it would benefit me any."

The findings contained in the order reducing the plaintiff's compensation at the expiration of 11 months from the time the operation was tendered him are supported by substantial evidence. The trial court's conclusion that plaintiff's refusal was unreasonable is the only proper one to be deduced from the findings made. The authorities fully support the trial court's action. Under an annotation entitled: "Workmen's Compensation: Duty of injured employee to submit to operation or to take measures to restore earning capacity", appearing in 6 A.L.R. 1260, supplemented in 18 A.L.R. 431, 73 A.L.R. 1303 and 105 A.L.R. 1470, many cases touching the question involved will be found listed and discussed. The cases to which the annotations are appended, in the order of their reporting, are O'Brien v. Albert A. Albrecht Co., 206 Mich. 101, 172 N.W. 601, 6 A.L.R. 1257; Henley v. Oklahoma Union Railway Co., 81 Okl. 224, 197 P. 488, 18 A.L.R. 427; Consolidated Lead & Zinc Co. v. State Industrial Commission, 147 Okl. 83, 295 P. 210, 73 A.L.R. 1298, and Robinson v. Jackson, 116 N.J.L. 476, 184 A. 811, 105 A.L.R. 1466.

The rule deducible seems to be that an injured workman will be denied compensation for an incapacity which may be removed or modified by an operation of a simple character, not involving serious suffering or danger. A refusal to undergo an operation under such circumstances is deemed unreasonable. Consolidated Lead & Zinc Co. v. State Industrial Commission, supra. On the other hand, if the operation be of a major character and attended with serious risk to life or member, the rule is that an injured employee's refusal to submit to such operation is deemed not unreasonable, and compensation should not be denied on that account. Grant v. State Industrial Accident Commission, 102 Or. 26, 201 P. 438. Examination of the record satisfies us that the operation proposed, although designated by one of the physicians as a "major operation of an orthopedic type," is not one which justifiably could be classified as dangerous to life or limb. The

trial court was warranted in characterizing the plaintiff's refusal as unreasonable in ordering the reduction in compensation it did in the event of a refusal.

Counsel argues that because the order reducing compensation, signed February 13, 1945, was not entered until August 14, 1945, it was not until the latter date that plaintiff was put to an election in reference to an operation and when so put the right to it already had expired under terms of the order or, to use the language of his counsel: "the axe descended simultaneously with the determination." He adds: "That judgment reduced appellant's (plaintiff's) compensation immediately although under it he could still receive his $18.00 per week for about four months. The appellant could not on August 14, 1945 do anything to preserve his rights except appeal."

The plaintiff, himself, was in court and had just finished testifying as a witness when the trial judge announced from the bench what order he would make as a result of this last hearing. As a witness on this final hearing, the plaintiff repeated more than once his decision not to undergo the operation recommended by three physicians and even urged by his own attorney. His reasons already have been stated. While it is true the order signed by the court on February 13, 1945, was not actually entered until six months later, it was stated at oral argument without challenge, what an examination of the whole record seems to make plain, that the reason for withholding from entry not only this order but as well the earlier one entered December 12, 1944, for the periods indicated was to give the plaintiff more time to make up his mind and, perhaps, to become satisfied to undergo the proposed operation. Whatever the reason, and giving all force to the doctrine that a judgment is not effective until entered, it certainly cannot be said, nor does it lie in the plaintiff's mouth to assert, that he was not given every opportunity to accept, at the expense of the defendants, the operation tendered. It, indeed, would be a repudiation of what the record boldly proclaims, to hold otherwise.

The trial judge was unusually solicitous of the plaintiff's rights and throughout extended him every safeguard. The judgment he entered is correct and should be affirmed.

It is so ordered.

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

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

On Motion for Rehearing.

Motion for rehearing has been filed in which the plaintiff (appellant) questions correctness of the opinion filed on several

grounds. We are not persuaded the opinion is erroneous in any of the respects challenged and thus determining, ordinarily, we should feel moved to dispose of same by a formal order merely denying the motion. However, counsel for plaintiff questions the accuracy of a statement in the opinion mentioning his failure to challenge a declaration of opposing counsel at oral argument as to reason for withholding from entry for stated periods certain orders touching compensation. While not disputing that the declaration was made, he disclaims having heard same and points out that if he had heard it he would have been in no position to deny or affirm, not having represented the plaintiff at the trial.

The language complained of appears in the following sentence from the original opinion, to wit: "While it is true the order signed by the court on February 13, 1945, was not actually entered until six months later, it was stated at oral argument without challenge, what an examination of the whole record seems to make plain, that the reason for withholding from entry not only this order but as well the earlier one entered December 12, 1944, for the periods indicated, was to give the plaintiff more time to make up his mind and, perhaps, to become satisfied to undergo the proposed operation."

It is unfair to counsel to attach significance to his failure to deny something transpiring at a trial at which he was not present representing any of the parties. When we made the statement we overlooked this fact. Accordingly, and in fairness to counsel so much of the quoted language as makes mention of this circumstance is withdrawn. Neither counsel nor his client should be prejudiced by the former's failure to deny something said to have transpired when he was not present.

Of course, by the same token, the defendants should suffer no prejudice through substitution of counsel in giving meaning, characterization and effect to what transpired below when the plaintiff was represented by other counsel. We have no quarrel with counsel's statement of the steps to be taken in ordinary sequence as a predicate to suspending or reducing a workman's compensation where he unwarrantably refuses to submit to surgical treatment found to be reasonably essential to improvement or recovery. Where counsel and the court differ is as to whether there had been a refusal by the plaintiff. If anything can be said to stand out in this record it is that court, counsel for defendants and the then counsel for plaintiff left the February, 1945, hearing faced with a refusal by plaintiff to submit to the operation which the judge announced from the bench he was recommending under penalty of a reduction in plaintiff's compensation if he persisted in such refusal. The court said:

"The Court:—(after argument by Mr. Brand) I do not see how I can do anything

on this except to order a reduction in this man's compensation. I believe eleven months is the longest time and reduce it to twenty-five percent after that if he refuses to take the operation. They would have to pay him all that time if he had it.

"The Witness:—I believe each one of these specialists should know what they are doing, and if they are wrong about one thing they could be about another, and I would want to know what the specific outcome of this operation would be.

"The Court:—They both think you would have a very decided improvement."

The order hereinabove quoted was signed, bearing date February 13, 1945, although withheld from entry until August 14, 1945, obviously with the thought that plaintiff, as indicated by the judge from the bench, might suffer a change of heart and submit to the operation. Of course, the matter should have been handled otherwise, to present the appearance of regularity and orderly sequence. But objection was not then taken in that behalf, or that plaintiff was not being given opportunity following entry of the order to elect whether to submit to the operation. In the mind of the court and all counsel he had already refused, even in the face of urgings from his own counsel, although as indicated the door continued to be held open for him for some time had he seen fit to enter through.

Even now, in this court, while insisting upon the naked legal right to time a refusal to follow formal entry of the order which the judge announced from the bench he was making, present counsel can give no assurance, at least offers none, that if the cause should be remanded, the plaintiff would submit to the operation. It is significant that not once during various hearings below did plaintiff indicate a willingness to undergo same if approved by the court. In the face of pronounced unwillingness to do so as shown by his testimony, the then counsel may have thought it superfluous to inquire.

The motion for rehearing will be denied and

It is so ordered.

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

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

188 P.2d 169

SULLIVAN v. ALBUQUERQUE NAT. TRUST & SAVINGS BANK OF ALBUQUERQUE et al.

No. 5032.

Supreme Court of New Mexico.

Oct. 4, 1947.

Rehearing Denied Dec. 29, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

William T. O'Sullivan, of Albuquerque, for appellant.

Simms, Modrall, Seymour & Simms and Martin A. Threet, all of Albuquerque, for appellees.

SADLER, Justice.

We are asked to reverse a judgment of the district court of Bernalillo County dismissing for want of indispensable parties the suit of plaintiff (appellant) seeking an adjudication that certain real and personal property standing in his wife's name at the time of her death was community property rather than her separate estate and, hence, his by right of full ownership.

Evelyn Clark Sullivan, the deceased wife of the plaintiff, died on March 2, 1944, at Albuquerque, N. M., after a marriage to him in the state of New York which had continued uninterruptedly from its date on July 28, 1918, until the time of her death. Soon after the plaintiff's marriage, he entered the Army of the United States and served in World War I. Due to the fact that he was an incompetent upon his discharge from the Army in 1919, and having continued such, some years later and on October 8, 1934, the probate court of Cook County, Illinois, appointed the wife guardian of his estate. As such she collected over a considerable period of time certain veteran's benefit funds, such as monthly pension and compensation or disability benefits, belonging to him.

About the year 1921, during the residence of the husband and wife in Albuquerque, she acquired title to a certain piece of improved real estate, which they occupied as a home; also the furniture, furnishings and household effects therein and, as well, the sum of one thousand ($1000) dollars in cash, at the time of the wife's death, stood to the credit of an account in her name in Albuquerque Trust and Savings Bank in Albuquerque. Following her death, a last will and testament which she executed in her lifetime was probated at Kenosha, in the state of Wisconsin. Northwestern Loan and Trust Company of Kenosha in that state was named executor of the will as well as trustee of decedent's estate and duly qualified as such. Subsequent to the probate of the will and on June 9, 1944, Albuquerque National Trust and Savings Bank of Albuquerque, New Mexico, was appointed ancillary administrator with the will annexed in Bernalillo County, New Mexico, and duly qualified as such. Under the terms of the will the following persons

were named either as a legatee, cestui que trust, remainderman, contingent remainderman or trustee, to-wit: Mildred Coulson, Lester F. Clark; Northwestern Loan and Trust Company; Edward Thomas McGuire, an Incompetent; Lillian Clark; Christian Science Benevolent Association of Boston and Theodore Sullivan, the plaintiff herein.

The original complaint was captioned, as to plaintiff, when filed: "Theodore Sullivan, an Incompetent Person, by William T. O'Sullivan as Ancillary Guardian of his Estate." William T. O'Sullivan, appearing as attorney for the plaintiff, had succeeded by appointment to ancillary guardianship of plaintiff's estate in New Mexico a short time after the death of the plaintiff's wife, she having filled the office of general guardian of his estate, under an appointment in Illinois, as aforesaid, for approximately ten years prior to her death.

The original complaint consisted of two causes of action, the first alleging that the real estate had been purchased with the proceeds of veteran's benefits of the plaintiff and that, contrary to an understanding between the parties, the title was taken in the wife's name; that it and the furniture, furnishings and household effects, likewise purchased with funds belonging to the plaintiff, constituted his separate estate. It contained the further allegation that the funds deposited in the Albuquerque bank to the credit of plaintiff's wife, as aforesaid, consisted of commingled proceeds of veteran's benefits belonging to plaintiff plus rentals received from said real estate and constituted community property of the two spouses. The defendant bank, as administrator with the will annexed of testatrix, was charged to have taken wrongful possession of all this property under a claim that it was separate estate of decedent. And as a second cause of action, the plaintiff repleaded all paragraphs of the first cause of action and in an added paragraph set up a confidential relationship to have existed between the parties, the receipt by the wife of the funds aforesaid and their investment in the properties mentioned, taking title in her own name.

The plaintiff prayed (1) that a decree be entered declaring all said property and funds to belong to him and calling upon defendant bank, administrator as aforesaid, to account to plaintiff therefor and for the rents and profits thereof; or, in the alternative, (2) that a trust be impressed upon all of said property in plaintiff's favor to the full extent his funds could be shown to have been wrongfully invested therein—and for general relief.

