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189 P.2d 87

THOMPSON v. SAUNDERS.

No. 5060.

Supreme Court of New Mexico.

Dec. 30, 1947.

Rehearing Denied Feb. 10, 1948.

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Harry L. Bigbee, of Sante Fe, for appellant.

C. C. McCulloh, Atty. Gen., Robert W. Ward, Asst. Atty. Gen., Robert V. Wollard, Asst. Atty. Gen., and William R. Federici, Asst. Atty. Gen., for appellee.

COMPTON, Justice.

Appellant, a small loan operator, instituted this proceeding against the State Bank Examiner, Woodlan Saunders, to restrain the enforcement of the provisions of House Bill No. 96 of the Eighteenth Legislature, Chapter 174, N.M. Sts. 1947, known as the "Small Loan Act", as violative of Section 20, Article 4 of the Constitution, as a first cause of action, and for a declaratory judgment as a second cause of action.

From a judgment dismissing the complaint, the case is brought here for review.

The validity of the Act is challenged on account of the failure of the journals of the House of Representatives and Senate to show that the enrolled and engrossed bill was read publicly in full in each house and signed by the proper officers of each in open session.

The constitutional provision, necessary to a consideration, reads: "Immediately after the passage of any bill or resolution, it shall be [properly] enrolled and engrossed, and read publicly in full in each house, and thereupon shall be signed by the presiding officers of each house in open session, and the fact of such reading and signing shall be entered on the journal."

The court made findings of fact which we deem necessary to a decision, as follows:

"9. The enrolled and engrossed copy of H. B. No. 96, duly signed by the officers of the House and Senate, and approved and signed by the Governor, was deposited with the Secretary of State as a public record in her office within the time required by law, and is now on file in said office as such public record.

"15. That the journal of the Senate kept by the Senate during the regular session of the legislature of the State of New Mexico, which was the Eighteenth Regular Session of the state legislature, does not

show that House Bill No. 96 was either read in full or that the enrolled and engrossed copy thereof was read in full in open session, or signed in open session by the officers of the senate."

An examination of the record shows that the findings are supported by substantial evidence. Consequently, such findings are binding here.

This brings the case squarely within the rule announced in Kelley v. Marron, 21 N.M. 239, 153 P. 262, 270, where this court committed itself to the "enrolled and engrossed bill" doctrine, that is to say, that an enrolled and engrossed bill, properly authenticated, approved by the Governor, and deposited with the Secretary of State as a part of the records of that office, is conclusive as to the regularity of its enactment, and that the courts cannot look beyond the duly authenticated bill to the journals to ascertain whether constitutional requirements have been complied with in its enactment.

This provision was before the court in Smith v. Lucero, 23 N.M. 411, 168 P. 709, 711. There the Senate journal affirmatively showed that the resolution did not receive the required majority. In sustaining the rule it said: "It was the evident intention of the constitutional convention in inserting this section to provide that in all cases the Legislature should put out to the world a finished product, and that all questions of procedure in the enactment of any bill or resolution should be left behind and not open to inquiry. * * * and that all questions about the procedure or contents of the action should be settled once for all by the enrolled and engrossed bill or resolution."

In State v. Hall, 23 N.M. 422, 168 P. 715, 718, the rule again was re-affirmed in the following language: "This question, however, is foreclosed by the decision of this court in the case of Kelley v. Marron, 21 N.M. 239, 153 P. 262. In that case the court, without reservation, committed itself fully to the doctrine that courts cannot go behind an enrolled and engrossed bill, properly authenticated, found in the office of the secretary of state as a part of the records of that office."

Notwithstanding, appellant strongly urges that we should look to the journal to ascertain whether the bill in question had been *signed and certified as required by the Constitution.* If, as in Smith v. Lucero, supra, where the journal affirmatively showed that a proposition did not receive the required majority, it was held that we could not look beyond the enrolled and engrossed bill, by what reason may mere silence of the journal be permitted to impeach it? We fail to appreciate the distinction. In any event, the question is foreclosed by the decisions of this court.

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It is our opinion that when a bill has been duly introduced, finally passed by both houses, signed by the proper officers of each, approved by the Governor, and filed in the office of the Secretary of State, it is properly authenticated as required by the Constitution, and so appearing, as an enrolled and engrossed bill, resort to the journal or other evidence, is inadmissible to contradict or impeach it.

Nevertheless, the journal is an indispensible and constituent part of legislative procedure and the directory provision regarding it ought to be followed. It may strongly support a challenged statute (Earnest v. Sargent, 20 N.M. 427, 150 P. 1018) but at no time will it be permitted to speak in opposition to a regularly enrolled and engrossed bill.

In support of his contention, appellant cites Smith v. McMichael, Ga.Sup., 45 S.E. 2d 431, as tending to show that the court which had theretofore adopted the "Enrolled bill" rule, had departed from its former holding in this respect and had considered evidence other than the enrolled bill in determining the validity of the questioned act. The court there was considering a constitutional provision which reads: "No local or special bills shall be passed, unless notice of the intention to apply therefor shall have been published in the newspaper in which the Sheriff's advertisements for the locality affected are published, * * * preceding * * * the General Assembly. No local or special bill shall become law unless there is *attached to and made a part of said bill* a copy of said notice certified by the publisher, * * * to the effect that said notice has been published as provided by law." Const.1945, art. 3, § 7, par. 15. (Emphasis ours.)

That court re-affirmed the "enrolled bill" rule, and then held the Act void for the reason that the enrolled bill did not embrace the required notice as a part of the act. It took notice of the enrolled bill itself as showing non-compliance. It was held to be the manifest intention of this provision that the bill as finally enrolled as the statute should manifest its regularity. The construction was not inconsistent with prior decisions of that court.

We, therefore, conclude that the enrolled and engrossed bill, thus signed by the proper officers of each house, approved by the Governor and filed in the office of the Secretary of State as a part of the records of that office, is not only the best evidence as to its regularity and authenticity, but is conclusive, without reservation, that all constitutional requirements have been fully complied with in its enactment.

Our decision renders unnecessary discussion of the second cause of action. It would be without purpose.

Accordingly, the trial court was correct in sustaining the Act and dismissing appel-

lant's cause. The judgment will be affirmed, and it is so ordered.

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

SADLER, J., did not participate.

189 P.2d 450

McCARTHY v. KAY.

No. 5061.

Supreme Court of New Mexico.

Dec. 30, 1947.

Rehearing Denied Feb. 19, 1948.

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

Seth & Montgomery, of Sante Fe, for appellee.

McGHEE, Justice.

In his lifetime J. H. McCarthy instituted and prosecuted an ejectment action against Kay. His administrator is the plaintiff in the present action.

McCarthy had leased a store building to the defendant for a term of years. The lease contained a provision that the defendant would pay all expenses incurred

by the plaintiff in enforcing any of its provisions. The defendant refused to vacate at the expiration of his term and McCarthy filed a statutory ejectment action asking for possession and the rents for the time prescribed in the statute, but did not ask for the expenses incident to its prosecution. The defendant answered, denying that the plaintiff was entitled to possession, and by way of cross-complaint asked for damages in excess of eleven thousand dollars. To support his defense and cross-complaint he attached what he claimed was a copy of the lease. At the trial the court found that the claimed lease was a forgery and rendered judgment for the plaintiff and against the defendant on his cross-complaint. It is for the expenses of a questioned document expert, trips to paper mills, depositions, attorney's fees, and various expenses incurred in exposing the forgery and defeating the defendant in his false claims that the present action was instituted.

Following the filing of the complaint the defendant filed a motion to dismiss on the following grounds: (1) That the action was barred by limitations; (2) that the former judgment was res adjudicata, and (3) that in any event the plaintiff had so split his cause of action when he failed to include such items in the ejectment suit that he could not now maintain this one. An order was entered sustaining the motion on all three grounds, but the plea of limitations has been abandoned in this court.

Must a plaintiff who has leased property to another for a term of years where the lease contains a provision that the lessee will pay all expenses sustained by the lessor in enforcing its covenants, claim such expenses in an ejectment suit where the defendant has wrongfully held over after the expiration of his term, or may he maintain a subsequent action therefor?

When the defendant refused to surrender possession of the property, McCarthy was driven to a choice of remedies to regain possession and he selected ejectment, now a statutory action, Sec. 25-801 et seq., 1941 Statutes. The only relief provided by our ejectment statutes is possession of the property plus rents for a specified period.

If a plaintiff in an ejectment action is entitled to rents and profits for a period other than that provided by the statute he must maintain an independent action therefor as he cannot recover them in an action in ejectment. Neher v. Armijo, 11 N.M. 67, 66 P. 517. In this case it was claimed that the parties who had recovered possession of an interest in real estate in an ejectment action were barred from asking for an allowance of rents and profits in a partition suit that was later filed, but this court, speaking through Mr. Justice Parker, denied the claim, stating on page 80 of 11 N.M., page 518 of 66 P., after quoting the

statute: "It will be seen that the statute limits recovery in *ejectment* to a period subsequent to knowledge of plaintiff's right by defendant, or, in the absence of knowledge, to the period covered by the pendency of the action. It is claimed for the judgment in ejectment by appellant that it operates as a bar to any further recovery of rents and profits, but we cannot agree to the proposition."

This case is cited along with Huffman v. Knight, 36 Or. 581, 60 P. 207, in Brooks v. Yarbrough, 10 Cir., 37 F.2d 527, 530, as authority for the following: "In order to come within the rule against splitting causes of action, the omitted claim must be a part of the cause of action sued upon and recoverable in such action."

In Huffman v. Knight, supra, by one trespass two flocks of sheep had been wrongfully taken. The plaintiff was the sole owner of one flock and owned an interest in the other. He instituted a replevin for both flocks, but at the trial he only recovered possession of the sheep of which he was the sole owner, it being held that he could not maintain replevin for property in which he only owned an interest. He then brought trover to recover the value of his interest in the partnership sheep. It was there held that the rule against splitting causes of action did not apply in such a case, it being stated that the former action must be one upon which he could recover before the rule operated.

Where the recovery in ejectment is by statute limited to possession and rents accruing subsequent to knowledge by the defendant of the plaintiff's claim, by what kind of reasoning can it be said that such a judgment bars an action for the expenses incurred by McCarthy in his ejectment suit?

The defendant quotes that part of the opinion in Floersheim v. Board of County Commissioners, 28 N.M. 330, 212 P. 451, to the effect that a judgment between the same parties or their privies operates as a bar to a subsequent action not only on what was litigated, *but what might have been litigated.* This court has whittled away at the rule stated in the italicized language for years, and finally in Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636, 142 A.L.R. 1237, assembled the authorities on the point, and held that the prior judgment between the same parties operated as an estoppel only as to questions of fact in issue in the prior case which were essential to a decision therein and upon the determination of which the prior judgment was rendered. The expenses sought to be recovered here were not an issue in the ejectment suit.

In Utah their forcible entry and unlawful detainer statute allows the recovery

of rent in the summary judgment on behalf of the plaintiff for rent accruing subsequent to the unlawful detainer. One suit was filed for the unpaid rent and another for the unlawful detainer. Judgment was first rendered finding the defendant guilty of unlawful detainer and that the defendant had defaulted in the payment of $160 rent due June 15, 1923, but judgment was not rendered for the rent. In the other suit the defendant pleaded that the right to recover possession and the right to recover rent were merged in the unlawful detainer case, and that the action for the money could not be maintained. The Supreme Court of that state in the case of Voyles v. Straka, 77 Utah 171, 292 P. 913, held that the actions were not merged, and that the plaintiff was entitled to his judgment for rent in the independent action.

The general Kentucky statute as to joinder of causes of action for the recovery of real estate and damages for the withholding, etc., appears to be identical with the rule we had in effect at the time of the filing of the ejectment action which was Sec. 105-406, 1929 Code. It was there held in the case of Strubbe v. Green, 234 Ky. 384, 28 S.W.2d 471, that while in an action for the recovery of real property and rents, profits and damages for withholding it might be joined in one action, the plaintiff was not required to join them, but could in one action sue for the land and in another for rents and profits or damages for detention. This case followed the earlier rule announced in that state in Walker v. Mitchell, 18 B.Mon., Ky., 541, and Burr v. Woodrow, 1 Bush, Ky., 602. In Walker v. Mitchell the plaintiff first sued for the recovery of real property and for damages for its detention for two years. In her second suit she asked for the rents and profits, plus the extraordinary expenses incurred in the suit by way of attorney's fees, attending court, etc. It was held that her action for rents and profits was barred by the judgment in the first suit, but that the other expenses which were not sought in the first suit were not barred. In speaking of these expenses the court said at p. 547 of 18 B. Mon. "But in this case the plaintiff claimed in her petition a right to recover for the extraordinary expenses incurred, in her action for the recovery of the land, and as these expenses could not well have been recovered in that action, and were not set up, or embraced in the petition in terms, or by any fair or reasonable construction, she could not, as to those expenses, have been barred by the former recovery; it results, therefore, that the court below erred in giving judgment in bar of the claim to recover the reasonable fees she had paid, or was bound to pay to counsel, for services in and about the recovery of the land; but as to all else besides this claim the judgment was correct."

How similar are the statements of the court in this old Kentucky case to what has

been in the mind of the writer. How could McCarthy have anticipated that the defendant would produce a forged instrument (the one belonging to McCarthy had been lost) and cause him to spend thousands of dollars defeating the unfounded claims based thereon?

If the defendant had vacated the premises and McCarthy had brought suit for unpaid rent, then the contention of the defendant that he could not later maintain an action for expenses would probably be well taken. But here McCarthy was driven to a possessory action. From what has been said above it is plain that a count for expenses could not be joined in ejectment, and certainly it could not have been joined in a summary action of forcible entry and unlawful detainer.

We are of the opinion neither the doctrine of res adjudicata, nor the rule against spitting causes of action affords the defendant any protection in this case, and that the action of the trial judge in sustaining the motion to dismiss was erroneous; so we say to the defendant: Go back to the courthouse in the historic Town of Taos, and there in the face of the country answer unto the plaintiff for what may be lawfully due him on account of moneys expended by McCarthy defending against your forgeries and unfounded claims.

It is only fair to say that the attorneys who represent the defendant in this action were not attorneys in the ejectment suit.

The judgment will be reversed and the case remanded to the district court with instructions to set aside the order sustaining the motion to dismiss the complaint, enter one denying it, and to then proceed in accordance with the views herein expressed, and it is so ordered.

BRICE, C. J., not participating.

LUJAN and COMPTON, JJ., concur.

SADLER, J., concurs in the result.

189 P.2d 632

WILLIAMS v. HAAS.

No. 5030.

Supreme Court of New Mexico.

Jan. 30, 1948.

Rehearing Denied Feb. 27, 1948.

W. C. Whatley and T. K. Campbell, both of Las Cruces, for appellant.

Mechem & Mechem, of Las Cruces, for appellee.

SADLER, Justice.

The plaintiff below appeals from a judgment dismissing his complaint following an instructed verdict against him given by the court on defendant's motion at the close of plaintiff's case. Damages for personal injuries suffered in an automobile collision between a car driven by plaintiff and a truck driven by defendant were sought in the complaint filed.

The defendant's motion for directed verdict stated two grounds, namely, (1) that plaintiff was guilty of contributory negligence as a matter of law and (2) that no negligence on defendant's part was shown. The trial judge sustained the motion without stating upon which ground he based his action, nor was he requested by the plaintiff so to do. Nevertheless, in this court, the plaintiff assigns and argues the single claim of error that the trial court erred in holding plaintiff guilty of contributory negligence as a matter of law. Since the defendant seems willing to meet him on this issue, although calling our attention to the state of the record mentioned, we first consider the question thus presented to ascertain whether it settles the case. If it does, our inquiry ceases.

On March 5, 1945, the plaintiff, driving a Chevrolet coupe, was traveling south on a county road in Dona Ana County about four miles south of the village of Chamberino. As he neared the scene of the collision, he came to another county road running east and west and intersecting the north-south road at a right angle in such fashion as to form a T but without bisecting or extending through the east-west road. Without coming to a stop, he approached the intersection with his car in intermediate gear, traveling at a speed between 10 and 12 miles per hour. He did not proceed to center of the intersection on the right of the north-south road before turning to the left and east, there being some small mud holes from a recent rain in the intersection on south side of the east-west road. Accordingly, he cut the extreme northeast corner of the intersection of the east-west and north-south roads. He had traveled only 35 feet easterly on the north side of the east-west road when his coupe was struck in the rear, to the right of center, by the defendant's truck traveling east. The plaintiff's car from the force of the impact and its own momentum was propelled some 25 feet in the direction it was going, partially reversed its position, overturned and resulted in the injuries he complains of. When struck, the plaintiff's car was wholly on the north side of the east-west road and had negotiated about 35 feet thereof before being struck.

One approaching the intersection from the direction plaintiff did, in endeavoring to see traffic to the right would have to look through two different sections of a lattice fence some 5 or 6 feet high on west side of north-south road and north side of the east-west road enclosing the yard of what is designated as the Skevington house and coming down to within 12 or 13 feet of the center of the east-west road and within 4 to 5 feet of the north edge of said road. There was also a Chinese Elm tree at the intersection to the right as well as a telephone pole. However, the lattices were separated by sufficient distances to enable

one to see through them and at the time of year in question there was no foliage on the tree and neither it nor the telephone pole obscured a view to the right upon entering the intersection from the north. The plaintiff looked both to the left and right on approaching the intersection and seeing no traffic entered the same as aforesaid. The plaintiff's coupe partially reversed its position and turned over pinning the plaintiff's right hand between the body and right door of the car, necessitating amputation of the little finger of his right hand, causing considerable shock and much pain and suffering.

The plaintiff testified regarding conditions existing at the northwest corner of the intersection, as follows:

"A. On the north side of the east and west road there is a picket fence.

"Q. Indicate on that plat how that fence comes down from his house and where it goes to there? A. (Done).

"Q. Was there any vegetation there at that time? A. No, sir.

"Q. Was it possible to see between those palings in that paling fence? A. I think so.

"Q. Could you do it? A. I could do it.

"Q. Can you describe that paling fence a little more in detail so we can understand what it is? A. Well, it is a slat fence, tied together with wire—just regular, I suppose you call it chicken fence—it's board slats.

"Q. What are the width of those board slats? A. About an inch and half.

"Q. What is the distance between those slats? A. I think about the same, about an inch and half.

"Q. How high is that fence? A. As far as I can remember, I think there were about thirty inch slats, two of them, one on top of the other, more or less.

"Q. About five feet high? A. Five or six feet high."

Again, when cross-examined touching same, he testified:

"Q. This lattice fence, you say, is a wire fence with board stuck down? A. That's right, regular woven, wooden fence.

"Q. You say it has two tiers? A. Two tiers, yes.

"Q. About how high would you say they are? A. I would say they are thirty inches, more or less.

"Q. Does that go clear around here? A. Goes clear around the front.

"Q. So that in coming down the Somerville road, in order to see if any car was approaching on your right along what you would call the east and west road, you would have to look through two fences? A. Yes, you would have to look through two. You

see, the corner of that fence is just sixty-one feet, I measured it, on the lattice fence on the east side of that fence to the corner of the Sommerville road is sixty-one feet.

"Q. And comes down to how close to this. A. Sixty-one feet from there to the center of that other road."

As to manner of entering the east-west road and the time elapsing after entering same before being struck, the plaintiff stated:

"Q. Go ahead and tell what you did and how you entered that east and west road and what position on that road your vehicle occupied as you entered and after you started toward the east? A. I turned the corner to my left, my car was in intermediate, there was a little mud on each side, I drove to that intersection, which wasn't very far, in intermediate, I slowed up there, looked right and left and never saw any object, I turned the corner and just in a second, or moment or so, I felt something hit me on the rear."

Whether the plaintiff has been guilty of contributory negligence barring a recovery is nearly always a question for the jury under proper instructions by the court. It is rarely the case the facts are such that the court can say as a matter of law that plaintiff is himself such an offender against the rules of the road as to deny him recovery. Yet, on occasions it does thus appear and when it does, the court should not and will not hesitate so to declare. Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24, and cases cited. We think this is not such a case, even though strongly relied upon by counsel for defendant in support of the motion to dismiss. The defendant's motion reads as follows:

"Judge Mechem: Comes now the defendant, plaintiff announcing that he rests, and moves the Court to instruct the Jury to return a verdict for the defendant, for the reason that the evidence of the plaintiff shows that he was guilty of contributory negligence, in that he did not yield the right-of-way to the defendant, who was approaching the same intersection to his right, and did not keep a proper look out for any car approaching from his right; and also, that he gave no indication or signal that he intended to turn in any direction when he approached the intersection.

"Argument.

"Judge Mechem: I want to add one ground to my motion, that there is no evidence to show that the defendant was guilty of negligence."

There is nothing in the record, save as inferred from physical facts, as to the speed at which defendant was driving when his truck struck the rear of plaintiff's car. The complaint charged him with excessive speed, driving on the wrong side of the road and failure to keep a proper look out. That he was driving with his truck partially on

the wrong side of the road is positively testified to by the plaintiff. Negligence on defendant's part in this particular must be taken as established for purposes of going to the jury. Also, in the other two particulars charged it may be said sufficient appears in the testimony and exhibits to warrant the question of defendant's negligence to go to the jury. Hence it is that as to the question of defendant's fault, the plaintiff was entitled to go to the jury. However, since plaintiff's negligence is an integral factor in the doctrine of contributory negligence, we still must say whether it exists in a way that will debar plaintiff of recovery as a matter of law. We give a negative answer to this inquiry.

In order to bar recovery, there not only must be negligence on plaintiff's part but causal relationship as well between that negligence and the injuries complained of. Even though granted that he did not keep to the right of center of the intersection before turning to the left, to have done so would have put him in the direct path of the oncoming truck of defendant for a likely broadside impact. His failure to do what defendant charges was negligence, and so it is under the statute, 1941 Comp., § 68-501 (g), unquestionably saved him from greater harm.

If it is granted that the plaintiff was negligent in entering the intersection as he did without stopping or signaling as required by 1941 Comp., § 68-517, or in violation of the provisions of § 68-518, according right of way to vehicles on the right under certain conditions (although apparent that plaintiff's car had entered the intersection before defendant's truck did) still these facts do not resolve the decisive inquiry of causation. After all contributory negligence is not established until causal relationship between it and the injury is shown. This is where error appears in the trial court's action in directing a verdict against the plaintiff. He was entitled to have it say whether any violation shown by him of statutory regulations or the common law of due care was a proximately contributing factor in bringing about his injury. Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585; Langenegger v. McNally, 50 N.M. 96, 171 P.2d 316; Bunton v. Hull, 51 N.M. 5, 177 P.2d 168. See, also, Young v. City of Camden, 187 S.C. 414, 198 S.E. 45; Mathers v. Stephens, 22 Wash.2d 364, 156 P.2d 227; Branegan v. Town of Verona, 170 Wis. 137, 174 N.W. 468.

The trial court erred in directing a verdict for the defendant. Accordingly, the judgment rendered thereon will be reversed and the cause remanded with a direction to the district court to award the plaintiff a new trial. The plaintiff will have his costs in this court.

It is so ordered.

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

189 P.2d 993

STATE v. PRINCE.

No. 5054.

Supreme Court of New Mexico.

Jan. 7, 1948.

Rehearing Denied March 2, 1948.

C. C. McCulloh, Atty. Gen., Robert V. Wollard Asst. Atty. Gen., and Harry D. Robins, Sp. Asst. Atty. Gen., for plaintiff in error.

Lewis R. Sutin, of Albuquerque, for defendant in error.

COMPTON, Justice.

Defendant in error was charged by an information containing two counts, based upon Section 41-4519, New Mexico Statutes, 1941 Compilation, which reads as follows: "Any person being in the possession of the property of another, who shall convert such property to his own use, or dispose of such property in any way not authorized by the owner thereof, or by law, shall be guilty of embezzlement * * *" Sec. 2, Ch. 70, Laws 1923, N.M.Sts.

The information charged:

"That in the county of Bernalillo, State of New Mexico, the said Lewis Prince, being entrusted in the possession of certain monies of Markus and Markus, a partnership, did on the 20th day of March, 1946, fraudulently convert the sum of forty-one dollars and 41/100 ($41.41) to his own use or did dispose of such property in a way not authorized by the owner thereof or by law.

"Count 2. On the 2nd day of August, 1946, in the same county and state, the said Lewis Prince, being entrusted in the possession of certain monies of Markus and Markus, a partnership, did fraudulently convert the sum of Fifty-four and 50/100 ($54.50) dollars to his own use or did dispose of such property in a way not authorized by the owner thereof or by law."

The statute in question expressly repealed a prior statute which read: "If any person who shall be *entrusted* with any property which may be the subject of larceny, shall *embezzle or fraudulently convert* to his own use, or *shall secrete with intent to embezzle or fraudulently convert* to his own use any such property, he shall be deemed guilty of larceny." Section 1543, Code 1915. (Emphasis ours.)