The answer of the Albuquerque Trust and Savings Bank as administrator with the will annexed consisted largely of general denials but with an affirmative plea, nevertheless, showing disposition of all

funds received from the government of the United States for support of herself and husband and for expenses of guardianship. It further alleged that she had fully and finally accounted in the guardianship proceeding in Illinois up to and including the 31st day of January, 1944, and that there were no funds whatever on hand unexpended belonging to the plaintiff on said date.

In the meantime, an offer to purchase the real estate involved together with the household furniture, furnishings and personal effects in the residence located thereon for the stated price of $5500 less a realtor's commission of five (5%) per cent. having been made, a written stipulation, signed by or on behalf of Albuquerque National Trust and Savings Bank, ancillary administrator aforesaid and Theodore Sullivan, Incompetent, by attorneys thereunto duly authorized and approved by the court, was filed with the papers in the case. Under its terms the real estate and personal property were to be sold and converted into cash and the net proceeds held by the bank as ancillary administrator, subject to the condition that:

"* * * said net proceeds shall be treated as though they were the real and personal property unsold and such rights as the incompetent and his Ancillary Guardian may be determined to have, shall be by all parties treated as transferred to said net proceeds to the end that the purchasers may receive a clear and marketable title."

At this stage of the proceedings below, Albuquerque National Trust and Savings Bank, then the sole defendant, moved a dismissal of the complaint filed because of the absence of indispensable parties, to-wit, the parties hereinabove named as either a legatee, cestui que trust, remainderman, contingent remainderman or trustee whose interests would be adversely affected, it was said, should the claim of sole ownership by Theodore Sullivan, Incompetent, of the property and estate assertedly left by testatrix be established. Following argument on the motion, and on March 13, 1946, an order sustaining same was entered by Judge Henry G. Coors, senior judge of the Second Judicial District, then presiding in the trial of said cause. The order granted the plaintiff twenty days within which to amend by bringing in as defendants the parties held to be indispensable, in default whereof the complaint was to stand dismissed.

The next day after entry of the order sustaining the motion to dismiss, an amended complaint was filed in which all parties held indispensable were joined as parties defendant. Except to join the added parties as defendants and to institute the suit in his own proper person as plaintiff rather than as an incompetent by the ancillary guardian of his estate, the amended

complaint in its allegations was substantially the same as the original complaint. The defendant, Albuquerque National Trust and Savings Bank, aswered the amended complaint. The remaining defendants who had been joined as indispensable parties by the amended complaint, all appeared specially and joined in a motion to quash service of process on each and to dismiss the complaint for lack of jurisdiction over subject matter of the suit and of the persons of said defendants. This motion was duly argued and on January 16, 1947, the court entered its order quashing service of process on the non-resident defendants which had been made by personal service outside the state and dismissing the complaint as to all defendants. This appeal followed

We think the trial court erred in holding that the absent and non-resident defendants were indispensable parties to an adjudication of the plaintiff's claim to ownership of the personal property in the possession of testatrix at the time of her death. This consisted of the furniture, furnishings and household effects as well as the sum of one thousand ($1000) dollars in cash standing to the credit of her account in Albuquerque Trust and Savings Bank when she died. See York v. American Nat. Bank, 40 N.M. 123, 55 P.2d 737; 34 C.J.S., Executors and Administrators, § 740b, p. 766, and 21 Am.Jur. 904, §§ 939 and 940, Id. The author of the text in American Jurisprudence last cited, states:

"An executor or administrator usually is deemed to represent the beneficiaries entitled to the personal estate in all suits and actions in reference thereto to such an extent that it is unnecessary that they be joined as parties."

As to the real estate, a different rule prevails. In litigation affecting the title to, ownership of, or interest in, real estate the heirs and devisees are usually regarded as indispensable parties. 34 C.J.S., Executors and Administrators, § 741, p. 768; 21 Am.Jur. 902; Cf. Burguete v. Del Curto, 49 N.M. 292, 163 P.2d 257. This conclusion, however, does not settle the question before us, even though it relieves of error the trial court's action in sustaining the first motion to dismiss for absence of indispensable parties, if error it was as to all of the parties named. Certainly, as to any of the property specifically bequeathed by the will, real or personal, or whether so or not, as to any property left by testatrix and claimed by plaintiff whose sale might be required to satisfy bequests or legacies, the affected beneficiaries would be indispensable parties. They were entitled to their day in court and the trial court did not err in requiring their joinder.

After joinder of the absent defendants, all of whom save the Christian

Science Benevolent Association of Boston, Massachusetts, were brought in by personal service outside the state, the equivalent of service by publication under 1941 Comp., § 19-101(4k) all non-resident defendants including Christian Science Benevolent Association, not served, appeared specially as above noted and joined in the motion to quash service and dismiss the complaint upon the ground that the action was one in personam either to cancel the aforementioned deed or to reform same. If it was, of course, neither personal service outside nor service by publication within the state would give the court jurisdiction over the persons of the non-resident defendants. The chief question, then, is whether the plaintiff's complaint is accurately appraised as one in personam as to the real estate. The defendants mainly rely on our former decision in State ex rel. Truitt v. District Court, 44 N.M. 16, 96 P.2d 710, 126 A.L.R. 651. See, also, Rosser v. Rosser, 42 N.M. 360, 78 P.2d 1110.

We think neither case is decisive of this one. Stripped of unessential allegations and verbiage, whatever else it may be said to contain in the way of efforts at reformation or the impression of a lien on real estate, the complaint does have allegations sufficient to enable it to withstand the motion to dismiss, treated as a complaint in a suit to quiet title to real estate. As much cannot be said of the complaints in the Truitt and the Rosser cases, cited above, the allegations of which more properly classified each as an action in personam, as we held. The death of the wife having been shown, and the names and residences of the absent defendants set up, plus an allegation as to each that such defendant "claims or pretends to have some interest in and to the real * * * property" described, we note these additional allegations from the amended complaint, in the case at bar, to-wit:

"Ninth: That in or about the year 1921, plaintiff and his wife aforesaid became domiciled in the City of Albuquerque, County of Bernalillo, State of New Mexico, and acquired during such domicile the following improved real property in said city, county and state, to-wit: The South Eighty-one (81) feet of Lots Eleven (11) and Twelve (12) of Block Thirty-eight (38) of the Terrace Addition to the City of Albuquerque, County of Bernalillo, State of New Mexico, according to the Map thereof filed in the office of the Recorder of Bernalillo County on November 15th, 1920; and being also the house and lot designated as No. 319 South Sycamore Street, in said city, county and state; * * *

"Tenth: That the real property aforesaid was purchased by plaintiff and his wife aforesaid with funds belonging to plaintiff, including accumulated and monthly pension or compensation or disability

benefits paid to said wife as committee or guardian of the person and estate of plaintiff during plaintiff's incompetency adjudged to be such at the instance of and upon the petition of said wife, and title to said real property, without the knowledge or consent of plaintiff, was taken by said wife in her own name individually and contrary to an express understanding and agreement between plaintiff and his said wife that title thereto should be, and was being and at all times would be, taken, held and maintained in the names of plaintiff and his said wife as joint tenants, and the survivor of them; * * *

"Eleventh: That defendant Albuquerque National Trust and Savings Bank of Albuquerque, New Mexico, has taken possession of all the property aforesaid, both real and personal, and said defendant claims that plaintiff has no right, title or interest therein or thereto, and further claims that the same constitutes the sole and separate estate of said deceased subject to disposition and distribution under the Last Will and Testament aforesaid; that such claims of said defendant, and the claims and pretensions of the several defendants, and each of them, herein, are without right or equity and wholly false in law and in fact, and plaintiff as the surviving husband of said deceased is now and at all times since the death of his said wife has been the owner of and entitled to the possession of all such property, both real and personal, and to the rents and profits thereof since the death of his said wife.

"Twelfth: That plaintiff has no adequate remedy at law."

The plaintiff's pleading closed with a prayer "that a decree be * * * entered * * * adjudging plaintiff to be the sole owner of the real * * * property" described and for "such other and further relief as (the) court may deem just and equitable."

The foregoing allegations make of plaintiff the full beneficial owner of the real estate described and of the personal property, also, as for that matter. The equitable ownership of real estate is sufficient to support a suit to quiet title thereto. Under topic "Quieting Title," see 51 C.J. 168; 44 Am.Jur. 36; Abeyta v. Tafoya, 26 N.M. 346, 192 P. 481; Albarado v. Chavez, 36 N.M. 186, 10 P.2d 1102; McDaniel v. McDaniel, 36 N.M. 335, 15 P.2d 229.

It does not require citation of authority to support the proposition that constructive service suffices to bring the defendants before the court for purposes of the decree in a suit to quiet title. Nor can we refrain from observing the anomalous situation to result, if it could be said a claimant to full ownership of either real or personal property located in this state, could not have his claim adjudicated here because, perchance, of the non-residence

of other claimants to rights or interests in such property on whom the resident claimant could not secure personal service in New Mexico.

In sustaining defendant's second motion to dismiss, the trial court seemingly sensed no distinction between the rule to be applied in determining the effect of plaintiff's action as related to the real estate and as related to the personal property. If the non-resident defendants were indispensable to adjudicate rights claimed by plaintiff in the real estate, by the same token they must be deemed so as to the personal property. But there was this distinction. Presence of the deceased's personal representative as ancillary administrator and a defendant brought before the court all beneficiaries of the estate by way of representation, so far as the personal property was concerned. However, not so as to the real estate as shown by the authorities hereinabove cited. Nevertheless, the absent defendants became subject to joinder through constructive service, as we have held.

But, say counsel for defendants, the plaintiff waived error in the ruling by failing to except to the first order on motion to dismiss for absence of indispensable parties and then standing on the ruling. In other words, by amending and joining them, rather than suffering a dismissal and appealing, the plaintiff has waived error in the ruling, citing Salazar v. Garde, 37 N.M. 352, 23 P.2d 370 and Carroll v. Bunt, 50 N.M. 127, 172 P.2d 116. The doctrine relied upon has no application in the face of the claimed absence of indispensable parties. In the second syllabus by the court in Miller v. Klasner, 19 N.M. 21, 140 P. 1107, 1108, the rule is thus stated, to-wit:

"The general rule is, that a defendant must take advantage of the defect of parties defendant by demurrer or answer, failing in which the objection is waived, but this rule does not apply to an indispensable party, and where the court may not proceed to a decree or judgment without his presence."

Nor can it make any difference that, pendente lite, the real estate was sold along with all personal property not already in the form of cash and thereby itself converted into personal property as cash. The stipulation under which the sale took place, signed on behalf of the plaintiff as well as defendant, Albuquerque National Trust and Savings Bank as ancillary administrator, the only parties then before the court, specifically provided that the net proceeds of sale should "be treated as though they were the real and personal property unsold" and that such rights as the two parties were determined to have should be "by all parties treated as transferred to said net proceeds", to the end

that the purchasers might receive a clear and marketable title.

The effect we give this stipulation avoids consideration and decision, on the one hand, of plaintiff's contention that transmutation of the real estate into personal property removes real estate as a controlling factor in determining indispensability of absent defendants and, on the other hand, of defendant's claim that the stipulation does not enter the equation because not a part of the pleadings, on which alone judgment was rendered and for such reasons never considered by the trial court. Nor does it matter that the values of the real estate and personal property thus far have not been segregated by the trial court. Upon further proceedings following remand, if deemed essential, this detail can be taken care of. Likewise, we have not given weight to the circumstance that the plaintiff is a beneficiary under the will and in this action claims the entire property of the estate. If, as contended by counsel for defendants, renunciation of rights under the will is to be deemed a prerequisite to maintaining this suit, we can think of no stronger proof that renunciation has occurred than the claim asserted herein.

It follows from what has been said that the judgment under review must be reversed and the cause remanded for further proceedings consistent and in conformity with the views here expressed.

It is so ordered.

BRICE, C. J., and LUJAN, McGHEE, and COMPTON, JJ., concur.

On Motion for Rehearing.

SADLER, Justice.

The defendants (appellees) have moved for rehearing setting up grounds therefor which resolve themselves into two claims of error. First, it is said that in holding the plaintiff's complaint good as one to quiet title to real estate, we have adopted a theory foreign to that employed by the trial court and advanced by the plaintiff both below and before this court. Next, it is claimed we have ourselves determined in the opinion filed that the plaintiff is the equitable owner of the property described in the complaint rendering it only necessary for the plaintiff, after remand, to exhibit a copy of our opinion and move entry of judgment in his favor.

The error in interpretation indulged by counsel in advancing the second ground is so obvious that we first shall demonstrate its fallacy. In our opinion already filed we quoted at considerable length allegations of the plaintiff's complaint which, if true, would vest in him equitable ownership of

both the real estate and personal property involved. Accordingly, we followed the quotation with this observation, to-wit:

"The foregoing allegations make of plaintiff the full beneficial owner of the real estate and of the personal property, also, as for that matter."

It never occurred to us that this language could be interpreted as a judicial fiat, relieving the plaintiff of the necessity of proving what he alleged. It has been mistakenly so construed by counsel for defendant. Hence, we now affirm what we think the language as it stands obviously imports, namely, that the allegations made, *when proved,* make of the plaintiff full beneficial (equitable) owner of the property involved. If the language quoted permissibly could bear the meaning ascribed to it by counsel, and we think it cannot, to the extent that it does, the same is here and now utterly repudiated.

The claim is made and argued with much vigor that before the plaintiff can maintain a suit to quiet title as equitable owner of the real estate involved he first must establish in a separate suit that he is such equitable owner as the beneficiary of a constructive trust; that in such suit he would be compelled to secure personal service on the defendants as one to enforce a trust. We find no justification in the authorities for this claim. The decisions support the conclusion that the facts establishing a plaintiff as equitable owner may properly be proved as the basis of a decree in his favor in the suit to quiet title. Polson Sheep Co. v. Owen, 110 Mont. 601, 106 P.2d 181; Neve v. Allen, 55 Kan. 638, 41 P. 966; Hunt v. Hunt, 307 Mo. 375, 270 S.W. 365; Mitchell v. Black Eagle Mining Co., 26 S.D. 260, 128 N.W. 159, Ann.Cas. 1913B, 85; Casstevens v. Casstevens, 227 Ill. 547, 81 N.E. 709, 118 Am.St.Rep. 291. The plaintiff relying on an equitable title may fail in his proof in which event the decree will go against him. However, this fact in no way argues against his right to maintain the suit.

It is also argued with great earnestness, that we have unwarrantably held the complaint states a cause of action to quiet title to real estate because contrary to the theory urged below and adopted by the trial court. There is more than a grain of truth in this contention. Nevertheless, having found it necessary to reverse and remand the cause in any event by reason of error in the trial court's ruling as to presence of the non-resident defendants for purpose of testing ownership of the personal property, we feel it in the interest of justice to declare what our examination of the complaint discloses, namely, that allegations sufficient to state a cause of action in a suit to quiet title to real estate appear therein.

After all, the resident defendant, Albuquerque National Trust and Savings Bank as a representative of the non-resident defendants, has filed an answer joining issue with the plaintiff in the latter's claim to ownership of the personal property and of the real estate as well, as for that matter, although as to the real property we have held the non-resident defendants themselves must be brought in and may be by substituted service, viewing the complaint as one in a suit to quiet title so far as the real estate be concerned. Obviously, an ancillary administrator having already joined issue as to ownership of the personal property, the claim to both types of property should be heard and determined in the one and present suit, with all interested parties before the court, even though in permitting it, we depart somewhat from the theory employed below in appraising the complaint. It is a construction of same supported by allegations found therein, altogether apart from the prayer. Any contrary holding, for all practical purposes, would render the plaintiff remediless. The beneficiaries under the will reside in four different states. If in the kind of suit counsel insists should be brought and would have us hold the complaint herein alone to assert personal service be necessary, as they claim, then plaintiff could never bring all objecting defendants into court in a single suit so far as the real estate be concerned. He can do so in a suit to quiet title instituted in New Mexico. The amended complaint states a cause of action viewed as such. Under such conditions, we will not say to plaintiff, suing in New Mexico where both the real and personal property are located, that although he may have a right, he is without a remedy.

The motion for rehearing will be denied and it is so ordered.

BRICE, C. J., and LUJAN, McGHEE, and COMPTON, JJ., concur.

188 P.2d 177

STATE v. SIMS.

No. 5051.

Supreme Court of New Mexico.

Dec. 29, 1947.

Otto Smith and Carleton Davis, both of Clovis, for appellant.

C. C. McCulloh, Atty. Gen., and Robert V. Wollard, Asst. Atty. Gen., for appellee.

McGHEE, Justice.

The defendant was convicted of contributing to the delinquency of a seven year old girl.

His first ground for reversal is his claim that the trial court erred in overruling his challenge for cause to the juror Barnett, who was called into the box after he had exhausted his peremptory challenges. We quote the following from the examination of this juror:

By Mr. Rowley (Assistant District Attorney):

"* * * Q. Do you have a family? A. Two daughters.

"Q. Would the fact that you have two daughters yourself * * * would that tend to bias or prejudice you in a case of this kind, just because it is a case of this kind? A. I believe it would.

"Q. You say you have never heard what the facts might be? A. Nothing except I heard the charge read.

"Q. Would the mere fact that a man is charged cause you to be prejudiced against

him? A. Well, yes, if he is charged with it there is reason to believe it did happen.

"Q. You understand that in the trial of any criminal case a defendant is presumed to be innocent until he is proven guilty? A. Yes, sir.

"Q. And that a jury must agree unanimously on his guilt? A. Yes.

"Q. In the face of that, do you feel it would be impossible for you to sit as a juror and give the defendant a fair trial, just because he is charged with an offense? A. No, sir.

"Q. Of course, an offense of this kind is one that none of us like to think about. The mere fact that a man is charged wouldn't make you unfair to him if you are selected as a juror? A. No, sir.

"Q. If selected as a juror, would you try the case solely on the evidence you hear from the witness stand and the law given by the Court? A. Yes, sir.

"Q. You could, and would do it if selected as a juror? A. Yes.

* * * * * *

"(Questions for the defendant by Mr. Davis, answers by juror J. O. Barnett:)

"Q. Mr. Barnett, you say you have two daughters? A. Yes, sir.

"Q. And as a result of having two daughters your feelings in a case of this kind would be possibly stronger than a person without children? A. Yes.

"Q. Do you feel that if the decision in this case narrowed down to a fine point, where it was practically impossible to tell which way the finger would turn, do you feel you might possibly be inclined, owing to the feeling you have toward this sort of offense, to find against the defendant? A. Yes, I am afraid so.

"Mr. Davis: Challenge the juror for cause.

"The Court: Mr. Barnett, the defendant is presumed to be innocent and that presumption remains with him until you hear all the evidence in the case, and until you are convinced of his guilt beyond a reasonable doubt by all the evidence in the case. Can you hear the testimony and give the defendant that presumption of innocense and try the case solely on the evidence and the law?

"A. He said if it came to a fine point. You say beyond a reasonable doubt. If I had any doubt it would be against the defendant, if it was that close.

"The Court: I know, but the State is the one that is required to prove his guilt beyond a reasonable doubt. The defendant doesn't have to prove anything. A. I'm sorry, but I am new at this thing. I am certainly confused about the whole thing. Would you state that over again?

"The Court: Let me say it this way: The defendant is presumed to be innocent and the State must do the proving. A. Yes, sir.

"The Court: The defendant does not have to take the stand; he doesn't have to prove anything in his own behalf. The State is required to establish his guilt to your satisfaction and beyond a reasonable doubt by the evidence in the case. Can you give the defendant that presumption of innocence and try the case solely on the law and the evidence? A. I will certainly try to be fair, I will put it that way.

"The Court: There has nothing ever happened in connection with your family that would cause you to have any particular prejudice against an offense of this nature? A. No, sir.

"The Court: You think you can try the case without any bias or prejudice toward the defendant? A. Yes, I think I can do that alright. The point I am confused about, he said if it came down to a narrow point one way or the other. In my mind I am sure I would be prejudiced.

"Mr. Davis: I think that is sufficient answer. I think he should be excused.

"Mr. Rowley: I don't think so. Mr. Barnett stated he would be fair and that he would recognize the presumption of innocence. As he says, he is confused. Counsel said if it came to a hair line balance, or something of that sort. I think that is a rather confusing way to put it. If that question were put to any man in just that way, I doubt if he would know how to answer it. He states he will be fair and render a fair and impartial verdict based on the evidence and the law. I believe that is as far as he is required to go.

"The Court: Mr. Barnett, on the question of the hair-line balance, or some words to that effect. I have never heard that expression used. I don't know what the attorney had in mind, or what you have in mind in respect to that. If there is any hair-line doubt it is your duty to acquit the defendant instead of finding him guilty. His guilt must be proven to your satisfaction and beyond a reasonable doubt. With that explanation, can you try the case fairly? A. Yes, sir.

"The Court: Challenge overruled.

"Mr. Davis: Exception."

The trial court is necessarily invested with a wide discretion in the superintendence of the process of impaneling the jury and in the absence of unusual circumstances we will not disturb its exercise. State v. Burrus, 38 N.M. 462, 35 P.2d 285, and cases cited. On the other hand, it is the duty of the trial court to see that a fair and impartial jury is obtained, and to be careful in a case of this kind where due to the nature of the testimony it is difficult for strong jurors, who believe themselves to

have an open mind as to the charge, to return a verdict unaffected by their natural prejudice against such an offense.

The juror had plainly disclosed that he was disqualified to sit in the case, yet under skillful questioning from the bench he finally said that he would return a verdict in accordance with the law and the evidence. Who can say when the juror disclosed his true feelings? Was it when he said if he had any doubt it would be against the defendant, or was it when he made his last answer to the trial judge?

It is said in State v. Huffman, 89 Mont. 194, 296 P. 789, 790: "* * * where a juror admits bias, his subsequent statement that he can consider the evidence impartially should be received with caution, for, 'even though a juror be biased, he will, it is said, seldom admit inability to act impartially' (15 Cal.Jur. 430, and cases cited)."

We like the statement in Johnson v. Reynolds, 97 Fla. 591, 121 So. 793, 796: "It is difficult, if not impossible, to understand the reasoning which leads to the conclusion that a person stands free of bias or prejudice who having voluntarily and emphatically asserted its existence in his mind, in the next moment under skillful questioning declares his freedom from its influence. By what sort of principle is it to be determined that the last statement of the man is better and more worthy of belief than the former?"

A jury must consist of twelve impartial men. The integrity of the panel is destroyed if one of the jurors enters the box concealing bias. Lane v. State, 168 Ark. 528, 270 S.W. 974; Stockton v. State, 148 Tex.Cr.R. 360, 187 S.W.2d 86; Sorrell v. State, 74 Tex.Cr.R. 505, 169 S.W. 299, 303.