From an order sustaining a motion to quash the information as unconstitutional and void, plaintiff brings the case here for review by writ of error, assigning the following as error:

1. The court erred in making its conclusions of law.

2. The court erred in dismissing the information.

3. The court erred in dismissing the defendant.

These are argued under the single point: "That Section 41-4519 of the 1941 Compilation (being section 2, Ch. 70, Laws of 1923) is constitutional and that the information filed under said statute alleging all essential elements constituting the offense of embezzlement should not have been quashed as the defendant was sufficiently apprised of the offense charged."

Plaintiff contends that the legislature intended the statute to include all essentials for the crime of embezzlement, and that the *information* is so limited as to come

within legislative intent. It is also contended that the legislature in the exercise of police power had the authority to define embezzlement by saying what acts constituted the offense.

On the other hand, defendant contends the statute in question does not define embezzlement, as it does not include essential elements, viz., entrustment and fraudulent conversion. He also contends that the statute cannot be sustained as a reasonable exercise of police power.

The single question for our determination is whether the statute may be sustained when it omits certain essential elements necessary to constitute the crime of embezzlement, viz., entrustment and fraudulent appropriation.

The essential elements of the offense of embezzlement are: (a) That the property belonged to some one other than the accused. (b) That the accused occupied a designated fiduciary relationship and that the property came into his possession by reason of his employment or office. (c) That there was a fraudulent intent to deprive the owner of his property. 29 C.J.S., Embezzlement, § 5; Underhill's Criminal Evidence, Sec. 490, pages 4003, 4004. Section 1543, supra, was before the legislature when Section 41-4519, supra, was enacted. It knew the essential elements necessary to constitute the offense of embezzlement. It expressly repealed that effective statute.

In determining legislative intent, the court may consider both prior and subsequent statutes in pari materia, the evil or effect, past or anticipated, for which no adequate remedy is provided, the means announced by the legislature and the reason therefor. We know of no safer way to ascertain legislative intent than what it says.

"When in any enactment there appears an express modification or repeal of certain provisions in the former enactment, such express modification or repeal of the portions thereof thus affected will be held to disclose the full intent of the framers of the later enactment as to how much or what portion of the former it was intended to modify or repeal, this upon the principle 'expressio unius, est exclusio alterius.'" (Express mention of one thing implies the exclusion of the other.) (Translation supplied by appellee.) Fay v. District Court, 200 Cal. 522, 254 P. 896, 903.

A penal statute should define the act necessary to constitute an offense with such certainty that a person who violates it must know that his act is criminal when he does it. Then can it be said a person having property of another in his possession, which he believes to be his own, could possibly know that he had violated the law when he sells it or otherwise appropriates it to his own use. But it clearly appears from reading the statutes in question, such appropriation is made a crime. Under its

terms there is no defense for simple conversion, and to make an act, innocent itself, a crime, and criminals of those who might perchance fall within its interdiction, is inconsistent with law. The statute is uncertain in its meaning, vague and indefinite. A person charged thereunder is deprived of due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States. Cf. State v. Lantz, 90 W.Va. 738, 111 S.E. 766, 26 A.L.R. 894; Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172; Connally v. General Const. Co., 269 U.S. 385, 46 S. Ct. 126, 70 L.Ed. 322, 323; Ex parte Bales, 42 Okl.Cr. 28, 274 P. 485; State v. Park, 42 Nev. 386, 178 P. 389.

Plaintiff urges that since the essentials of embezzlement are included in the information, that it manifests the legislative intent. It is the statute not the charge under it that prescribes the rule of conduct and warns against transgression. In Lanzetta v. State of New Jersey, 306 U.S. 451, 59 S.Ct. 618, 619, 83 L.Ed. 888, in holding the statute unconstitutional, the Supreme Court said: "If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. * * * No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." Thornhill v. State of Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093.

Other authorities supporting this principle are assembled in State v. Menderson, 57 Ariz. 103, 111 P.2d 622.

Plaintiff also urges that in the exercise of police power the legislature has authority to define embezzlement and declare what constitutes an offense. It must be conceded that such power inheres in the state but in order that a statute may be sustained as an exercise of such power it must appear that the enactment has for its purpose the prevention of certain manifest or anticipated evil, or the preservation of the public health, safety, morals, or general welfare. As defined by Justice Holmes: "It may be said in a general way that the police power extends to all the great public needs. * * * It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare." Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186, 188, 55 L.Ed. 112, 32 L.R.A., N.S., 1062, Ann.Cas.1912A, 487.

The power thus defined, and a prior valid statute having been repealed, we are unable to determine that there existed, or was anticipated, that condition of public health, safety, morals or preponderant opinion making the statute in question immediately necessary for the public welfare.

No additional power is conferred by the new statute, unless it has for its purpose to embrace within its ambits the guilty and innocent alike. This would afford no reasonable ascertainable standard of guilt, and is therefore too vague and uncertain to be enforced. The accused, though presumed to be innocent, if proven guilty of simple conversion, nevertheless is a felon under the statute, in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.

To sustain the statute, we would supply by intendment, words of limitation, and this would be judicial legislation. The statute cannot be extended or sustained as a reasonable exercise of police power. State v. Henry, 37 N.M. 536, 25 P.2d 204, 90 A.L.R. 805; De Graftenreid v. Strong, 28 N.M. 91, 206 P. 694; Moruzzi v. Federal Life & Casualty Company, 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407; Tyson v. Banton, 273 U.S. 418, 47 S.Ct. 426, 71 L. Ed. 718, 58 A.L.R. 1236; State v. Menderson, supra, 57 Ariz. 103, 111 P.2d 622; State v. Burns, 53 Idaho 418, 23 P.2d 731; Gonzales v. Sharp & Fellow Construction Co., 48 N.M. 528, 153 P.2d 676; Id., 51 N.M. 121, 179 P.2d 762; People v. Mooney, 87 Colo. 567, 290 P. 271.

Plaintiff in support of its position cites Commonwealth v. Barney, 115 Ky. 475, 74 S.W. 181; State v. Brooken, 19 N.M. 404, 143 P. 479, L.R.A.1915B, 213, Ann.Cas. 1916D, 136, and State v. Shedoudy, 45 N.M. 516, 118 P.2d 280. These cases are not authority for the principle asserted. In Commonwealth v. Barney, supra, the court, in the absence of a prior, valid and effective statute, sustained the enactment as a reasonable exercise of police power. Subsequently, in Burnam v. Commonwealth, 228 Ky. 410, 15 S.W.2d 256, it refused to do so where a prior valid statute had been repealed. In State v. Brooken, supra, there existed no prior effective statute and it became necessary to ascertain the legislative intent and thus supply the statute by intendment. The same is said of State v. Shedoudy, supra. To sustain the statute, we must hold that the legislature in the exercise of police power retained in effect provision of a penal statute expressly repealed by it. This is contrary to all rules of statutory construction.

Our conclusion leaves the state without a statute defining embezzlement unless we determine whether section 1543, supra, has been disturbed by the repealing clause of chapter 70, Laws of 1923, N.M.St. supra. The public welfare impels us to decide this point.

The rule regarding the construction of repealing clauses is likewise a question of legislative intent. Where it appears from the repealing act, and the act sought to be repealed, that it was the legislative intent that the repealing clause should, in all events, be valid, such clause will be held to be valid; but where it is obvious that

where the repeal is intended to clear the way for the operation of the act containing the repealing clause and displacing the old law with the new, then, if the new law be unconstitutional the repealing clause becomes dependent and inoperative and falls within the main purpose of the act containing it. An unconstitutional law being void is not inconsistent with any former law. State v. Candelaria, 28 N.M. 573, 215 P. 816, and cases cited. People v. Butler Street Foundry & Iron Co., 201 Ill. 236, 66 N.E. 349, I Lewis' Sutherland, on Stat. Const.P. 245, citing cases. 59 C.J. 939. Tims v. State, 26 Ala. 165; People v. Fleming, 7 Colo. 230, 3 P. 70. Cook County v. Healy, 222 Ill. 310, 78 N.E. 623; State v. Rice, 115 Md. 317, 80 A. 1026, 36 L.R.A., N.S., 344, Ann.Cas.1913A, 1247; State v. McClear, 11 Nev. 39. City of Portland v. Coffey, 67 Or. 507, 135 P. 358; Porter v. Board of Com'rs of Kingfisher County, 6 Okl. 550, 51 P. 741.

It is evident that the legislature intended to displace the embezzlement law by substituting a new one. We are not satisfied that the legislature would have repealed the former act if it had not been supposed that the new act adopted in lieu of it was valid.

This being so, under the rule announced, the repealing clause necessarily fails when the purpose of the act fails and no former act is repealed. It follows that the embezzlement law existing prior to the Act of 1923 was not repealed. The judgment of the court was correct in holding that Section 41-4519, supra, did not define embezzlement, but the information having charged a crime under the act sought to be repealed, the court erred in discharging appellant.

The judgment is reversed, with directions to the trial court to reinstate the case upon its docket and proceed in a manner not inconsistent herewith, and it is so ordered.

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

SADLER, Justice (dissenting).

The prevailing opinion is correct in directing a reversal of the order of the trial court quashing the criminal information filed below. The holding that the statute in question is unconstitutional as denying to an accused due process of law under the Fourteenth Amendment to the Constitution of the United States is plainly erroneous. It convicts the legislature of sheer stupidity to hold that in enacting 1941 Comp. § 41-4519, it intended to authorize punishment of the innocent and well intentioned along with the venal and criminally disposed. The element of fraudulent intent necessarily is to be read into the statute and so construed, it is perfectly valid. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280; State v. Nance, 32 N.M. 158, 252 P.

1002; Commonwealth v. Barney, 115 Ky. 475, 74 S.W. 181. United States v. P. Koenig Coal Co., 270 U.S. 512, 46 S.Ct. 392, 70 L.Ed. 709.

Every accused who, over the past quarter of a century, approximately, has served time following conviction under this statute, will be made none the happier to learn the whole proceeding was a nullity. All now in prison after similar convictions under the statute should forthwith be given their freedom in an effort to make such atonement as the state presently can for the wrong inflicted. Resurrection of the old statute, repealed by the law enacting the one here challenged, if correctly accomplished on the theory employed by the majority, neither softens nor palliates the sting of unwarranted convictions under the one now stricken down. These unfortunate consequences all rest on the majority conclusion that the statute is no good. In my opinion, it is good. Hence, the untoward consequences mentioned in no way disturb me.

How much better to appraise the questioned statute on an assumption of legislative care and competence, rather than under an imputation of stupidity or carelessness, and so viewed, endeavor to find reason and purpose in its enactment. Thus considered, a perfectly logical legislative enactment emerges. Granting that under the law repealed, "entrustment" and existence of a "fiduciary relationship" are elements of the crime of embezzlement, Code 1915, § 1543, what is to prevent the legislature in the exercise of its undoubted power to define and declare public offenses and prescribe the punishment therefor (State v. Boloff, 138 Or. 568, 4 P.2d 326, 7 P.2d 775, and Sheehan v. Superintendent of Concord Reformatory, 254 Mass. 342, 150 N.E. 231) from broadening the scope of the offense? None can question that it is an immoral act for one in possession of the property of another, regardless of how such possession came about, to convert same to his own use with fraudulent intent. The legislature says it shall constitute the crime of embezzlement. Neither principle nor precedent deny its power to do so. Both repudiate our right to say it cannot.

The trial court should be instructed to overrule the motion to quash and proceed with the trial of defendant. The majority having concluded otherwise,

I dissent.

190 P.2d 208

HERON v. GAYLOR et al. (two cases).
SAME v. JAYNES et al.

Nos. 4956, 4957, 4958.

Supreme Court of New Mexico.

Nov. 10, 1947.

Rehearing Denied March 9, 1948.

Kenneth A. Heron, of Chama, per se.

Harry L. Bigbee, of Santa Fe, for appellees.

BRICE, Chief Justice.

These are companion cases and may be disposed of by one opinion.

The trial court at the close of the testimony in each of these cases announced in effect that he would discard all of the testimony of the appellant, a witness in his own behalf, and upon which his right to recover depended; and he then proceeded to determine each case upon the testimony introduced by the respective defendants.

We have examined the appellant's testimony carefully, and are of the opinion that there was no such inherent improbability as to the truthfulness of appellant's testimony that would authorize such action on the part of the trial court.