We hold that the error of the trial judge in forcing this juror upon the defendant after he had exhausted his peremptory challenges requires a reversal of the case.

In view of our action set out above we will not pass upon the other points raised.

The judgment of the district court will be reversed and the case remanded for a new trial, and it is so ordered.

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

COMPTON, J., not participating.

188 P.2d 180

FIRST NAT. BANK IN ALBUQUERQUE v. TANNY.

No. 5062.

Supreme Court of New Mexico.

Dec. 29, 1947.

Murphy & Nohl, of Albuquerque, for appellant.

Rodey, Dickason & Sloan, Frank M. Mims, and Jackson G. Akin, all of Albuquerque, for appellee.

LUJAN, Justice.

The defendant appeals from a judgment entered against him in the district court, where damages were assessed in double the rental value of the premises in question, used and occupied by him from the date of the original judgment to the date of delivery of possession.

On December 6, 1945, the plaintiff filed an unlawful detainer action against the defendant in the district court of Bernalillo County to recover possession of certain rooms occupied by him and located in the First National Bank building, Albuquerque, New Mexico, of which it was the owner. Following trial on the merits judgment was entered restoring possession of the premises to the plaintiff and allowing it the

actual rental value thereof to the day of its entry. The defendant appealed to this court, filed a supersedeas bond and remained in possession of the premises until October 30, 1946. The judgment was affirmed by this court. First National Bank in Albuquerque v. Tanney, 51 N.M. 60, 178 P.2d 581.

After the receipt of our mandate, the plaintiff on April 25, 1947, filed a motion in the district court asking for judgment against the defendant and his surety on his supersedeas bond for double the amount of the actual rental value of the premises from January 19, 1946, the date of rendition of the original judgment to October 30, 1946, the day of delivery of possession.

The court found that defendant remained in possession of the premises during the dates complained of; that the actual rental value of the same was $67.17 per month; and that plaintiff was entitled to double that amount for each and every month the defendant occupied said rooms.

The defendant seriously urges that plaintiff is not entitled to double the actual rental value of the premises in as much as it did not suffer any special damages due to his retention thereof. This contention is without merit.

The question depends upon our construction of Section 38-919, 1941 Comp., which reads as follows: "On appeals being taken to the district court, in any action of forcible entry and unlawful detainer, if the plaintiff recovers judgment, the damages assessed shall be the actual value of the rents due up to the rendition of judgment by the justice of the peace, and double the value of all rents accrued, after the rendition of judgment by the justice of the peace, and up to the rendition of judgment in the district court, and if an appeal be afterwards taken therefrom to the Supreme Court, and judgment for plaintiff be there affirmed, said plaintiff shall have the right to recover further damages at double the actual value of the rents of the property from the time of the rendition of judgment in the district court to the time of the delivery of possession to him, and shall have the right to sue for the same on the appeal or supersedeas bond given in the district court, which shall be fixed at a sum sufficient to cover such last mentioned damages, as also all damages and judgments rendered in the district court, which said bond shall contain a condition that the defendant appealing or taking a writ of error will pay all such judgment and damages if the judgment of the district court be affirmed."

This statute is mandatory in language and, as we view it, in fact. It is true that it is highly penal but such statutes have generally been held to be mandatory, leaving no discretion in the court as to the damages to be entered in case the plaintiff recovers judgment.

Absent a statutory provision expressly authorizing it, damages cannot be recovered in an action for unlawful detainer. The only relief would be restitution of the premises, 36 C.J.S., Forcible Entry and Detainer, § 59. Our statute, however, provides not only for restitution of the premises, but also for the actual value of rents due up to rendition of a judgment in the lower court. If an appeal is taken therefrom, then damages shall be assessed at double the actual rental value of the premises from the date of judgment to the time of delivery of possession. While the statute provides for recovery of actual rental value due up to date of judgment in the justice or district courts, it is damages which are assessed at double the actual rental value *only* when defendant continues in possession of the premises after judgment has been rendered against him and he thereafter refuses to vacate. (Emphasis ours.)

Thus, the statute makes it the imperative duty of the district court, in case of a finding for the complainant in actions like the present one, to give judgment for double the sum assessed as damages. Steinbrenner v. Love, 113 Mont. 466, 129 P.2d 101; Centennial Brewing Co. v. Rouleau, 49 Mont. 490, 143 P. 969; Stoltz v. United States, 9 Cir., 99 F.2d 283; Forrester v. Cook, 77 Utah 137, 292 P. 206; Feedler v. Schroeder, 59 Mo. 364; Northwest Theatres Company v. Hanson, 9 Cir., 4 F.2d 471; State ex rel. Needham v. Justice Court et al., Mont., 171 P.2d 351; Eccles v. Union Pacific Coal Company, 15 Utah 14, 48 P. 148; Lane v. Ruhl, 103 Mich. 38, 61 N.W. 347; and Nelson v. Alporte, 161 Mo.App. 605, 143 S.W. 519.

Finding no reversible error, the judgment will be affirmed and the cause remanded, with direction to the district court to enter judgment against the supersedeas surety. It is so ordered.

BRICE, C. J., and SADLER, McGHEE, and COMPTON, JJ., concur.

188 P.2d 181

BOGLE v. BOGLE.

No. 5035.

Supreme Court of New Mexico.

Dec. 29, 1947.

G. T. Watts, of Roswell, for appellant.

Hervey, Dow & Hinkle, of Roswell, for appellee.

LUJAN, Justice.

Inez Bogle, executrix of the Last Will and Testament of Oliver Jackson, deceased, and the former wife of Hal Bogle, instituted this action seeking an accounting and recovery of the earnings and profits claimed to have been made from approximately $20,000 turned over to him by the deceased during his lifetime under a power of attorney. The case was tried to the court without a jury. After deducting all

sums of money expended for the management of the estate, including the upkeep of the ward and attorney's fees, judgment was entered against the defendant in the sum of $14,664. Plaintiff appeals. We will refer to the parties as they appeared in the trial court.

The deceased was an uncle of the plaintiff. He was old and infirm and having considerable trouble closing a deal for the sale of his ranch located in Dona Ana County, and consequently appointed the defendant as his attorney-in-fact to close the deal and manage his affairs. Thereafter, deceased, made his home with the parties hereto. During that time at lucid intervals deceased was perfectly rational and mentally alert, on other occasions his mind was clouded. His condition grew worse and he was removed to a sanatorium in the State of Colorado where he finally died.

Shortly after receiving the money from the sale of the aforesaid ranch which he brought to a close, defendant deposited it in the bank under the name of Oliver Jackson and then consulted with his banker and his attorney relative to investing these funds in stocks and bonds or any other classes of securities and both advised against it as being speculative and as a risking danger of loss involved therein. Thereupon, he consulted with his attorney as to the advisability of borrowing the money himself, he to pay the same rate of interest which he paid his bankers on similar loans made to him. His attorney approving, he loaned the money to himself using the same solely to pay personal debts incurred prior to his appointment as attorney-in-fact.

Plaintiff contends, (1) that defendant commingled trust funds with his own money and invested it in various profitable ventures; (2) that he has not rendered an accounting and therefore she is entitled to an order directing him to file a true and correct one, so she may, at her election, take the profits earned by Jackson's money, or have compound interest at the legal rate of six per cent. per annum; and (3) that defendant should not be allowed his claimed expenses or attorney's fees.

Plaintiff contends that it was a violation of the trust relationship for defendant to loan himself the money, with which contention we thoroughly agree. Indeed, his action in doing so is to be severely condemned, however free from actual fraud the transaction may have been, as, indeed, it appears. Nevertheless, in view of the fact that none of the funds were invested by him in any speculative venture, but were used solely for the purpose of paying personal debts incurred prior to the time he borrowed the money, the defendant can not be made liable for any profits made in the operation of his private affairs during all of this time. Obviously, he is liable

for the principal and interest at the legal rate on the ward's funds loaned to himself, less deductions for lawful expenditures made on behalf of the ward, and less reasonable and proper expenses incurred in handling the estate. Restatement of the Law, Trusts, Sec. 170, *l*, p. 438. The very fact that defendant loaned the money to himself constitutes self-dealing, and is frowned upon by the law regardless of fair dealing or that the trustee was worth many times the amount of the loan and was able and ready to pay it upon call by the cestui que trust, and involving no loss to the trust estate. This may seem a harsh rule in some instances, but courts in most jurisdictions, including this State, adhere to the doctrine upon the theory that self-dealing engenders conflicting interests and creates divided loyalty. Perry, Trusts, Vol. 1, 7th Ed., Section 464, page 785; In re Estate of Binder, 137 Ohio St. 26, 27 N.E. 2d 939, 129 A.L.R. 130; Carrier v. Carrier, 226 N.Y. 114, 123 N.E. 135; In re Trusteeship of Stone, 138 Ohio St. 293, 34 N.E.2d 755, 134 A.L.R. 1306; Roberts v. Michigan Trust Co., 273 Mich. 91, 262 N.W. 744; In re Will of Sibert, 216 Iowa 336, 249 N.W. 196; Sunderland v. Commissioner of Internal Revenue, 3 Cir., 151 F.2d 675; Hutchings v. Louisville Trust Co., 303 Ky. 147, 197 S.W.2d 83.

Plaintiff next contends that the defendant is not entitled to compensation for his services as trustee because of his violation of the trust relationship. Defendant, pursuant to a court order, filed an itemized account of monies expended for the necessary upkeep of his ward as well as for expenditures incurred in the management of the estate, plus a claim for compensation. The court found the charges proper, reasonable and necessary and approved the same. He further allowed the defendant $1500 for his services. Reluctantly and with some doubt ourselves as to defendant's right to it in view of his own borrowing of the ward's funds; nevertheless, having acted under the mistaken advice of his attorney and without loss to the estate and having handled the ward's funds honestly and with good judgment at a considerable sacrifice of time which might have been devoted to his personal affairs, we are disposed to leave the trial court's discretion undisturbed as to this item. Richardson et al. v. Blue Grass Mining Co. et al., D.C.Ky., 29 F.Supp. 658, 670, affirmed 6 Cir., 127 F.2d 291.

It is finally contended that the defendant is not entitled to attorney's fees for the reason that it is not an action in defense of the trust estate. A trustee may incur attorney's fees reasonably necessary for the protection and preservation of the trust estate. But if he mismanages the estate or otherwise breaches his duties as trustee and the cestui que trust has to bring an action against him on account thereof, he is not entitled to charge the

trust estate with the fees for defending his own maladministration against the complaint of the cestui que trust. To permit him to do so would be to allow a trustee fees out of the estate, not for defending it, but for defending against it. Vol. 4, Bogert on Trusts and Trustees, Sec. 962, page 2783, Perry on Trusts, Vol. 2, 7th Ed., Sec. 903, page 1525, Pomeroy v. Noud, 145 Mich. 37, 108 N.W. 498; April v. April, 245 App. Div. 841, 281 N.Y.S. 538; In re Rosenfeldt's Will, 185 Minn. 425, 241 N.W. 573; Buder v. Franz, 8 Cir., 27 F.2d 101; Tucker v. Brown, 20 Wash.2d 740, 150 P.2d 604; and 24 C.J. § 2531, page 1057; 34 C.J.S., Executors and Administrators, § 942.

All things of record considered, we think the defendant should be denied the award of attorney's fees.

It follows from what has been said that the plaintiff is entitled to recover interest at the legal rate of six per cent. per annum for the varying periods defendant used any of the trust funds; that attorney's fees in the sum of $750 be disallowed as well as the $300 paid under stipulation to defendant from moneys on deposit with the clerk as a fee to his attorney for work on this appeal.

The judgment under review should be reversed and the cause remanded with direction to the trial court to modify its judgment and proceed further in accordance with the views herein expressed. The plaintiff will recover costs here and below. It is so ordered.

SADLER, J., and LUIS E. ARMIJO, C. ROY ANDERSON, and A. W. MARSHALL, District Judges, concur.

BRICE, C. J., and McGHEE and COMPTON, JJ., not participating.

188 P.2d 334

VETERANS' FOREIGN WARS, LEDBETTER-McREYNOLDS POST NO. 3015 v. HULL et al.

No. 5018.

Supreme Court of New Mexico.

Dec. 30, 1947.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

James J. McNamara, of Clovis, for appellant.

Lynell G. Skarda, Dist. Atty., of Clovis, for appellees.

LUJAN, Justice.

Appellant, as plaintiff, brought this action against appellees (Clerk and Treasurer of Curry County), as defendants, under authority of Chapter 143, Laws of 1935, 1941 Comp. 25-601, known as the Declaratory Judgment Act, to recover money paid under protest, as a license tax for operating a carnival within the County and beyond the limits of the City of Clovis, as imposed by the provisions of Chapter 79, Laws of 1931, 1941 Comp. § 62-410.

From a judgment of dismissal, plaintiff appeals

Appellant is a voluntary association of veterans of wars of the United States of America, known as Veterans' Foreign Wars, Ledbetter-McReynolds Post No. 3015. Through its authorized agents it entered into an agreement with a carnival company by which it was to receive 10 per cent. of the gross receipts of all places where tickets were sold and $5 per week from each concession where tickets were not sold, and that it would pay such taxes as might be assessed and levied against the company from its proceeds, the carnival company receiving the balance. The association paid the County Clerk the sum of $500 under protest.

The Court made the following findings of fact:

"No. 3. That during the month of April, 1946, plaintiff sponsored the exhibition of a carnival in Curry County, New Mexico, outside of the municipal boundaries of Clovis, New Mexico, and as part of its agreement with the operator of said carnival, the plaintiff agreed to pay, out of its part of the proceeds of said carnival, such tax-

es, if any, as might be assessed and levied by law.

"No. 4. That the taxes required to be paid by the said carnival company was an obligation of said carnival company, and not the obligation of the plaintiff.

"No. 5. That upon demand of the aforesaid County Clerk, made in accordance with the provisions of Chapter 79, Laws of 1931, plaintiff paid to the said County Clerk taxes in the sum of $500.00 for five (5) consecutive daily performances, which sum the said County Clerk thereupon paid to the aforesaid County Treasurer."

The Court concluded as a matter of Law:

"No. 2. That the license fee required to be paid, under the provisions of said Chapter 79, Session Laws of 1931, does not contravene Article 8, Section 1, of the Constitution of New Mexico.

"No. 3. That Chapter 79 of the New Mexico Session Laws of 1931 has not been repealed."

Three errors are assigned by plaintiff. First, it is claimed that the provisions of Chapter 79, Laws of 1931, are so vague and uncertain that they do not apply to carnivals. This Section reads as follows: "Every traveling or road show, circus, carnival * * * exhibition or amusement, of every kind and character, to which an admission fee is charged, given or exhibited within any county within the State of New Mexico and outside the limits of any incorporated city, * * * on or before holding, giving or conducting any performance thereof shall pay to the County Clerk * * * a license tax in the sum of One Hundred ($100.00) Dollars for each performance so given."

The term carnival has an extended signification, and comprehends a variety of amusements. As defined by Webster's New International Dictionary, Second Edition, it means, "an amusement enterprise consisting of sideshows, vaudeville, games of chance, merry-go-rounds, etc., also an association for conducting such an enterprise." It may be conceded, that its signification is broad enough to cover exhibitions of every kind and character from which an amusement is derived; yet it can by no means be said that the term "carnival" and "circus" are synonymous or can be used as convertible terms. They may both be arranged under the general term "amusement" but differ from each other as one species differs from another under the same genus. It may often be difficult to trace a dividing line between the term carnival and circus from the character of the exhibitions, with the exception,

perhaps, that a circus in addition to sideshows, and other attractions similar to a carnival, has three rings in which they perform, ordinarily.

The legislature having determined the propriety and policy of requiring a license tax for amusements of every kind and character, it would be difficult to state any reasonable ground for a distinction between circuses and carnivals which would justify the exaction of a license tax from one and the exemption of the other. They are amusements and there is no reason why one should bear the public burden more than the other. Both are places of popular diversion, and both attract large crowds of people, making additional police protection necessary. This assignment is without merit.

It is next contended by appellant, that the provisions of the above mentioned law are in violation of Article 8, Section 1, of the Constitution of New Mexico, in that the tax levied in said Act lacks territorial equality and uniformity; and is accordingly void. This section has no application to license or privilege taxes. State ex rel. Taylor v. Mirabal, 33 N.M. 553, 273 P. 928, 62 A.L.R. 296; State Office Building Commission v. Trujillo, 46 N.M. 29, 44, 120 P.2d 434.

In the enactment of the above law the Legislature was privileged to make a classification in respect to public amusements which would be subject to the act. It is within the power of the legislature to reasonably differentiate in taxes imposed on various classes of amusements, and until it is shown that it has clearly exceeded its authority and the restrictions by which it is controlled, the courts will not interfere. Brooks v. State, Tex.Civ.App., 58 S.W. 1032; Texas Company v. Stephens, 100 Tex. 628; 103 S.W. 481; Magoun v. Illinois Trust & Sav. Bank, 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; Orient Ins. Co. v. Daggs, 172 U.S. 557, 43 L.Ed. 552, 19 S.Ct. 281, 43 L.Ed. 552; Louisville & N. R. Co. v. Melton, 218 U.S. 36, 30 S.Ct. 676, 54 L.Ed. 921.

It is finally contended that the provisions of Chapter 79 supra were repealed by Chapter 167, Laws of 1941.

While repeal of statutes by implication is recognized, it is not favored, and that conclusion will not be indulged unless the later act is so repugnant to the earlier as to render the repugnancy or conflict between them irreconcilable. A court will always, if possible, adopt that conclusion which, under the particular circumstances in a given case, will permit both laws to stand and be operative. Levers v. Houston, 49 N.M. 169, 159 P.2d 761; State v. Melandrez, 49 N.M. 181, 159 P.2d 768.

It is to be noted that 10% of the revenue derived from the tax assessed pursuant to Chapter 167, Laws of 1941, is credited to the Bureau of Revenue and the balance to the State equalization fund, while the revenue derived by virtue of Chapter 79, Laws of 1931, is distributed as other county licenses, one-half to the general school fund and the other half to the county general current fund. Thus, the beneficiaries of the revenue are entirely different, one being the state and the other the county. Likewise, the rate is wholly different under the two Acts. The later bases the tax upon the charge for admission and the earlier one sets a flat fee of $100 for each individual performance given. Obviously the only thing the acts have in common is the subject of taxation. The taxing units being separate there is nothing improper in the procedure, 51 Am.Jur. (Taxation) Section 288, p. 341; State ex rel. Attorney General v. Tittmann, 42 N.M. 76, 75 P.2d 701; Amarillo-Pecos Valley Truck Lines, Inc., v. Gallegos, 44 N.M. 120, 99 P.2d 447. The taxes are uniform on subjects of like kind and nature. We find that the later Act expressly recognizes that the counties have a continuing right to license the subject, for it is said:

"Section 3. * * * conditioned that the applicant will pay any and all excise taxes or license fees levied by this Act, by any municipal ordinance, and by any of the laws of the State of New Mexico."

"Section 5. No municipality or county *shall license or authorize* any person to engage in the business of conducting an itinerant amusement enterprise unless the applicant has first complied with all of the provisions of this Act and has executed the bond required in Section 3 of this Act.

"Section 6. Nothing contained in this Act shall be construed to impair the right of any municipality to levy and assess any occupation tax against any itinerant amusement enterprise, but the *taxes levied hereunder shall be in addition to all other taxes, fees and charges.*" (Emphasis ours.)

The only power that counties have to levy a license tax on carnivals is that given them by Chapter 79, supra. There could be no doubt but that the Legislature contemplated the continuing force of the earlier law, otherwise the expression underlined would not have been used in the later Act.

The question is not raised as to whether the plaintiff in this action is an entity authorized to sue; accordingly, the matter is not before us for decision.

There being no conflict or irreconcilability between the statutes in issue and no expression of an intent to repeal, but rath-

er a specific recognition of the earlier law, there could be no repeal by implication.

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

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

COMPTON, J., did not participate.

188 P.2d 337

SEELE v. SMITH.

No. 5046.

Supreme Court of New Mexico.

Dec. 16, 1947.

George A. Shipley, of Alamogordo, for appellant.

Roy T. Mobley, of Alamogordo, and James T. Paulantis, of Albuquerque, for appellee.

COMPTON, Justice.

This is an election contest. The parties were opposing candidates for the office of Justice of the Peace, Precinct 19, Lincoln County, New Mexico, at the General Election held November 5, 1946. Contestant was the nominee on the Democratic ticket and contestee was the nominee on the Republican ticket. The returns, as certified by the election officials, show that contestant received 198 votes and that contestee received 201 votes. The County Canvassing Board issued its certificate certifying that contestee had been elected to the office.

The validity of the election is challenged by contestant. He alleged that he received

a majority of the legal votes cast. He also asserted that on account of irregularities of election officials in conducting the election, thereby causing a change in results, the election was a nullity and that it should be declared that contestant received a majority of the legal votes, consequently, entitled to the office.

Contestee, by answer, admitted that he was the holder of a certificate of election from the County Canvassing Board, certifying that he was the duly elected Justice of the Peace. He denied that contestant received a majority of the legal votes. He then pleaded affirmatively that all ballots cast at the election for Justice of the Peace were preserved, as required by law, and were available for a recount by contestant. Contestee also challenged the sufficiency of the notice of contest. At the conclusion of the hearing, the court made its findings of fact, except those we deem unnecessary to a decision, as follows:

"3. The contestant, George H. Seele, was the candidate of the Democratic Party for Justice of the Peace, and the contestee, Herbert Smith, was the candidate of the Republican Party for the said office.

"4. The following persons served as judges and clerks of the election:

"Election Judges

"Republican—R. B. Halladay and Dewey Gann

"Democratic—I. N. Wingfield

"Counting Judges

"Republican—Paul Mayer and Miss Emma Chase

"Democratic—D. B. Morgan

"Poll Clerks

"Republican—Mrs. Bertha Kirk

"Democratic—Mr. Eric C. Bruce

"Counting Clerks

"Republican—Mrs. Kiel Bonnell

"Democratic—Mrs. Lillie May Ward

"6. When the counting judges and clerks had made a full and complete count of all of the local ballots they found therefrom that a majority of the said ballots had been cast for the contestant, George H. Seele.

"7. After the counting judges and clerks had made a full and complete count of all of the local ballots they found therefrom that the number of ballots cast for each of the candidates for the office of Justice of the Peace of the Precinct No. 19 were as follows:

"For the contestant, George H. Seele, 201 votes

"For the contestee, Herbert Smith 197 votes.

"10. While the counting judges and clerks were engaged in counting the remainder of the state ballots, one of the election judges R. B. Halladay, who was not a counting judge or clerk, acting in

the role of Superintendent or director of the polls, and assuming authority to do so, took possession of all of the local ballots lying loose and unbound upon a separate table, removed such ballots from the custody and control of the counting judges and clerks, carried the same to a separate table some distance from that being used by the counting judges and clerks, and there placed the said ballots in the hands of Dewey Gann, and caused the said ballots to be recounted by a committee named by him, the said R. B. Halladay, and composed of the following election officials: Dewey Gann, Mrs. Bertha Kirk, and Mr. Eric Bruce, none of whom were counting judges or clerks.