We are of the opinion that the appellant did not have a fair and impartial trial in each of these cases, because of the unwarranted refusal of the trial court to consider his testimony in making its decision;

and that justice requires a new trial in each case. Testimony of a witness, interested or not, cannot arbitrarily be disregarded by the trier of the facts. Chesapeake & Ohio R. Co. v. Martin, 283 U.S. 209, 51 S.Ct. 453, 75 L.Ed. 983; Medler v. Henry, 44 N.M. 275, 101 P.2d 398.

The judgment in each of the respective causes is reversed with instruction to the trial court to set it aside and grant to the appellant a new trial.

It is so ordered.

LUJAN, SADLER, and COMPTON, JJ., and E. T. HENSLEY, Jr., D. J., concur.

McGHEE, J., did not participate.

190 P.2d 434

STITT v. COX et al.

No. 5058.

Supreme Court of New Mexico.

Jan. 31, 1948.

Rehearing Denied March 23, 1948.

J. B. Newell, of Las Cruces, for appellant.

Holt & Holt, of Las Cruces, for appellees.

COMPTON, Justice.

Appellees, James W. Cox and Fannie C. Cox, father and mother respectively of William W. Cox, deceased, on September 18, 1946, filed their petition to revoke the last will and testament of the said William W. Cox, deceased, which was admitted to probate on the 8th day of March, 1946.

The petition alleged that on the 28th day of January, 1942, the said William W. Cox made his last will and testament, devising and bequeathing all his property to his wife, Ruth Elaine Cox; that thereafter, on July 10, 1944, Ruth Elaine Cox secured a divorce from the said William W. Cox and was thereby restored to the use of her maiden name, Ruth Elaine Stitt; that immediately following divorce, and pursuant to previous agreements, the parties consummated a property settlement, present and prospective, and that it was the intention of the parties, when the divorce was granted, and property rights were adjusted, that the will should no longer be effective. It further alleged that on May 13, 1945, the said William W. Cox died without issue and that appellees were the heirs of the deceased and entitled to his estate. Judgment was asked accordingly.

Motion to dismiss on the grounds (1) that the petition was not timely filed, and (2) that the will was not revoked by the method provided by law, was overruled, whereupon appellant answered, denying that it was the intention of the parties that divorce and property settlement should render the will ineffective, and as an affirmative defense re-pleaded the grounds theretofore asserted in the motion to dismiss.

Appellant contends that appellees are barred from maintaining this action, as it was not commenced within six months from the date of probate; and that the statute provides the exclusive method whereby a will may be revoked. On the other hand, appellees contend that this is not a will contest, but a proceeding to determine the heirs of the deceased and the ownership of his estate; that divorce and property settlement impliedly revoke a will, and being thus revoked, the statute is not a bar to the suit.

The trial court treated the proceeding as one to determine heirship. Judgment was entered revoking the will and decreeing that appellees were the heirs of William W. Cox, deceased, and entitled to his estate, from which appellant brings this appeal.

The pertinent statutes are:

"When a will has been approved, any person interested may at any time within six (6) months after such probate, contest the same or the validity of the will. For that purpose he shall file in the court in which the will was proved, a petition in writing, containing his allegations against the validity of the will or against the sufficiency of the proof, and praying that the probate may be revoked." 32-212, N.M. Sts.1941 Comp.

"If no person shall, within *six* (6) *months* after the probate, contest the same, or the validity of the will, or if on such contest the will is sustained, the probate of the will shall have the same effect as a final decree in chancery." Ch. 14, Laws 1943, N. M.Sts.

"Any will may be revoked by the testator by an instrument in writing, executed and attested in the same manner as is required by law for the execution and attestation of a will, by which instrument the maker distinctly refers to such will and declares that he revokes it; or such will may be revoked by the making of a subsequent valid will disposing of the same property covered by the first will, although no reference be made in the later will to the existence of the earlier one." 32-108, N.M.Sts.1941 Comp.

It clearly appears that a proceeding to revoke a will and determine heirship, is a direct attack upon the judgment admitting the will to probate, and falls within the inhibitions of Section 32-212, supra. Whether the proceeding be one to contest or revoke a will, its effectiveness, if sustained, is to annul and set aside the judgment admitting it to probate.

There exist various methods of direct attack upon the order admitting wills to probate.

2 Page, Wills (Permanent Edition, Par. 672) the author says: "The most common form of direct attack are appeal, error, contest, *application to revoke the order of probate* * * * these methods of direct attack are provided for, usually by statute, and they are the methods which the law has given in order to revoke the order admitting the will to probate." (Emphasis ours.)

"If the time within which application for revocation of probate may be made, is fixed by law, the application must be made within that time." 2 Page, Par. 679, Op. cit., supra.

At 68 C.J. 925, this language is used: "Modern statutes generally provide for at-

tack on probate by means of a bill or by an action to contest the will, this remedy being provided in some jurisdictions in addition to proceeding to contest prior to probate or in opposition to probate. It is a new, substantive, and independent right, *provided it is exercised within the period prescribed.* * * * the right to contest a will is not a right at common law, but a right conferred solely by statute which affords the exclusive mode of setting aside a will; and the statute being in derogation of common law, must be strictly construed * * * and so the proceeding, being purely statutory, can only be brought and successfully maintained in the court *within the time and on the grounds prescribed* in and by the statute which authorized such action." (Emphasis ours.) Cf. Sanders v. Sanders, 52 Ariz. 156, 79 P.2d 523; In re Estate of Dunsmuir, 149 Cal. 67, 84 P. 657; Camplin v. Jackson, 34 Colo. 447, 83 P. 1017; Renwick v. Macomber, 233 Mass. 530, 124 N.E. 670; Bronson v. Bronson, 185 Wash. 536, 55 P.2d 1075, 107 A.L.R. 238.

In Re Martinez' Will, 47 N.M. 6, 132 P.2d 422, it was held that the right to attack the validity of a will, after probate, was conferred by statute, and that its provisions must be strictly construed. See also In re Towndrow's Will, 47 N.M. 173, 138 P.2d 1001.

It is seen that an order admitting a will to probate, after lapse of time allowed to have it annulled or set aside, becomes final as to all parties where jurisdiction is acquired, and is conclusive as to its validity, viz., that the will is that of the deceased. Lack of jurisdiction is noted in cases of pretermitted children and cases where the testator may be living at the time of probate of his will.

Appellees have presented many strong authorities supporting the rule that divorce and property settlement impliedly revoke a will of the spouses but the conclusion we have reached renders unnecessary a discussion of this question.

We are of the opinion that appellees' failure to contest the will or its validity within the time allowed by statute is a bar to this proceeding, and the trial court erred in overruling appellant's motion to dismiss. For that reason, the judgment will be reversed, with directions to the trial court to reinstate the case upon its docket and enter an order dismissing appellees' petition, and it is so ordered.

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

191 P.2d 334

STATE ex rel. GUTIERREZ, District Attorney, v. FIRST JUDICIAL DIST. COURT WITHIN AND FOR McKINLEY COUNTY et al.

No. 5100.

Supreme Court of New Mexico.

March 22, 1948.

Marcelino P. Gutierrez, of Santa Fe, and Owen B. Marron, of Albuquerque, and Denny & Glascock, of Gallup, for relator.

Rodey, Dickason & Sloan, of Albuquerque, for respondents.

SADLER, Justice.

The relator seeks by Prohibition against the District Court of the First Judicial District for McKinley County and R. F. Deacon Arledge sitting as Judge thereof an answer to the question whether an accused

in a felony prosecution, upon approval by the court of accused's waiver of jury trial, may be tried before the court without a jury, notwithstanding the state declines to consent and formally objects thereto.

The accused was about to be placed on trial for the commission of a felony. He formally waived trial before a jury and announced a desire for trial before the court without a jury. The state declined to consent to the waiver and announced that it would insist upon a jury trial. Thereupon, the respondent judge approved the accused's waiver and was about to proceed with the trial without a jury after overruling the state's objection to the waiver. The state on relation of the district attorney of the first judicial district then sued out an alternative writ of prohibition before us. Now, upon submission of the matter on the merits, we are asked by relator to perpetuate the writ and by the respondents to discharge it. Neither side questions, both conceding, the propriety of prohibition as a remedy.

We think the writ was not improvidently issued. The question presented has never been judicially determined in this jurisdiction although some of our decisions incline us to the view announced. They are the cases of State v. Hernandez, 46 N.M. 134, 123 P.2d 387; State v. Garcia, 47 N.M. 319, 142 P.2d 552, 149 A.L.R. 1394, and State v. Shroyer, 49 N.M. 196, 160 P.2d 444. In the Hernandez case, the precise question was whether a defendant *could* waive his right to a jury trial. In territorial days, in the case of Territory v. Ortiz, 8 N.M. 154, 42 P. 87, the right of defendant to waive jury trial in a felony case had been denied. In the Hernandez case we overruled the Ortiz case upon the authority of Patton v. United States, 281 U.S. 276, 50 S.Ct. 253, 263, 74 L.Ed. 854, 70 A.L.R. 263, in which the right of an accused to waive trial by jury even in a felony case was finally set at rest. Nevertheless, the United States Supreme Court felt called upon in closing its opinion to add the following cautionary remarks touching exercise by an accused of his right or privilege to waive jury trial. The court said:

"In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, *we do not mean to hold that the waiver must be put into effect at all events.* That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is

of such importance and has such a place in our traditions, that, *before any waiver can become effective, the consent of government counsel and the sanction of the court must be had,* in addition to the express and intelligent consent of the defendant." (Emphasis ours.)

The foregoing language from the opinion in the Patton case constitutes its concluding paragraph. In State v. Hernandez, supra, we commented on same, as follows [46 N.M. 134, 123 P.2d 388]:

"The right of waiver with the safeguards thrown around its exercise in felony cases, as outlined in the concluding paragraph of the opinion in the Patton case, would seem more consonant with reason, justice and the orderly dispatch of judicial business than the conclusion reached in the Ortiz case."

Again in State v. Garcia, supra, after recalling our holding that the right to a jury trial could be waived, even in a felony case, we said [47 N.M. 319, 142 P.2d 557]:

"We indulged the cautionary remark, however, that a right so important was 'not to be lightly held the subject of waiver.' We accordingly approved what was said in the concluding paragraph of the opinion in the Patton case as to the safeguards to be thrown around an exercise of the right to waive a jury in felony cases."

Counsel for respondents recognize that in the language of this court in the Hernandez, Garcia and Shroyer cases, approving the cautionary remarks of the court in the Patton case, already quoted, they are faced with persuasive authority against their position. In answer, they argue that in what is said in the Patton case on the right of government counsel to object to an accused's waiver of jury, we are confronted with pure obiter dictum. Hence, we should not feel ourselves bound by it. Even so, and granting that the precise question was not there before the court, if the pertinent language be dictum, it comes from a high source and on three separate occasions, we have seen fit to approve it, without reservation. In the face of a like claim as to the character of the pronouncement in the Patton case, federal circuit courts of appeal and state courts as well continue to follow it as expressing a salutary limitation on the unrestricted right of an accused to waive trial by jury. United States v. Dubrin, 2 Cir., 93 F.2d 499; Rees v. United States, 4 Cir., 95 F.2d 784; Taylor v. United States, 9 Cir., 142 F.2d 808; C. I. T. Corporation v. United States, 9 Cir., 150 F.2d 85; People v. Scornavache, 347 Ill. 403, 179 N.E. 909, 79 A.L.R. 553, with annotation of question involved at page 563.

In C. I. T. Corp. v. United States, supra, where it was sought to weaken the Patton case as authority by the contention that what was there said on the precise question before us is dictum, the court said [150 F.2d 92]:

"If the rule of the Patton case be dictum because the government had consented to the waiver, so also is the money lender's claimed interpretation of the Adams case [Adams v. United States, 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435]. There, also, the United States had joined in the waiver.

"The Supreme Court in the Adams case summarizes its holding in the Patton case without suggestion that its statement of the law is in error. We do not agree that the latter case thus sub silentio overrules the statement of the earlier that 'the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant.' "

The opinion in the case of People v. Scornavache, supra, by the Supreme Court of Illinois contains an illuminating discussion of the whole subject. It is the more valuable to us as precedent by reason of the fact that the pertinent constitutional provisions affording an accused the guaranty of jury trial in Illinois are in language almost identical with that in our constitution. See N.M.Const. art. 2, §§ 12 and 14, and Ill.Const. Art. 2, §§ 5 and 9. The holding in the case mentioned is indicated by the following language from the opinion, to-wit [347 Ill. 403, 179 N.E. 912]:

"No case appears in the books holding that, in the absence of a statute so providing, the accused in a criminal case has a right, without the consent of the prosecution, to determine that the case shall not be tried by jury."

The Court delivered itself of other remarks, so pertinent to the question involved that we quote them, as follows:

"There is, of course, nothing in the Constitution conferring the right of jury trial on the state, but such has for centuries been the established mode of trial in criminal cases. The maintenance of a jury as a fact-finding body occupies that place in government, as we know it in America, which in the absence of a statute so providing, requires that such trial be not set aside merely on the choice of the accused.

"* * * The protective provision of the Constitution was not designed to enable the accused to say there shall be no jury trial, but, on the contrary, to enable him to say there shall be such a trial. The right to a jury trial is not the right to be tried without a jury."

Counsel for respondents cite cases from Georgia and Texas as authority for the contention that consent of the state to a defendant's waiver of jury is unessential. The cases are Sammons v. State, 53 Ga. App. 369, 185 S.E. 923; Palmer v. State,

195 Ga. 661, 25 S.E.2d 295, and Schulman v. State, 76 Tex.Cr.R. 229, 173 S.W. 1195. And we may add to the case last cited, Mackey v. State, 68 Tex.Cr.R. 539, 151 S.W. 802; and Kuhn v. State, 142 Tex. Cr.R. 40, 151 S.W.2d 208. It is claimed that, in the absence of substantial differences in constitutional context from that obtaining here, in the decisions cited the courts reached conclusions in accord with respondents' contention that consent of the state is not required to effectuate a defendant's waiver of jury trial.

We do not so interpret these decisions. In each state the court had before it, in Texas a statute and in Georgia an ordinance, giving the accused the right to waive a jury in misdemeanor prosecutions. In the Palmer case, the court was dealing with a felony case and also a code provision providing that "a person may waive or renounce what the law has established in his favor." The Code (Ga.) § 102-106. The Court merely held it would apply the rule in misdemeanor cases to felony prosecutions and accorded the trial judge the right to refuse a request for jury trial. The holding, in the Sammons case was to the same effect. The Texas cases likewise interpreted a statute giving the accused the right to waive a jury in misdemeanor cases and held its effect was to render consent of the state unnecessary. Whether the same rule would be applied there in felony cases, we do not know. In holding as it did as to misdemeanor prosecutions, however, the Texas courts may very well have concluded that so far as the state was concerned, in enacting the statute the legislature itself had consented to trial without a jury in cases where the defendant should waive one. *We have no such statute in New Mexico as the one referred to in Texas,* nor do we have one similar in import to the ordinance involved in the Georgia decisions.

It is claimed by respondents that sound reason and principle sustain their position even if it can be said the language of the court in Patton v. United States is not mere dictum. (We think it is something more.) They base their argument in this connection upon the absence of any guaranty to the state of a jury trial and a conception of the guaranty to an accused as one wholly and solely for his peculiar benefit. Accordingly, what is his to enjoy is his to waive.

We doubt not that the United States Supreme Court in the Patton case was mindful of these considerations when it made the pronouncement it did touching the safeguards to be employed in the exercise by a defendant of his right of waiver. Nevertheless, it failed to accord them decisive effect. It may very well have felt, as its pronouncement strongly indicates, that an institution so deeply imbedded in English and American jurisprudence as the traditional jury in the trial of criminal cases, although appearing in federal and state

constitutions as a guaranty to the accused alone, was not to be denied through judicial interpretation the reciprocal effect in right and enjoyment by the state historically accorded it. Whether so or not such is the effect of its decision. We already have been content to give formal approval to its holding on three separate occasions. We thus have no hesitancy in now following and applying same to the facts of this case.

Although it adds nothing to the effect of federal decisions on the subject, it is worthy of note that the practice forecast by them is now settled by a formal rule in the federal courts. Rule 23(a), Federal Rules of Criminal Procedure, 18 U.S.C.A. following section 687, reads:

"Rule 23(a). Trial by jury. Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing wtih the approval of the court and the consent of the government."

It should be here mentioned that one of the grounds set up for a writ of prohibition was that the respondents, acting in excess of their jurisdiction, had ordered and were about to enforce the filing with the papers in the case of a transcript of the testimony of certain witnesses at the preliminary hearing of the accused, taken down for the state by a shorthand reporter employed specially for that purpose by the relator. The alternative writ issued, in addition to restraining respondents from proceeding to trial without a jury pending final hearing herein, likewise ordered respondents to refrain from enforcing the order to file the transcript for the same period. The relator now has admitted that the order for filing transcript is a matter within the jurisdiction of the district court and has disclaimed reliance upon it as a ground for the writ.

We are well satisfied that the trial court may not, over the state's objection, proceed to try the defendant without the presence and participation of a jury. Lacking the *right,* in this instance, it lacks the *power* so to do. For interesting articles on the subject involved, see 18 Am. Bar Ass'n. Journal 226; 25 Mich.L.Rev. 695; 45 Harv.L.Rev. 932, and 27 Ill.L.Rev. 447. Accordingly, the alternative writ of prohibition will be made absolute in so far as it restrains respondents from proceeding to trial of defendant without a jury. It will be discharged in so far as it restrains them from enforcing the order relative to filing of a transcript of some of the testimony taken at the defendant's preliminary hearing.

It is so ordered.

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

LUJAN, J. did not participate.

191 P.2d 338

In re ARCH HURLEY CONSERVANCY DIST., HUDSON IRRIGATION EXTENSION.

No. 5008.

Supreme Court of New Mexico.
Jan. 2, 1948.

Rehearing Denied April 13, 1948.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Seth & Montgomery, of Santa Fe, and George A. Shipley, of Alamogordo, for appellants.

James L. Briscoe, of Tucumcari, for appellees.

SADLER, Justice.

The appeal is from a decree of the District Court of Quay County, incorporating a certain portion of the right of way of Chicago, Rock Island and Pacific Railway Company in the Hudson Irrigation Extension of Arch Hurley Conservancy District, after overruling and dismissing the objections of Joseph B. Fleming and Aaron Colon as trustees of said railway company to the inclusion of such right of way within said Extension of the Conservancy District named. A separate appeal also was taken from last mentioned order. The Arch Hurley Conservancy District was organized under the provisions of L. 1927, c. 45, 1941 Comp., § 77-2701 to 77-3024, and subsequently, following enactment of L. 1939, c. 148, 1941 Comp., § 77-3101 to 77-3124, qualified under the provisions of the later act. For convenience and simplicity of expression Arch Hurley Conservancy District will be referred to hereinafter as the "Conservancy District", the original act under which it organized as the "Conservancy Act"; and the area brought within the original district as an addition thereto, as the "Hudson Extension".

The proceedings to create and incorporate the Hudson Extension as a part of the Conservancy District were initiated by the filing of a petition by certain landowners praying consent of the District Court of Quay County, sitting as a Conservancy Court, for the filing of a petition to bring

the new area into the Conservancy District. The petition received the approval of the court, whereupon another petition was submitted pursuant to the provisions of 1941 Comp., § 77-2705. It described the area of the proposed extension, was signed by owners of real estate lying within the boundaries thereof and prayed for inclusion in the Conservancy District of the area described. It embraced, as stated, a certain portion of the right of way of the railway company, the appellant herein.

The railway company duly filed objections to the proposed extension and a hearing was had thereon at which much testimony was taken. The objections were overruled and dismissed and the trial court made findings of fact and conclusions of law upon which it based the order of dismissal. While somewhat lengthy, these findings and conclusions, as well as those incorporated in the later decree bringing the area described within the Conservancy District, are essential to an intelligent understanding of the errors assigned and argued. Accordingly, they will be set out in our opinion in the order of their filing below. This calls first for those made following the hearing of appellant's objections as result of which they were overruled and dismissed. They read as follows:

"Findings of Fact.

"The Court having considered the pleadings, testimony, objections, arguments, requested findings of fact and conclusions of law, makes the following Findings of Fact.

"1. That some years ago Arch Hurley Conservancy District was organized in Quay County, State of New Mexico, for the purpose of utilizing waters from Conchas Dam for irrigation purposes in said County; that approximately 80,000 acres are included in the exterior boundaries of the District, of which 45,000 were to be irrigated; that after studies of the land it has been determined that approximately 8,000 acres of the 45,000 acres are not suitable for irrigation, and it is proposed to transfer the water for such 8,000 acres to other lands outside the District within that is called the Hudson Extension.

"2. That there are approximately 25,600 acres of land within the exterior boundaries of the proposed Hudson Extension, and it is proposed to furnish water for irrigation to approximately 7,000 acres within said tract, said lands to be later selected by the Bureau of Reclamation after studies.

"3. That the railroad line of the Chicago, Rock Island and Pacific Railroad Company runs from Southwest to Northeast for a distance of approximately ten miles; that the right of way of the railroad company is 200 feet wide, and there are approximately 240 acres of land included in such right of way that the assessed valuation of said ten miles of right of way is approximately $240,000.00, and that the total valuation of the other land in the Dis-

trict in their present raw unimproved state is approximately $50,000.00.

"4. That the purposes of the Conservancy District are to provide water for irrigation, flood control and drainage, but for the proposed Hudson Extension there will be no flood control or drainage but an irrigation project only, and it is agreed that no drainage, flood control or irrigation will be provided for the lands of the Objector, and that the benefits to be derived by the Objector will come only from increase in traffic occurring on account of reclaiming of such lands in the irrigation thereof.

"5. That economists of the United States Bureau of Reclamation have made studies on estimates of the amount of freight which will be available for shipment in some manner and there has been no testimony introduced to contradict such estimates; however, I am impressed that such witnesses were rather optimistic, but I find it to be a fact that the reclamation of the lands within the proposed Extension will provide a substantial increase in the amount of business for the railroad as compared with that now originating there, but the court is unable to determine the amount of such business; the time when it will start moving in substantial quantities, or the revenue that will be derived therefrom by the Objector.

"6. That in the Construction of the diversion work and canals which will carry the water to the lands in the Arch Hurley Conservancy District the two railroads operating into Tucumcari, New Mexico, to-wit, the Objector and the Southern Pacific Railroad Company, have been paid to date approximately $400,000.00, and while the testimony shows that the majority of it has come over the Chicago, Rock Island and Pacific Railroad there has been no breakdown of figures to show the actual amount.

"7. That the petition for the inclusion of the Hudson Extension within the Arch Hurley Conservancy District has been signed by the owners of more than one-third of the land in area.

"8. That the non-irrigated lands in said District exclusive of the right of way of the Objector will be benefited by the construction of the canals and the irrigation of the 7,000 acres by reason of the fact that they will be adjoining and near to the irrigated lands and will therefore increase in value.

"9. That the present estimated cost for canals and diversion system to supply waters to the lands in the District is now estimated at $13,000.00 of which amount the Directors have agreed by contract to repay the sum of $5,655,000.00 and such action has been approved by this Court, and the resolution further provides that the 'A' lands shall bear 80 per cent of such cost and the 'B' lands 20 per cent, and I find that the right of way of the railroad com-

pany will under the present classification be classified as 'B' land, the resolution and the decree confirming it having been introduced in evidence as Exhibit P-4.

"10. As to waters being supplied to such lands within the original District there has been no classification of lands, and there has been levies made on an ad valorem basis for several years to pay the incidental expenses of the Conservancy District, and under the plan of operation of the District there will be levies made annually.

"11. That in addition to the construction cost, it will be necessary when the project gets in operation to levy a charge or tax for operation of said project, and the amount thereof has not as yet been determined, but it will be the actual expenses incident to the operation of the irrigation system by the Reclamation Service.

"12. That the contract between the District and the United States also provides that there may also be a tax levy made on an ad valorem basis not to exceed two mills for any one year to provide a bond guaranty fund up to 15 per cent to repay the indebtedness of the District to the Reclamation Service; it is also provided in the contract that special assessments to be made by the District shall include an addition to any others that are or may be authorized by law to 'conservation and development from assessment' as provided by Chapter 37, 1935 Session Laws, and that such funds shall be used for servicing the obligations of the District to the United States under the contract.

"13. That the secretary of the Interior has executed his written consent to the inclusion of lands of the proposed Hudson Extension into the Arch Hurley Conservancy District.

"14. That when it became apparent that there would be surplus water within the District for approximately 7,000 acres of land, engineers of the United States Reclamation Service made an investigation of various bodies of land in Quay County and determined that considering the quality of land, cost of applying the water thereto, and suitability of irrigation, the lands in the proposed Hudson District were the most suitable for such purpose.

"15. That all of the City of Tucumcari is within the Arch Hurley Conservancy District; that all real estate within said City is subject to the same levies which were made upon the properties of the Objector and on the same ad valorem basis; that the real estate upon which the levy of the District was made in the year 1945 excluding all properties of the Objector as shown by the tax rolls of Quay County for said year exceeded the sum of $2,000,000.-00; that the assessed value of the properties of the Objector within the original District for the year 1945 was the sum of $521,000.00.