"11. At the conclusion of the recount of the local ballots the said R. B. Halladay announced the results thereof to be as follows:

"For the contestant, George H. Seele, 198 votes

"For the contestee, Herbert Smith, 201 votes.

"The said R. B. Halladay thereupon directed the counting judges and clerks to enter the totals of votes cast for Justice of the Peace of the said Precinct No. 19, as found by the said recount, upon the Tally Books and the certificates thereto, as the correct totals of the votes cast for each of the candidates for the said office.

"12. The counting judges and clerks entered the totals of votes cast for each of the candidates for Justice of the Peace, as directed by the said R. B. Halladay, upon the Tally Books and certificates thereto, and made return thereof to the County Clerk, with the understanding and belief that the said R. B. Halladay was authorized to direct such action.

"13. The counting judges and clerks were not requested to make a recount of the local ballots by the said R. B. Halladay or any other person present in the counting room, and the said counting judges and clerks were not requested to approve the recount made by the committee of election judges and clerks, appointed by the said R. B. Halladay.

"16. Upon the basis of the recount as made by the committee of election judges and clerks as announced by R. B. Halladay, and not upon the count of the said ballots made by the counting judges and clerks, the contestee, Herbert Smith, was certified as having received a majority of the votes cast; and upon the basis of such certificate the Board of County Canvassers issued to the contestee Herbert Smith, a Certificate of Election on the 11th of November, 1946.

"19. There is no evidence of any error or irregularity in the count of the ballots for Justice of the Peace by the counting judges and clerks."

And then concluded as law:

"1. The count of local ballots was made by the counting judges and clerks, was full, complete and made in the manner provided by law.

"3. There was no irregularities or errors in the count of the local ballots made by the counting judges and clerks, which required a recount of the said ballots, and no such recount was necessary.

"6. The recount of local ballots by the committee of election judges and clerks was in violation of law, a nullity, and should not have been returned to the clerk of Lincoln County as the official count of the said ballots.

"8. The contestant received a majority of the votes cast for Justice of the Peace of Precinct No. 19, Lincoln County, New Mexico, at the general election held in and for the said precinct on the 5th day of November, 1946, and is entitled to the said office and to enter upon the duties thereof at the time and in the manner provided by law, for the term to which he was elected, with all of the privileges, power and emoluments belonging thereto."

Contestee assigns as error Findings of Fact numbered 6, 7, 9, 10, 11, 12, 16 and 19 and Conclusions 1, 3, 6, 7, 8, 9, which are presented and argued by him under four points.

The following map, Exhibit 2, the same being a photostat facsimile of the original tally sheet used at the election, graphically portrays and explains the evidence complained of:

Mere irregularities or error by election officials in the conduct of election or in the counting and certifying, which do not change the results, will not invalidate an election.

To conduct the election the following officials were selected: Election judges: R. B. Halladay and Dewey Gann, Sr., Republicans, and I. N. Wingfield, Democrat; election clerks (poll clerks): Mrs. Bertha Kirk, Republican and Eric C. Bruce, Democrat; counting judges: Paul Mayer and Emma Chase, Republicans, and D. B. Morgan, Democrat; counting clerks: Mrs. Kiel Bonnell, Republican and Mrs. Lillie May Ward, Democrat. The election judges and clerks commenced their duty at 9:00 a. m., and concluded at 6:00 p. m., or shortly thereafter. The counting judges and clerks commenced their duty at 11:00 a. m., and remained in continuous session until all ballots were counted and results certified, except for short intermissions, completing their duties about 8:30 p. m. The counting judges and clerks as ballots were delivered from the election room, first separated those for Justice of the Peace and Constable (known as local ballots) from those for state candidates, first counting the ballots for Justice of the Peace and Constable, then state ballots, continuing this method throughout the day. When the last ballots were being counted, the election judge, R. B. Halladay entered the counting room and made inquiry if all ballots for Justice of the Peace had been counted, as the vote was close. He was assured by the counting judges and clerks that all ballots were being correctly counted and there could be no mistake; whereupon he made examination of the ballots for state candidates and there found three or four ballots for Justice of the Peace and Constable which had not been counted. The counting judges continued until all ballots were counted, including those found by Halladay, and declared the results, by extending the totals for each candidate on tally sheets; Herbert Smith, receiving 39 and 158, George H. Seele receiving 55 and 146, respectively. The counting judges and clerks informed Halladay and other election officials that contestee had received 197 votes and contestant had received 201 votes. The counting judge, Paul Mayer, relying upon the results thus made and extended, signed the certificate of return (in blank) to be completed when the counting judges and clerks had completed their count for state candidates.

The counting judges then proceeded with their count of ballots for state offices, whereupon Halladay again returned to the counting room and stated that the election was too close, and he wanted to count them. He appointed a committee, other than counting judges and clerks, to make the recount.

In our examination of the record to determine if the judgment is supported by substantial evidence, the testimony of Emma Chase, Lilly May Ward and D. B. Morgan, was considered with that of other witnesses.

The witness Emma Chase, the Republican counting judge, in part, testified:

"Q. What did you do with the local ballots? A. We had just finished them when the election officials came in, and they took them and recounted them.

"Q. Did Mr. Halladay, or anyone, request you to recount them? A. No.

"Q. What was done with the local ballots, where were they placed? A. Mrs. Ward was calling them off, she would pick one up and call it off, Mr. Halladay picked it from the table.

"Q. You heard nothing said about their being any irregularity in the count which you had just made? A. No.

"Q. Do you recall whether or not you had completed counting all the ballots before Mr. Halladay picked them up and carried them to another place? A. Yes, *the first time he came in* I knew he complained because some of the local ones were mixed with the state ballots. We hadn't finished. He found some local ballots in the state ballots." (Emphasis ours.)

"Q. Did you count these ballots he found among the state ballots? A. Yes, we went through them very carefully.

"Q. That was prior to the time Mr. Halladay carried them to another table and had them recounted? A. Yes.

"Q. Did you participate in this recount? A. No.

"Q. Do you recall whether or not that recount was made by any of the counting judges and clerks? A. I don't believe so.

"Q. Do you recall who made the recount? A. As I recall, it was Mr. Gann, Mrs. Kirk and Mr. Halladay. I believe Mr. Bruce was there.

"Q. After this purported recount was completed were you asked whether the totals were satisfactory to you? A. We were rather told that they had counted them three times and that they were correct.

"Q. Do you recall who told you that? A. Mr. Halladay.

"Q. Did Mr. Halladay give you any instructions as to the totals? A. He said our totals were to be struck out and theirs put in because they were correct.

"Q. Where had you put your totals? A. On the tally sheet. *We just put the other one over it, or with it.*" (Emphasis ours.)

The witness Lillie May Ward, Democratic counting clerk, testified in part:

"Q. After you received the count of those ballots found among the state ballots, do you recall what the totals were for the two candidates for Justice of the Peace? A. The total?

"Q. Yes, how many votes did you find had been cast for Mr. Smith and how many for Mr. Seele? A. 201 for Mr. Seele and 198 for Mr. Smith.

"Q. I am speaking about the count made by you counting judges and clerks. A. 201 and 197.

"Q. Mr. Smith received the 197? A. Yes, sir.

"Q. What did Mr. Halladay do, if anything, with regard to having a recount made? A. He said he would appoint a committee.

"Q. Who were the members of the committee? A. Mr. Dewey Gann, Mr. Bruce and Mrs. Kirk."

Similar testimony was given by the witness D. B. Morgan. The evidence is undisputed that the recount was made by persons other than counting judges and clerks.

The question for our determination is whether the count, made by election officials, other than regular counting judges and counting clerks, changing the results was valid.

It is contended by contestee that all precinct officials, whether designated as receiving or counting judges and clerks are charged by law with the duty of tallying, counting and certifying the results. This contention under the provisions of subsection A(20) (Instructions to voters) Chapter 113, Laws of 1943, New Mexico Statutes, which reads: "When the count and tally of votes has been completed and entered upon the Tally Book, then all election officials (being judges and clerks of election, and also counting judges and counting clerks, if any) shall sign the certificate on the back cover of the Poll Book and also the certificate on the back cover of the Tally Book. When all certificates are signed, the judges of election shall mail to the Secretary of State at Santa Fe, one copy of all Poll Books and one copy of all Tally Books, and the other copies shall be delivered to the County Clerk as required in Instructions numbered 24 and 25."

And under subsection B(3) of the Act, page 235, which reads: "All judges and clerks of election, and also all counting judges and clerks, if any, must sign the certificate printed on the back cover of this Tally Book."

As an additional authority for this contention, he calls our attention to the provisions of the certificate required to be signed by all election officials appearing at page 235 of the Act, which reads:

"We, the undersigned, being all of the election officials for the election held on the——day of———A.D. 19——, in Precinct Number——, Election District Number——, County of———, New Mexico, do hereby certify as follows:

"(1) That the ballots used, in making the count of the votes cast for the respec-

tive candidates as hereinafter set out, were ballots Number 1 to Number——inclusive, all as shown in the accompanying Poll Book and our certificate thereon.

"(2) That we correctly counted and tallied the votes legally cast in said ballots for the respective candidates, and that the result of such count and tally is as follows: * * *."

As an aid to the construction of these provisions, we have only to consider Section 56-317, New Mexico Statutes, 1941 Comp., which provided for separate forms of oath to be subscribed by judges and clerks and counting judges and clerks. As amended by Section 1, Chap. 113, supra, it is provided that all election officials, instead of subscribing to an oath as theretofore required, shall sign the certificate upon the back of the poll books, and tally books, and by so doing, such election officials *shall be deemed* to have taken and subscribed to an oath that they will discharge and have discharged the duties of their respective office faithfully and impartially.

It is evident from a consideration of these provisions, that each group of election officials merely certifies that they have and will discharge the duties of their respective office faithfully and impartially. These provisions cannot be given the construction as contended.

Subsection A(19). ("Officials who shall count and tally ballots") Chapter 113, supra, specifically provides that in those precincts where counting judges and clerks have been appointed "only such counting judges and counting clerks shall count and tally the ballots and the votes cast for each candidate, and enter the same in the 'Tally Book.'"

We therefore conclude, that the count as made by the election judges and clerks was a nullity.

Contestee further contends that all ballots are yet available and that the court has inherent power to make a recount. Procedure for a recount was unknown to the common law; hence we must look to the statute, if any, for such authority. We know of no authority and none has been cited where, under the circumstances shown, the court possesses such power. The burden, by statute, is upon the party asserting this right. Contestant did not seek a recount and it was not incumbent upon him to assume this burden. 29 C.J.S., Elections, §§ 289, 291, (a) and (b), 295.

Contestee finally contends that the facts as alleged, are insufficient as grounds for an election contest. But it is contestant's claimed majority, adversely affected by the conduct of election officials that affords this ground. Section 5, art. 7, Constitution of New Mexico.

We have considered all assignments of error and find no merit in them. From a full consideration of the case, we conclude

that the judgment is supported by substantial evidence, and following the rule so frequently announced, it will not be disturbed.

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

LUJAN, J., concurs.

BRICE, C. J., did not participate.

SADLER, Justice (specially concurring).