"16. That the City of Tucumcari, New Mexico, has almost doubled in population in the last few years.

"Based upon the foregoing Findings of Fact, I conclude as a matter of law—

"1. That under the law there is no authority for the Court to exclude any land from the District but the petition must be approved or rejected.

"2. That by the act of Legislature providing that Class 'B' lands may be assessed on an ad valorem basis regardless of whether they receive drainage, flood control or irrigation water, that it was the intention of the Legislature that such projects should be considered at least in part a public improvement, and part of the cost thereof should be paid by ad valorem tax on all the property within the District.

"3. That the Objections filed by the Trustees of the Railroad Company should be dismissed and the prayer of the Petitioners granted."

In due season following the filing of its decision containing the foregoing findings of fact and conclusions of law and on July 24, 1946, the trial court entered its order formally dismissing the appellant's objections. This was followed by its later decree entered August 3, 1946, incorporating the Hudson Extension and the area embraced in it as an integral part of the Conservancy District. Omitting the preamble and the lengthy description of the area embraced in the Hudson Extension, the findings additional to those already made and set out hereinabove, as well as what appears to be a conclusion of law immediately preceding the decree itself, all read as follows:

"This cause having come on for hearing in open court at Tucumcari, New Mexico, * * * and the court being duly advised, finds:

"I. That the said petition of Jerry Kimes et al. for the inclusion of the area hereinafter described within the boundaries of the Arch Hurley Conservancy District has been signed and presented in full conformity with the Conservancy Act of New Mexico and amendments thereto;

"II. That the allegations of said petition are true;

"III. That no protesting petition has been filed except the petition which has been dismissed as hereinbefore stated;

"IV. That the Court has jurisdiction of the parties to and the subject matter of this proceeding;

"V. That the purposes for which said district is established are to irrigate the lands included within the extension hereinafter described and to operate the irrigation of such lands in connection with the general purposes of the Arch Hurley Conservancy District, which general purposes have heretofore been determined in the proceedings by which the said Arch Hurley Conservancy District has been formed;

"VI. That public safety, health, convenience and welfare will be promoted by the inclusion of the area hereinafter described within the Arch Hurley Conservancy District as prayed in said petition and that a public necessity exists for the inclusion of such area within such district;

"VII. That the territory which is hereby added to the said Arch Hurley Conservancy District is bounded as follows (description omitted).

"VIII. That the said territory last above described should, from the time of the entry of this decree, be for all purposes a part of the Arch Hurley Conservancy District;

"Now, therefore, it is by the court ordered, adjudged and decreed:

"That the territory as above described be and the same is hereby added to the Arch Hurley Conservancy District and from the time of the entry of this decree said area shall for all purposes be a part of said Arch Hurley Conservancy District;"

The appellant first argues under its Point I that the Hudson Extension must be considered on its own merits, separate and apart from prior proceedings for organization of the Arch Hurley District which, as previously noted, we shall refer to herein simply as the conservancy district. Since no particular ruling by us seems to be invoked and counsel for the appellees disclaims making the contention imputed to him in an anticipatory way by appellant's counsel that there has been a determination of the essential facts here involved in that "the conservancy court considered petitions covering other property not far distant, but entirely separate from the instant land, in connection with the proceedings for the formation of the Arch Hurley Conservancy District," we must assume the comment made is by way of inducement for such bearing as it may have in the further consideration of the case. It will be so treated by us.

It is next argued as Point II that under the Conservancy Act the individual petitions, by fixing the boundaries of the district, determine whether or not the property included will be benefited, thereby resulting in an unlawful delegation of power by the legislature.

The case of State ex rel. Merriam v. Ball, 116 Tex. 527, 296 S.W. 1085, is chiefly relied upon by appellant. However, an examination of same does not disclose it to have been resolved upon the question of an unlawful delegation of legislative powers but rather upon the constitutional ground that there was a denial of due process in the failure of the act involved to provide for a hearing to property owners on the question of benefits and district boundaries. Counsel do not point out the respect in which an unlawful delegation of legislative power is accomplished except as it may be found in the assertion that the in-

dividual signers of the petition under 1941 Comp., § 77-2705 "in fixing such (the) boundaries of the proposed area make the determination that all property within such proposed boundaries will be benefited by operation of a district." This is followed by the statement: "In the case at bar it is the individuals who have signed the petitions who have determined that the property of the objector's railroad will be benefited by the Hudson Extension." Upon the correctness of this assertion and that of another made later: "Under Section 77-2705(5) New Mexico Statutes, the petition need only allege, objector maintains, that *some* of the lands (described) will be benefited"—the appellant largely rests its argument under this point. As we shall presently show neither statement finds adequate support in the pertinent language of the Conservancy Act.

As a matter of fact, the petitioners *must allege* and the conservancy court *must find* that the property described in the petition will be benefited by the organization of the conservancy district—not *some* of the property described in the petition, as appellant would construe the statute—but all of it. In setting forth what the petition shall contain, § 77-2705(5), the second item provides: "That property within the proposed district will be benefited by the accomplishment of one or more of the purposes enumerated in section 201 (§ 77-2704)."

Under § 77-2709, before the conservancy court hearing the matter can declare the district organized, it must find among other things "that the allegations of the petition are true," one of the prime allegations being that the property in the proposed district will be benefited by one of the purposes of organization named in a previous section—in this case—irrigation. This statutory finding under similar acts has been held to constitute provision for a hearing as to whether or not lands included in the proposed boundaries will be benefited. Patterick v. Carbon Water Conservancy District, 106 Utah 55, 145 P.2d 503; San Saba County Water Control and Improvement Dist. No. 1 v. Sutton, Tex.Com.App., 12 S.W.2d 134, 70 A.L.R. 1255. In the Patterick case [106 Utah 55, 145 P.2d 508] from Utah, the court dealt with an act in many respects similar to our own. The petition there must allege: "That property within the proposed district shall be benefited by the accomplishment of the purposes enumerated in Section 3 of this act." And before organizing the district, the court, among other things, as is the case with our act, must find that "the allegations of the petition are true." Ruling on these provisions, the court said:

"Plaintiff also contends that the 'due process' clause is violated because there is no provision by which the court can modify the boundaries of the proposed district, nor can it determine that individual pro-

perties or sections of properties will not benefit by the creation of the district.

"Sec. 100-11-7, U.C.A. 1943, provides:

" 'Upon the said hearing, if it shall appear that a petition for the organization of a water conservancy district has been signed * * * and that the allegations of the petition are true * * * the court shall * * * adjudicate all questions of jurisdiction, declare the district organized and give it a corporate name * * *.

" 'If the court finds that * * * the material facts are not as set forth in the petition filed, it shall dismiss said proceedings * * *.'

"As we have shown above one of the material facts which the court must find true is: 'That property within the proposed district will be benefited by the accomplishment of the purposes enumerated in Section 3 of this act.' The purposes enumerated in Sec. 3 of this act are conserving, developing and stabilizing supplies of water for domestic, irrigation, power, manufacturing and other beneficial uses. It is apparent therefore that the act makes provision for a hearing as to whether or not lands included in the proposed boundaries will be benefited."

A similar holding was made in the Sutton case cited above in an opinion by the Commission of Appeals of Texas which was adopted as the opinion of the Supreme Court. There was before the court for construction Vernon's Ann.Tex.Stat. 1925, Art. 7880, § 19, reading: "If it shall appear on hearing to the commissioners' court that the organization of a district as prayed for is feasible and practicable, that it would be a benefit to the land to be included therein, or be a public benefit, or utility, the commissioners' court shall so find and grant the petition. If the court should find that such proposed district is not feasible or practicable, would not be a public benefit or utility, * * * or is not needed, the court shall refuse to grant the petition."

The court then proceeds to state the question for decision and states [12 S.W. 2d 136]:

"The question turns upon the interpretation of section 19 already quoted. Construing this section, the Court of Civil Appeals said [8 S.W. 2d 319]: 'There is no discretion in the commissioners' court under section 19 to change the boundaries in any respect. The commissioners' court is therein required either to grant or refuse the petition and the matters to be inquired into upon the hearing by the commissioners' court are specifically stated as follows: That the district is feasible and practicable, that it would be a benefit to the land to be included therein or be a public benefit or utility. If these issues are determined in the affirmative, the commissioners' court is required to grant the petition.'

"This interpretation is not an unreasonable one, and the language is susceptible

of that meaning, but it is not the only reasonable interpretation. The language is likewise susceptible of another meaning, and that is that the finding that the district is a public benefit or utility *includes the finding of benefits to each and every tract included in the project.*" (Emphasis ours.)

Then following citation and quotation at some length from the case of Rutledge v. State, 117 Tex. 342, 292 S.W. 164, 7 S.W. 2d 1071, construing provisions of an earlier act of 1915, under which it was held the commissioners' court possessed authority to exclude, after hearing, any lands found not to be benefited, the court proceeds with further consideration of the act involved and says: "Here the statute not only provides for notice and a hearing as to whether or not the district is 'feasible and practicable,' and whether the same would be 'a public benefit or utility,' but, as already pointed out, also as a part of this determination whether 'it would be a benefit to the land to be included therein.' It is true the act does not specifically give the commissioners' court the power to grant the petition after having found that any part of the lands included therein would not be benefited, but rather it appears to be the duty of the court to refuse to grant the petition in such a case. This would not render the law repugnant to the due process clause, since to refuse the petition would be full relief to the complainant."

The conclusion announced in the last sentence of the quotation next above, although fortified by provision in another section of the act for a further hearing for exclusion of lands impossible of benefit as mentioned in next paragraph of the opinion, seems to have been first rested on provisions of the act akin in effect to language in ours, unaided by the latter provision. The foregoing authorities are convincing precedents against the appellant's claim that the individual signers of the petition themselves determine the lands described in the petition will be benefited or that under 1941 Comp., § 77-2705 (5-2) the petition need only allege "some" of the lands described therein will be benefited. As pointed out in the Sutton case just quoted from it would appear to be the duty of the commissioners' court, upon finding that some of the lands described cannot be benefited, to refuse to grant the petition, thus giving an objector full relief against inclusion of his lands in the district.

It would seem that in deciding contrary to appellant's contention, that the individual signers of the petition fix the boundaries and determine the benefits, we had fully disposed of the claim that legislative powers have been unlawfully delegated. However, the point made is so closely interwoven in cases cited, as well as in argument, with a contention that there is a denial of due process in these particulars that we shall cite

some additional authority to support our conclusion that no unlawful delegation of legislative power is disclosed. In addition to the cases discussed, see Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 178, 17 S.Ct. 56, 41 L.Ed. 369, 395; also, In re Proposed Middle Rio Grande Conservancy Dist., 31 N.M. 188, 242 P. 683; Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L. R. 1261, with annotation at 1274 under subject "Constitutionality of Levee and Flood Control acts," containing a sub-heading at page 1284 entitled "Delegation of Power." The exact claim of unlawful delegation now discussed seems not to have been made in any of the cases we have examined, notwithstanding our conservancy acts have been exposed to vigorous challenge in this Court on several occasions. The decisions involving Middle Rio Grande Conservancy District, just cited, represent two instances and for still another, see Cater v. Sunshine Valley Conservancy District, 33 N.M. 583, 274 P. 52. In Fallbrook Irrigation District v. Bradley, supra, the Supreme Court of the United States disposed of a contention analogous to the one under consideration, [164 U.S. 178, 17 S.Ct. 70] as follows:

"An objection is also urged that it is delegating to others a legislative right,—that of the incorporating of public corporations,—inasmuch as the act vests in the supervisors and the people the right to say whether such a corporation shall be created, and it is said that the legislature cannot so delegate its power, and that any act performed by such a corporation by means of which the property of the citizen is taken from him, either by the right of eminent domain or by assessment, results in taking such property without due process of law.

"We do not think there is any validity to the argument. The legislature delegates no power. It enacts conditions upon the performance of which the corporation shall be regarded as organized with the powers mentioned and described in the act."

Two other points argued by the appellant, Points V and VI, relating as they do to a claim of unwarranted delegation of legislative power, will be taken up out of order and disposed of, now that we have just finished resolving another like claim of error. It is first said that the power given by the so called "Contract Act" (L. 1939, c. 148) to the Secretary of Interior to approve or disapprove the extension of a district constitutes an unlawful or unwarranted delegation of legislative powers to that official of the United States government. It is section 19 of the act mentioned (1941 Comp., § 77-3119) to which we are referred as conferring this legislative power. It reads: "77-3119. After a reclamation contract has been entered into by a contracting district, except upon the written consent thereto of the secretary

of the interior, no change shall be made in the organization or boundaries of such district, either by the exclusion therefrom of district lands, by the inclusion therein of new lands, or by dissolution of the district or otherwise."

Since one of the main purposes of taking advantage of the contract act is to permit a conservancy district to avail itself of government aid in constructing its works and irrigation system by virtue of the federal reclamation law therein referred to, we see no impropriety in giving the Secretary of Interior the same voice that ordinarily is extended to other money lenders or mortgagees to approve or veto any change calculated to increase or diminish size of the acreage which in part, at least, constitutes the security for the money advanced. Certainly, we find no element of unlawfully delegated legislative power in this provision for a simple means whereby he may protect the government against a diminution of its security.

What has been said as to this contention applies in large measure to the claim under Point VI that legislative power is unlawfully delegated to the same official, Secretary of Interior, in the privilege given him by the contract act as to classification of lands and apportionment of assessments. In the first place, the act itself in section 6 thereof (§ 77-3106) sets up the classification of lands into what is known as Class "A" lands, being the irrigable lands in the district to be levied against annually at a uniform rate per acre and Class "B" lands, to embrace all other real property in the district, not within Class "A", to be assessed and levied against annually on an ad valorem basis.

Although argued by appellant that the practical and real determination of how lands are to be classed rests with the Secretary of Interior under the contract act, nevertheless, an examination of pertinent sections of the act does not support this assertion. While it is true that under subparagraph 2 of section 6 of the contract act (L. 1939, c. 148) the Secretary of Interior appears to have authority to designate the irrigable lands within a contracting district under a reclamation contract, it is the Board of Directors who, within 30 days after the Secretary has given public notice of his designation of irrigable lands, meet and adopt a resolution classifying all real property into Class "A" and Class "B" property "*giving due consideration* to such designation of irrigable lands as may have been made by the secretary of interior." (Emphasis ours.) The board is enjoined to commence proceedings immediately thereafter in the conservancy court to determine the validity of such classification as provided in section 20 of the act.

Turning to Section 20 of the act (1941 Comp., § 77-3120) we find the duty enjoined on the board to commence special proceedings to establish the due execu-

tion and validity of any reclamation contract that may have been entered into by the district and authorized as well (a mandatory duty where required by the act) to commence similar proceedings "for the judicial examination, approval and confirmation of any bond issue, assessment, resolution providing for apportionment of assessments to classes of property or *classifying property,* order, act, proceeding or contract of such district." (Emphasis ours.) As already indicated, section 6 of the act enjoins it as an absolute duty on the board to commence this proceeding forthwith following the board's adoption of a resolution classifying real property to test the validity thereof.

Subsequent sub-paragraphs of Section 20 make provision for the filing of a petition, fixing of a time for hearing of same and the publication of notice for four successive weeks in the English language in a newspaper of general circulation published in each county where any of the lands of the district lie and as well in Spanish in any county of the district where there is such a newspaper of general circulation. Any person interested in the district, or any of the phases mentioned including the classification of property, may appear and answer or demur. At such hearing the conservancy court will determine the validity of any classification madé as well as all other matters before the court. Provision is made for appeals to the Supreme Court of New Mexico of any final judgment entered in such special proceeding provided the same be taken within 20 days and perfected within 60 days after the granting of such appeal.

What has been said with reference to the action of the board in the matter of classification of lands applies in large measure to apportionment of assessments. It is true, as already pointed out by appellant, that under section 7 of the contract act (1941 Comp., § 77-3107), the action of the board of directors in determining and establishing an apportionment of the assessments as between Class "A" and Class "B" property is subject to the approval of the Secretary of Interior. Nevertheless, the action of the Secretary on such apportionment must, in turn, "be submitted to the conservancy court for judicial examination, approval and confirmation of such action as in section 20 hereof provided." In other words, in the special proceeding provided for in section 20 wherein practically every phase of the organization, classification, assessment and other matters touching the activities of the district are before the court, the question of the validity of the apportionment of assessments is under review and subject to the approval of the conservancy court. We see no unlawful delegation of legislative power. On the contrary the legislature seems to have been careful in providing ample safeguards to

the property owner for a hearing on any claim of injustice, discrimination or unfairness as the classification or assessment may affect his property.

The appellant argues as its Point VII that petitioners, the appellees, abused the true legislative purpose of the Conservancy Act by applying it to a factual situation never contemplated. We are reminded by counsel of a stipulation made at the opening of the trial, to-wit: "It is agreed between the parties that the petitioners do not claim benefits to the land by reason of Flood Control, or that it is intended to include lands of the Objectors for irrigation or drainage, but they claim the right to assess them to include the District on account of incidental benefits that will be derived, that is, benefits from an economic standpoint; and this related to the additional lands proposed to be included, what is now called the Hudson District."

It is pointed out that under 1941 Comp., § 77-2704, the conservancy court is authorized to establish a conservancy district for any or all of the several purposes enumerated in said section, including prevention of floods, regulating the flow of streams, drainage, irrigation, etc., but counsel argue, nevertheless, as follows: "The Objector urges that the use of a Conservancy District for the area covered by the Hudson Extension results in a confiscation of Objector's property; this for the reason that the Conservancy Act, considered as a whole and together with the Contract Act, contemplates the use of a Conservancy District in a situation where it is possible to provide other benefits to the property than may arise from irrigation. The Acts, by their titles and provisions, are designed to be used in a locality where there may be performed a combination of purposes; for example, in a situation such as exists in the area served by the Middle Rio Grande Conservancy District, where there are performed irrigation services and definite flood control activities. Such a factual situation is in direct contrast to that existing in the area proposed to be included in the Hudson Extension."

The foregoing is a fair summary of appellant's position and contentions under this point. It must be borne in mind that the Arch Hurley Conservancy District, rightly or wrongly, already has been organized and exists under and by virtue of the provisions of the Conservancy Act. We cannot in this proceeding undo what heretofore has been done in the matter of its corporate parentage. Nevertheless, counsel reminded us at the outset that Hudson Extension must stand "on its own legs," so to speak. Hence, yielding to this admonition, we are called upon to say whether a district whose sole purpose is irrigation, accomplishing only inevitable incidents otherwise, may organize under and enjoy the benefits of the Conservancy

Act. We think so and in our opinion that is exactly what is held in Cater v. Sunshine Valley Conservancy Dist., 33 N.M. 583, 274 P. 52. Relying upon that decision as a precedent, we must hold the trial court did not err in ruling against the appellant's claim in this connection. Indeed, it is doubtful whether the requested finding and conclusion pointed out as raising the matter below had the effect of actually directing the court's attention to the question now argued.

Two additional claims of error are argued which, since somewhat related, will be treated together. The one is that the ad valorem method of tax as applied to appellant's property as a measure of benefits, especially in view of the fact that none of it will or can be used for irrigation, amounts to a taking of its property without due process of law. The other is that there is no evidence of any real benefit to appellant's lands, such as there is, being too speculatory and fanciful to support a finding of benefits.

We take up first the question of the assessment and levy of an ad valorem tax in connection with a public improvement commonly and more often financed exclusively by special assessments laid in proportion to benefits. We start our consideration of the proposition with the understanding that if the legislature had created the district in the first instance, in the exercise of its discretion, it could have provided for a tax on all property within the district to pay for the costs and maintenance of the project in view of the public purpose involved. See In re Proposed Middle Rio Grande Conservancy District, 31 N.M. 188, 242 P. 683, and Patterick v. Carbon Water Conservancy Dist., supra. The power of the legislature to authorize an ad valorem tax for a public improvement has been too long and well established to be now open to question. Fallbrook Irrigation Dist. v. Bradley, supra; Memphis and Charleston Railway Co. v. Pace, 282 U.S. 241, 51 S.Ct. 108, 75 L.Ed. 315, 72 A.L.R. 1096, with annotation at 1103 under the subject: "Validity of Ad Valorem Tax for Highway Purposes without Attempt to Apportion on Basis of Benefits"; Patterick v. Carbon Water Conservancy Dist., supra.; People v. Lee, 72 Colo. 598, 213 P. 583; Smith v. Wilson, D.C., 13 F.2d 1007; Texas & P. Ry. Co. v. Ward County Irr. Dist. No. 1, 112 Tex. 593, 251 S.W. 212. The authorities mentioned abundantly sustain the right to lay an ad valorem tax on all real property in the district so long as the same is neither discriminatory nor confiscatory. In this connection it may be mentioned that all real property in the City of Tucumcari, as the trial court's findings disclose, is subject to an ad valorem tax on the same basis as is the real property of appellant in the Hudson Extension. This claim of error must be ruled against it.

Coming now to the strongly argued proposition that the benefits to be derived by appellant from the creation and operation of the district are too speculative and fanciful to afford support for a finding of benefits, we will quote the trial court's finding on this subject as follows: "5. That economists of the United States Bureau of Reclamation have made studies on estimates of the amount of freight which will be available for shipment in some manner and there has been no testimony introduced to contradict such estimates; however, I am impressed that such witnesses were rather optimistic, but I find it to be a fact that the reclamation of the lands within the proposed Extension will provide a substantial increase in the amount of business for the railroad as compared with that now originating there, but the court is unable to determine the amount of such business, the time when it will start moving in substantial quantities, or the revenue that will be derived therefrom by the Objector."

It is to be noted from the finding that the appellant offered no testimony whatever touching the question of these indirect benefits and the trial court was compelled to draw such inferences as it felt the testimony would warrant regarding same.

It is well established that in order to justify assessment of benefits to particular lands for public improvements, it is not essential that such benefits be direct or immediate. They may consist of gains to be reasonably expected as a result of the improvement. Kansas City Southern R. Co. v. Road Improvement Dist. No. 3, 266 U.S. 379, 45 S.Ct. 136, 69 L.Ed. 335; Texas & P. Ry. Co. v. Ward County Irr. Dist. No. 1, supra. Speaking on this subject in the Kansas City Southern R. Co. case, supra, Mr. Justice VanDevanter said [266 U.S. 379, 45 S.Ct. 139]: "To justify an assessment of benefits to particular lands it is not essential that the benefits be direct or immediate. Valley Farms Co. v. Westchester County, supra, [261 U.S. 155, 43 S.Ct. 261, 67 L.Ed. 585]. But it is essential that they have a better basis than mere speculation or conjecture. Kansas City Southern R. Co. v. Road Improvement Dist. No. 6, supra, [256 U.S. 658, 41 S.Ct. 604, 65 L.Ed. 1151]. In the case of railway property they may consist of gains from increased traffic, reasonably expected to result from the improvement. Thomas v. Kansas City Southern R. Co., supra, [261 U.S. 481, 43 S.Ct. 440, 67 L.Ed. 758]; Branson v. Bush, [251 U.S. 182, 189, 40 S.Ct. 113, 64 L.Ed. 215, 220]."

The Supreme Court of Texas through the Commission of Appeals in Texas & P. R. Co. v. Ward County Irr. Dist. No. 1 [112 Tex. 593, 251 S.W. 214], supra, said: "In other cases the Legislature has left the matter of assessments of benefits to be

determined by some board or court under designated procedure. In the cases where the Legislature has itself fixed the amount of the benefits or an arbitrary method of ascertaining them, it is quite generally held that the action of the Legislature in this regard is not subject to review by the courts. Manifestly the effect of any particular improvement or public work upon any particular property is incapable of mathematical calculation or demonstration. There are so many elements which enter into the value of property, especially of real estate, that it is impossible to ascertain what effect any particular undertaking may have upon it. It may be fairly assumed that the natural effect of any public work is to enhance in some degree the value of property within reasonable proximity to the improvement. The possible and probable effect as to enhancement in value upon each particular piece of property is subject to as great a variety of opinions as there are varieties in location, distance, use, etc., as applied to each individual piece of property. The Legislature is as well qualified as any body or court to determine these matters, and the courts have wisely decreed that when it has determined them, its enactments are final, 'unless the method prescribed is one so arbitrary and unfair as to amount to an abuse of legislative power.' [Dallas County] Levee District [No. 2] v. Looney, above [109 Tex. 326, 207 S.W. 310]."

While, as pointed out by appellant's counsel, the testimony touching likely benefits was of necessity predictory in character, it was all the court had to go on and we are unable to say it does not support the trial court's finding on this issue. Query: Was not the burden on appellant, in any event, to overcome the presumption attending the board's determination, under legislative authorization, of benefits? See Kansas City Southern R. Co. v. Road Improvement Dist. No. 3, supra.