One finding made by the trial court demands special comment. It is Finding No. 15 and reads: "15. Prior to the result of the so-called recount, no entries had been made by the regular counting officials of the tally made by them of the votes counted for Justice of the Peace in Precinct 19."

In making this finding the Court could not have intended that the regular counting officials did not carry forward on each of the two tally sheets used the totals of the votes tallied on each since such tally sheets were in evidence below and are certified up to us as original exhibits and a mere look at them discloses on each sheet the total vote there tallied for Justice of the Peace.

Furthermore, and notwithstanding a statement by the trial judge in course of the trial that the tally sheets showed no change, the photostatic copy of the sheet upon which the larger number of votes for Justice of the Peace were tallied plainly discloses that the results of the recount were superimposed over the totals for that sheet already entered there by the regular counting officials and the interim tallies then made to agree with such totals by additional changes that are apparent at a glance. It is significant that the trial judge did not carry forward into a finding his statement made during progress of the trial that the tally sheets showed no changes.

The trial court found that the result of the count made by the counting judges and clerks of all ballots cast in the race for Justice of the Peace in the precinct involved produced the result of 201 votes for contestant, Seele, and 197 votes for contestee, Herbert Smith. There is substantial evidence to support this finding and it fully supports the judgment rendered in favor of the contestant who is the appellee here. Const. art. 7, § 5. I concur in an order of affirmance.

McGHEE, Justice (specially concurring).

The contestant alleged, among other things, that he received a majority of the votes cast for the office of justice of the peace. Section 56-606, 1941 Code, provides that any material fact alleged in the notice of contest and not specifically denied by the answer within 20 days after service of the notice of contest shall be taken and considered as true. The answer of the contestee as to the matters of fact set up

in the notice of contest was a general denial. This admitted all matters of fact stated in the notice of contest and the answer could not thereafter be amended. Bull v. Southwick, 2 N.M. 321; Vigil v. Pradt, 5 N.M. 161, 20 P. 795; Garcia v. Lucero, 22 N.M. 598, 166 P. 1178; Wood v. Beals, 29 N.M. 88, 218 P. 354. The trial began after the time for amendment of the answer had expired. In my opinion the matters set out herein settle this case.

I concur in the affirmance of the judgment.

188 P.2d 343

MEDINA v. NEW MEXICO CONSOLIDATED MIN. CO. et al.

No. 5050.

Supreme Court of New Mexico.

Dec. 22, 1947.

Vincent M. Vesely, of Silver City, for appellant.

Woodbury & Shantz, of Silver City, for appellee employer.

Hubert O. Robertson, of Silver City, for appellee insurer.

COMPTON, Justice.

Appellant, Ann Medina, instituted suit against appellees, New Mexico Consolidated Mining Company, employer, and London Guarantee and Accident Company, Limited, its insurer, in a proceeding under the New Mexico Workmen's Compensation Act, section 57-913, 1941 Comp., to recover compensation on account of the death of her husband, Ignacio Medina, occurring on January 19, 1946. The case was tried to a jury and at the conclusion of the testimony a motion for an instructed verdict was sustained and judgment entered accordingly. From the adverse judgment appellant appeals.

Ignacio Medina, at the time of his death, was regularly employed as a "shift" boss at the Copper Flats Mine of the employer. The workings of the mine are upon two levels, 400 and 200 feet, respectively, and connected by a manway. Access to the upper level is gained by climbing an almost verti-

cal ladder, with offsets as safety devices, a distance of 130 feet through the manway, thence up an 80 foot drift to a cross-drift, where the current mining operations at that level are conducted. The cross-drift extends approximately 120 feet to the left and 500 feet to the right. The left was unused at the time, except possibly for storage of old timbers. To the right, a distance of 500 feet, is located an over-night powder magazine where all dynamite is supposed to be stored.

The previous day, the deceased and a group of four employees, mined on the 200 foot level, which necessitated blasting. When the day's work was done, fuses and caps were placed in the left drift, and a partial box of dynamite was left by Medina in the right drift, at a distance of approximately 300 feet, near a well-traveled path extending from the entrance of the mine to the powder magazine. Due to his contract of employment, Medina was vested with the discretion to work in and about the mine wherever his services were needed or required. If unsafe conditions were found, it was his duty to correct them and report such conditions to the superintendent. On the day in question, they were to work on the lower level reinforcing the mine with timber. They usually worked in pairs, except Medina. The group had their noonday meal together, and about 1:30 P.M., or shortly thereafter, Medina was seen walking towards the manway which led to the upper level. Some time later they heard the report of one or more blasts from that level, but gave it no concern until he did not appear at quitting time. A search was made and his body, without the head, was found at or near the entrance of the mine. Near the body was a box of dynamite recently opened, with two or three sticks of dynamite missing. The deceased was wearing a miner's safety hat, fragments of which were scattered over a wide area. The walls and ceiling near the body were spattered with blood. Several feet away from the body a fuse with battered end was found.

Appellant filed her claim, alleging that Medina's death arose out of and in the course of his employment and asked judgment accordingly. By answer, appellee denied that the injury, resulting in the death of Medina, arose out of and in the course of his employment.

The question presented for our determination is whether there is substantial evidence that would support a verdict for appellant.

When it is error for the trial court to direct a verdict, has been announced in various ways (Federal Land Bank v. Upton, 34 N.M. 509, 285 P. 494; Melkusch v. Victor American Fuel Co., 21 N.M. 396, 155 P. 727; New Mexico–Colorado Coal & Mining Co. v. Baker, 21 N.M. 531, 157 P. 167; Young v. Southern Pac. Co., 34 N.M. 92, 278 P. 200) and we also held that it is error for the trial court to direct a verdict for the defendant

if there is substantial evidence that would support a verdict for plaintiff. Caviness v. Driscoll Const. Co., 39 N.M. 441, 49 P.2d 251.

"Where there is substantial evidence that the death of an employee resulted from accident and that the accident occurred during his hours of work, at a place where his duties required him to be, or where he might properly have been in the performance of such duties, the jury or other trier of the issues of fact may reasonably conclude therefrom, as a natural inference, that the accident arose out of and in the course of the employment." Southwestern Portland Cement Co. v. Simpson, 10 Cir., 135 F.2d 584, 588; cf. McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867; Sullivan v. Suffolk Peanut Co., 171 Va. 439, 199 S.E. 504, 120 A.L.R. 677; Tewes v. Industrial Commission, 194 Wis. 489, 215 N.W. 898; Lewis v. Industrial Commission, 178 Wis. 449, 190 N.W. 101, 25 A.L.R. 139.

Suicide, as a defense, was not an issue in the case, but it is now claimed that as the evidence shows that the injury was intentionally self-inflicted, such evidence is admissible to rebut the presumption of accidental death upon the premises. This must be conceded to be the rule. But suicide is an affirmative defense and the party asserting this issue has the burden of establishing the fact by a preponderance of the evidence. Whether a violent death is accidental or suicidal, the law presumes that it is accidental until the contrary is shown by a preponderance of the evidence. Thus, supporting appellee's claim is the presumption against suicide. DeBruler v. City of Bayard, 124 Neb. 566, 247 N.W. 347. This presumption, though not conclusive, is sufficient unless rebutted by substantial evidence, to support an award for compensation. Hepp v. Quickel Auto Supply Co., 37 N.M. 525, 25 P.2d 197.

We do not attempt to explain the death. To do so leads to speculation, conjecture and surmise. Here, as in most death cases, the dependent is deprived of her best witness, the employee himself. However, the essential facts necessary to a recovery need not be proved by direct evidence, but may be established by reasonable inferences drawn from proven facts.

There was evidence of the following: Medina had a 9 year old daughter; there was no domestic trouble; he was the owner of a modest adobe home; he was jovial and talkative, except when at work. He had a small current life insurance policy; he manifested no signs of worry, and there was no apparent cause for suicide.

When the Deputy State Inspector of Mines made an investigation the morning following the accident, no parts of burned matches, fuse nor other circumstance was found tending to establish an intentional self-inflicted injury. The battered fuse and

freshly opened box of dynamite are not without significance.

As we appraise the evidence, the death of Medina is unexplained An unexplained death is not without its perplexing problem, but awards, generally, have been sustained in such cases.

In Browne v. Marvell Transp. Co., 246 App.Div. 659, 283 N.Y.S. 209, an award was sustained, as within the scope of employment, where the body of a truck driver was found in a river with his valuables missing.

In Sullivan v. Woodle, 252 App.Div. 906, 299 N.Y.S. 824, inferences were sufficient to sustain an award where a general caretaker was found dead from a gunshot wound upon the premises of his employer.

Similarly, in Sawyer's case, 315 Mass. 75, 51 N.E.2d 499, an award was sustained where a truck driver was found fatally burned near the truck in which a soldier "pick-up" was in the front seat, also fatally burned. The contention was that the soldier was the driver at the time, and that the death of the employee was without the scope of his employment.

A leading case on "unexplained death" is Krell v. Maryland Drydock Co., 184 Md. 428, 41 A.2d 502, citing cases. There the husband was last seen hurrying on the job near a waterfront, with proof he did not leave by the only gate-exit, with no cause for suicide, it was held sufficient with other similar circumstances, to sustain an award for "accidental drowning", though the body was never found. For the latest cases in basic principles of Workmen's Compensation, see "Current Trends" by Samuel B. Horovitz. XII Law Soc. J., 465.

It is our opinion that an inference that Medina was engaged in the performance of the duties as required by the contract of his employment, and that there was a causal connection between the condition under which he worked and the resulting injury, was warranted by the evidence, if the jury should so determine. Consequently, it was error for the trial court to direct a verdict for appellees.

The judgment will be reversed with direction to the trial court to reinstate the case upon its docket, grant appellant a new trial, and proceed in a manner not inconsistent with the views here expressed.

And, it is so ordered.

LUJAN, SADLER and McGHEE, JJ., concur.

BRICE, C. J., did not participate.

188 P.2d 609

MERRILL v. KLEIN.

No. 5009.

Supreme Court of New Mexico.

May 20, 1947.

Rehearing Denied Jan. 31, 1948.

John B. Wright, of Raton, for appellant.

Crampton & Robertson, of Raton, for appellee.

McGHEE, Justice.

This is an appeal from a judgment holding that the defendant was guilty of an unlawful detainer. We will refer to the parties as they appeared in the trial court.

On May 15, 1925, Mrs. Dave Stockton, mother of the plaintiff, leased the property involved herein to J. L. McDermott for 5 years, with a provision that part of the rent was to be paid to the First National Bank of Raton to apply on indebtedness owing for improvements made on the lot.

The lease provided:

"Said Second party shall be permitted and required to assign his right, title and interest in this lease to The First National Bank of Raton, New Mexico, which said bank shall have the power to re-assign said lease at its discretion and judgment, but that said second party shall have no other right or authority to sub-let said premises or assign this lease without the written consent of said first party first had and obtained."

In 1928 McDermott was delinquent in his payments to the bank and with his consent and that of the bank the defendant and two parties named Lytle and Bridges took over the business (a pool hall) and assumed his obligations under the lease agreement. Later Bridges quit the business and it was sold to Lytle who operated it for some time. The defendant held a mortgage on the business. The defendant became the owner of the business in 1932, after the plaintiff had acquired the building and lot.

Mrs. Stockton, the bank (while it was interested) and the plaintiff have continuously accepted the rent from the parties operating the business since the time of the execution of the lease in 1925, although with some modifications in amounts.

The defendant contends that he and those associated with him and their successors stepped into the shoes of McDermott as lessees for the unexpired term of the lease and that on the expiration of such term they held over and became tenants from year to year, and that the plaintiff could not terminate such tenancy until she gave six months' notice. The plaintiff contends that the verbal assignment from the bank, if any was given, was void under the third section of the English statute of Frauds which reads:

"And, moreover, that no leases, estates, or interests, either of freehold, or terms of years, or any uncertain interest, not being copyhold, or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall

* * * be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law." and that if we hold that performance on the part of the sub-lessees and acceptance of rent made the statute of Frauds inapplicable, when new people took over they became tenants from month to month, and that the forty-five days' notice to vacate given to the defendant was sufficient to terminate the tenancy.

It is true that an assignment of a lease for more than one year is required to be in writing. 36 C.J.S., Frauds, Statute of, § 114, p. 606. An oral assignment of a lease fully executed by the delivery of possession to the lessee and accepting rent therefor removes the transaction from the statute of frauds. 36 C.J.S., Frauds, Statute of, § 240, p. 742.

A written assignment signed by the lessee is not the contract but only the evidence required by the statute. Chicago Attachment Co. v. Davis Sewing-Machine Co., Ill.Sup., 25 N.E. 669. A provision in a lease prohibiting an assignment without the consent of the lessor is for the benefit of the lessor only, and one which it may at its election waive. Webster v. Nichols, 104 Ill. 160.

When Mrs. Stockton accepted the rents from the new tenants following the first oral assignment of the lease and the oral consent thereto by the bank, such assignment became as valid as though made and approved in writing, and both the landlord and tenant were bound by the terms of the original lease, and when the tenant held over after the expiration of the term and the landlord accepted the rents a tenancy from year to year came into being. This result is a legal consequence of the conduct of the parties and does not at all depend upon the intention of the tenant, and in order to terminate a tenancy from year to year, so as to entitle the lessor to possession, or the lessee to exemption from the payment of rent, six months' notice of the termination of the tenancy, and looking to the end of the year is necessary. Maniatty v. Carroll Co., 114 Vt. 168, 41 A.2d 144, 156 A.L.R. 1306.

This court said in Otero v. City of Albuquerque, 22 N.M. 128, 158 P. 798, 799: "* * * the only remaining question which requires consideration is whether a tenant holding over after the expiration of his lease, without any express agreement but with the assent of his landlord, holds on the same terms as those of the original lease, including all the covenants thereof, unless made inapplicable by changed conditions. This question has been so often answered in the affirmative by the courts

and text-writers that it is no longer an open one."

It is true the rental was reduced, but this was by express agreement. The provision of the original lease that the lessee would pay the insurance seems to have been construed as applying only until the bank was paid. Strict compliance with the provision for repairs seems to have been waived by the landlord. When the defendant took over the business he went into possession of the leased premises with the consent of the plaintiff without any modification of the lease, and both he and the plaintiff were bound by its terms as it had been extended by the acts of the parties, as modified by their express or implied consent.

We conclude that the defendant is holding under a tenancy from year to year, and that six months' notice must be given him in order to terminate such tenancy at the end of a lease year.

The judgment will be reversed and the cause remanded to the district court with instructions to enter judgment for the defendant, and it is so ordered.

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

SADLER, J., did not participate in this opinion.

188 P.2d 611

STATE v. WILCOXSON.

No. 5028.

Supreme Court of New Mexico.

Jan. 5, 1948.

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

C. C. McCulloh, Atty. Gen., and Wm. R. Federici and Robert V. Wollard, Asst. Attys. Gen., for appellee.

DAVID W. CARMODY, District Judge.

This is an appeal from a judgment of the District Court of Valencia County, in a cause in which the defendant was charged, and found guilty, upon an Information accusing him of maliciously and wilfully maiming neat cattle. The original Information charged that the act was committed on or about June 26, 1946. However, during the presentation of the State's case, a motion was made by the defendant to require the State to elect as to whether the crime was committed on June 26th or on June 18th. The motion was overruled at the time it was originally made, and it was subsequently renewed at the close of the State's case. At that time the Court sustained the motion to elect, and, as a result of this action, directed the State to amend its Information. The State amended the Information to charge the commission of the crime on June 18, 1946, and thereafter the case proceeded on the basis of this amendment.

The attempted proof of the crime charged was that the defendant, Wilcoxson, cut the tongue from a black bald-faced steer, the property of Ringer and Kothman. The commission of the offense was testified to by two eye witnesses, who were a distance of from three to four hundred yards away, and there was other evidence to corroborate the fact that the tongue of the steer had actually been cut out. The defense consisted of an alibi for the June 26th date, and the introduction of considerable testimony that the two State's eye witnesses could not have seen the events to which they testified by reason of the distance between them and the alleged offense. De-

fendant was convicted by a jury, which recommended clemency, and it is from this conviction that the defendant appeals.

The defendant claims error on many grounds, but for the purpose of this opinion, only two of such points will be discussed. The defendant strongly argues that the permitting of the amendment to the Information at the close of the State's case constituted prejudicial error. During the process of the State's case counsel for the defendant advised the Court that he would like to present a motion. The jury was excused and the following motion was made by the attorney for the defendant:

"Mr. Dickason: It now appearing from the evidence that there is some testimony to the effect that a crime was committed on the 18th day of June, 1946, or that at least an occurrence was had at that time, and we do not admit that there is evidence that this defendant committed the crime on that date, and it appearing from the testimony that there was another occurrence testified to on the 26th day of June, 1946. Either of which offenses, if proven, would constitute a crime in itself. The defendant, at this time, upon it appearing that there are two separate occurrences, and having been charged only with the one that occurred on or about the 26th day of June, hereby moves the court to require the State to elect on what date they intend to charge the defendant with having committed the crime of maiming cattle, in order that he may present his defense as to some definite occasion."

The Court overruled the motion and advised counsel that it could be renewed at the end of the State's case. At the close of the State's case, the following occurred:

"Mr. Dickason: Now, at the close of the State's case, the State having rested, the defendant renews its motion that the state be required to elect as to whether or not they rely on the occurrence of June 18th or the occurrence of June 26th as testified here, for a conviction in this case.

"The Court: The motion is well taken, and the District Attorney will be required to elect upon what date they desire to prosecute this man on.

"Mr. Robins: For the purpose of enabling the defendant to present a proper defense?

"The Court: Yes.

"Mr. Robins: On that basis the state will elect the 18th of June, 1946.

"The Court: The record will so show, and you may amend your information.

"Mr. Robins: Is that required if we put on or about June 26th?

"The Court: Yes, but I want it to conform to the testimony.

"Mr. Dickason: We except to the amending of the information for the reason that the original complaint in this case

charged the defendant with having committed the crime on the 26th day of June, 1946, and the information having charged the crime as being on or about the 26th day of June, 1946; all of the testimony at the preliminary having been as to the occurrence on June 26th, and that being the only occasion that was ever brought to the defendant's knowledge prior to the time of the trial."

From the above it will be seen that the action of the trial Court was taken upon the direct motion of the defendant himself. The defendant advised the Court that the motion was being made "in order that he (the defendant) may present his defense as to some definite occasion." It will also be noted that the Court, in requiring the State to elect, did so "for the purpose of enabling the defendant to present a proper defense."

In view of this state of the record, it would appear that the defendant is now attempting to take advantage of the Court's action by excepting to a ruling which he himself sought. The defendant certainly had his proper remedy which he might have taken after the Court directed the amendment of the Information, but apparently did not at the time deem that any other action should be taken. The mere fact that no other motion was made subsequent to the amendment of the Information tends to show that the defendant was not in anyway prejudiced, nor did he feel at the time that he was prejudiced by the ruling of the Court. This Court will look with disfavor, and with a critical eye, upon any effort by a party litigant to take advantage of error in a court's ruling, which is brought on by the granting of a motion made by a party himself. We hold that the defendant, by his own action in moving that the State elect, led the Court into error, if error it was, and that, therefore, the defendant waived his right to claim error in the Court's ruling directing the State to amend its Information.

Another point which the defendant relies upon for a reversal is that the Court erred prejudicially in its rulings on the evidence. Counsel points out various alleged errors in the rulings of the Court on objections made relating to cross examination of the State's witnesses. The appellant in his brief points out numerous instances in which he claims error in the rulings of the trial court. Three of these instances are set out hereafter, and this court is specifically passing on these instances, but upon none of the others appearing in appellant's brief:

1. The witness, J. D. Ringer, was one of the State's eyewitnesses to the alleged offense on June 18th. This witness testified on direct examination that he and another witness, Gilbert Aragon, were some three or four hundred yards away when they saw

a person whom they identified as the defendant, apparently commit the act complained of. This witness was asked the question, "Were you armed at that time?" Objection to the question was made by the District Attorney that it was not proper cross examination, and the objection was sustained.

2. Subsequently, the same witness, J. D. Ringer, was asked the question, "You had your guns with you at the time you saw this man rope the cow, didn't you?" Here again the objection by the State was sustained.

3. During the testimony of Gilbert Aragon, he was asked by the defendant, "Will you state whether or not you were armed at the time?" Again objection was made and the objection was again sustained.

The question as to the scope of the cross-examination has been ruled upon by this Court on many occasions, among which are the cases of Morrill v. Jones, 26 N.M. 32, 188 P. 1108, and State v. Stewart, 34 N.M. 65, 277 P. 22. In the case of Krametbauer v. McDonald et al., 44 N.M. 473, 104 P.2d 900, 904, this Court set out the rule very clearly:

"It has been the rule * * * that the cross examination of a witness should be limited to those facts and circumstances connected with the matters inquired of in the direct examination, *except as to those tending to discredit or impeach the witness, or to show his bias or prejudice, or the like.* (Emphasis ours.) Such is the rule in this jurisdiction. * * *

"But cross examination is not confined to the identical details testified to in chief, but extends to its entire subject matter * * *, and to all matters that may modify, supplement, contradict, rebut, or make clearer the facts testified to in chief by the witness on direct examination. * * *

"It should be stated that the scope of cross examination must necessarily rest largely in the sound discretion of the court because of the difficulty of ruling precisely on the questions that arise in nearly all contested cases. The trial judge is clothed with a large discretion in the application of the rule. * * * *It is much safer to resolve the doubts in favor of the cross examiner than to risk excluding testimony that should be admitted.*" (Emphasis ours.)

Considering the above rule with reference to this particular case and the instances of error hereinbefore set out, it is necessary to understand the actual facts at issue, as they were presented at the trial. Here we have a case involving a particularly heinous charge, one which makes a normal man shudder from the sheer barbarity of it. The two witnesses involved, Ringer and Aragon, could have, under our law, gone to extreme lengths to apprehend

the perpetrator, the alleged offense having been committed in their presence. Their every act on this occasion is material and their failure to act is a question for the jury in determining the credibility to be given their testimony. When the entire record in this case is considered, together with the fact that the jury recommended clemency, it would appear to us that there was an undue limitation by the trial court of the cross examination of the two witnesses, with reference to the question of whether or not they were armed. The ruling in these instances should have been resolved in favor of the cross examiner, then there would not have been the risk of excluding testimony that should have been admitted.

We, therefore, hold that the trial Court was in error and ruled prejudicially against the defendant at the trial, in view of the fact that the jury should have been allowed to consider these matters in their deliberations, and were prevented from doing so by the rulings of the Court. The case will, of necessity, have to be reversed, and in view of this fact, it will not be necessary for this Court to consider or pass upon the other points raised by the defendant in his appeal.

The judgment will be reversed and the cause is remanded to the District Court of Valencia County for a new trial.

BRICE, C. J., and SADLER, McGHEE, and COMPTON, JJ., concur.

LUJAN, J., not participating.