Before closing notice should be taken of the claim made by strong intimation and innuendo, if not directly charged, that the Hudson Extension was set up and agreed upon in order to capture for assessment and levy some highly assessed right of way belonging to the appellant. In this connection, it is pointed out that the assessed value of its property within the extension, although representing only a small fraction of the area involved, carries an assessed value five times greater than that of all other real property within the extension, namely, $250,000 as compared to $50,000 for all other real property.

The record does not support the implication. It appears therefrom that engineers of the Bureau of Reclamation made a study of three separate areas upon which to place the excess of water that would exist after appropriations on all lands suitable for irrigation within the boundaries of the existing conservancy district. Their relative

estimate found that the Plaza Larga Area would cost $64.32 per acre, the San Jon Area $90.34 per acre and the Hudson Area, representing the lands included in the Hudson Extension, would cost $39.81 per acre. The reason for agreeing upon it as the area of extension seems obvious.

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

It is so ordered.

BRICE, C. J., LUJAN, J., and A. W. MARSHALL and CHARLES H. FOWLER, District Judges, concur.

191 P.2d 350

STEVENS et al. v. FINCHER et al.

No. 5064.

Supreme Court of New Mexico.

March 15, 1948.

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

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

McGHEE, Justice.

The appellees obtained a decree quieting title to lots 3 to 10, inclusive, in block 51 of La Vista Addition to Hot Springs, New Mexico, based on a tax deed.

The attack of appellants on the tax deed was aptly summarized by the trial court as follows: (a) that the taxes against the property for 1938 were assessed against one F. N. Stevens, who appears to have

been a stranger to the title; (b) that the period of redemption had not expired when the tax deed to the state was made by the county treasurer; (c) that the deeds are invalid and void because based on a tax sale certificate which recites the date of sale as of December 4, 1939, when in fact the sale to the state could have been on December 8, 1939, only, wherefore said tax sale certificate also is void; (d) that the deeds are invalid and void because of the mistakes, errors, uncertainties and discrepancies appearing in the dates and recitals therein; (e) that the deeds and tax sale certificates are invalid, of no effect, and void for lack of a sufficient and proper description of the property to identify the same, or to point out information directly leading to the identification of the property, with the lands in question in this suit.

Property may be legally taxed in New Mexico whether listed in the name of the owner or one not connected with the title. Heron v. Ramsey, 45 N.M. 483, 117 P.2d 242.

The appellants introduced an abstract of the lots excluding the tax sale certificates and deeds which were introduced by appellees, which includes the dedication of the La Vista Addition to the then Village of Hot Springs, a plat said to accompany it (although it is not copied into the record), and the acceptance on the part of the municipality. This dedication gives the legal description of the addition. It was agreed at the trial that the trial court might and should inspect the records of the county clerk's office to determine the correct filing date of the tax sale certificate; and for other matters if deemed expedient; and that the court should assume and take judicial notice of the situation of the village, town or city of Hot Springs and the location of the school districts of Sierra County, especial reference being had to School District No. 6. Based upon the matters appearing in the abstract and the inspection of the records in the county clerk's office, plus the matters which it was agreed might be judicially noticed the court made its findings of fact of which we copy the following:

"5. The defendant Thomas B.Williams, M.D., claims title to said eight lots, Nos. 3, 4, 5, 6, 7, 8, 9, and 10, under and by virtue of a deed to him from the State Tax Commission of New Mexico, dated November 6, 1942, filed August 9, 1945, and recorded in Book Q, page 169, of said Warranty Deed Records (Abstract 18). Among other things this deed recites that the property therein was sold to the State for delinquent taxes as evidenced by tax sale certificate No. 1088 executed by the Treasurer of Sierra County on December 18, 1939; that more than two years had elapsed since the date of 'issuance and sale of said certificate;' that on December 8, *1942,* the County Treasurer executed and delivered to the State tax deed No. 696 covering said property and that said deed was recorded in

Book E, page 469, of Deed Records of said county; that the consideration for the deed to Williams was $15.00 received. The description of property set forth in the deed was: 'real estate, situate in the County of Sierra, State of New Mexico, to-wit: Lots 3 to 10 inclusive, La Vista, Block 51.'

"6. The tax sale certificate No. 1088 mentioned and referred to in the deed from the State Tax Commission to Williams was made December 18, 1939, by the County Treasurer of Sierra County, upon sale of the property for delinquent taxes for 1938 (Abstract 16). It is in the prescribed form and recites that the property 'was, on the 4th day of December, 1939, duly sold by me in the manner and form prescribed by law, for the delinquent taxes for the year 1938, * * * to State of New Mexico * * * said State of New Mexico being the best bidder therefor.' In said certificate the description of the property is written as:

" 'real estate in said county and state, to-wit:

" 'Lots 3 to 10 inc. La Vista Block 51,

" 'Valued at $24.

" 'Assessed to F. N. Stevens, S. D. No. 6.'

"7. The tax deed No. 696, from the Treasurer of Sierra County to the State of New Mexico, mentioned and referred to in the deed from State Tax Commission to Williams, bears date of December 8, 1942. It was filed January 12, *1942,* and recorded in Book E, page 469, of Quitclaim Deed Records of the County (Abstract 17). It recites that it is issued pursuant to the sale of the property for taxes for 1938 'held on the 4th day of December, 1939, and tax sale certificate No. 1088 therefor issued and dated the 18th day of December 1939, more than two years having elapsed since the date of the said tax sale certificate and property not having been redeemed.' Said tax deed No. 696 gives description of the property conveyed as: 'property heretofore assessed to F. N. Stevens, situated in School District No. 6 in the County of Sierra, State of New Mexico, to-wit: Lots 3 to 10 inclusive, La Vista, Block 51.'

"8. Examination made by Court and counsel together of the records of the County Clerk's office disclosed proof that the recording date of said tax deed No. 696 was January 12, 1942, as it purports to be. This was made clear by the filing and recording dates of the several instruments immediately preceding and following the record of said deed on consecutively numbered pages of the record book. The Court finds that the date of December 8, *1942,* written in said tax deed as the date of its issuance is erroneous; although the recitals in the deed of the Tax Commission to Williams referring to such tax deed show that such date was actually written therein. From the evidence and the recitals in the instruments and the circumstances of the case the Court finds that the date

year written in said tax deed as '1942' was a typographical error, and that the correct date which was intended to be written was December 8, 1941.

"9. Reference to calendar shows that the tax sale held in December, 1939, for delinquent taxes of 1938, commenced on December 4th and concluded on the 8th. December 8th was the day on which property not sold to others at such sale was struck off and sold to the State for such delinquent taxes, and was the only day of the sale on which sale to the State could be made. The sale was the regular tax sale held pursuant to statutory command and the time therefor was fixed by law. The reference to such sale as 'on the 4th day of December, 1939,' contained in the tax sale certificate No. 1088 and in the tax deed No. 696 (Abstract 16, 17), served only to identify it as the statutory tax sale of 1939, and did not shorten the taxpayer's period of redemption and did not adversely affect the taxpayer's interest or rights, in that the full period of redemption was allowed after the property was struck off and sold to the State on December 8, 1939, and no redemption was made or offered. The 8th day of December, 1941, on which the Treasurer executed the tax deed No. 696 to the State, was after expiration of the period of redemption from tax sales made to the State on the fifth day of the statutory tax sale of property for delinquent taxes for 1938, which commenced December 4 and continued daily until concluded on December 8, 1939.

"10. The Court takes notice of the fact and finds that School District No. 6 of Sierra County, New Mexico, was and is the municipal school district of the village, town or city of Hot Springs, Sierra County, New Mexico. La Vista Addition to the Village of Hot Springs, New Mexico, is an addition to such village, town or city, containing sixty-four blocks numbered 1 to 64 (Abstract 1), and in practice there can be no other addition of that name in Hot Springs. The deed from the State Tax Commission to Williams so mentions, refers to and recites from the tax sale certificate No. 1088 and tax deed No. 696 (which in turn refers to the certificate) as to charge the reader of said Williams deed with knowledge of the information furnished by said instruments and to make the same available to describe and identify the property conveyed. Thereby it fully appears that the property conveyed was 'Lots 3 to 10, inclusive, Block 51, La Vista, in School District No. 6 of Sierra County, New Mexico,' which is plainly to say 'Lots 3 to 10, inclusive, Block 51, La Vista, in Hot Springs, New Mexico,' which description and reference with common understanding leads directly and unerringly to the identical property in suit, to-wit, 'Lots 3 to 10, inclusive, Block 51, of La Vista Addition to the Village of Hot Springs, New Mexico.'"

In view of the findings of the trial court as to the correct dates of the instruments, it was correct in concluding that the two-year period of redemption had expired when the treasurer executed tax deed No. 696 to the State of New Mexico.

We are of the opinion that the description of the property set forth in the deed made by the State Tax Commission to Williams, considered with the information furnished through the recitals in the deed is sufficient to point out and identify the property, and does do so as set forth in the findings, in accordance with the rule announced in Heron v. Ramsey, supra.

The other questions raised by appellants are without merit.

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

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

191 P.2d 352

ADAMS et al. v. COX.

No. 5063.

Supreme Court of New Mexico.

March 15, 1948.

Frazier & Quantius, of Roswell, for appellants.

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

McGHEE, Justice.

The plaintiffs appeal from an order dismissing their amended complaint seeking damages for the claimed breach of a contract to sell them the Lighthouse Laundry and two lots in Roswell, New Mexico.

The amended complaint, omitting the formal parts, reads:

"1. That the parties hereto are all residents of Chaves County, New Mexico.

"2. That heretofore on January 11th, 1947, the parties hereto entered into a certain written contract covering the sale and purchase of the Lighthouse Laundry and equipment and the real estate where said Lighthouse Laundry is located in the City of Roswell, New Mexico, as will more fully appear from copy thereof attached hereto, made a part hereof and marked Exhibit 'A'. As part of the sale agreement, it was verbally agreed between the parties that the $12500.00 to be paid in cash upon completion of abstract title, etc., was to be raised in part by a first mortgage upon the property being purchased by plaintiffs from defendant, which mortgage was to be in the sum of $7500.00 and that defendant was to be secured by a second mortgage for the sum of $7500.00 upon said property, payable as provided in Exhibit 'A'; that plaintiffs purchased said property for operation as co-partners.

"3. That in pursuance of said agreement the parties hereto arranged for the Equitable Building & Loan Association of Roswell, New Mexico, to loan to plaintiffs the sum of $7500.00, to be secured by first mortgage upon the property being purchased, it being further arranged that Irene Adams would sell certain real estate for the sum of $5000.00, thus making a total of $12500.00 in cash to be paid to defendant, pursuant to the contract, and defendant would be secured by a second mortgage on the property for the balance of $7500.00, as agreed; that Irene Adams did sell her said property for $5000.00, and thereafter the parties hereto met in the office of the Equitable Building & Loan Association on or about January 16th, 1947, ready to close the transaction and fully perform under their contract, but defendant thereafter refused to comply with his contract and agreement to accept a second mortgage covering the sum of $7500.00, to be payable at the rate of $200.00 per month, with 6% interest; thus breaching the contract and agreement; that defendant thereafter and subsequent to said breach, proposed a new arrangement with plaintiffs whereby $12500.00 would be paid to him in cash, and the balance secured by a first mortgage in his favor, well knowing that plaintiffs could not meet such requirements, and plaintiffs could not, and did not, agree to such new proposal.

"4. That by the acts and conduct of defendant, aforesaid, he is estopped to dispute his agreement and contract with plaintiffs.

"5. That on and about January 11th, 1947, the property involved was reasonably worth the sum of $22500.00, and plaintiffs have been damaged in the sum of $2500.00 as the direct and proximate result of defendant's refusal to perform his said obligations.

"6. That the net income from the property being purchased on January 11th, 1947, and thereafter, was, and is, the sum of $1000.00 per month; that plaintiffs were ready, willing and able to comply with their purchase agreements, and take possession of the property on or about January 16th, 1947, and as the direct and proximate result of defendant's failure to perform his said obligations they have been damaged in the sum of $1000.00 per month beginning with January 16th, 1947.

"7. That plaintiffs incurred expense of $25.00 in order to procure the loan from the Equitable Building & Loan Association, and are proximately damaged in said sum by defendant's failure and refusal to perform."

Second Cause of Action

"1. She adopts Paragraphs 1, 2, 3 and 4 of the First Cause of Action, by reference as fully and effectively as if set forth in the second cause of action in full.

"2. That plaintiff, Irene Adams, borrowed the sum of $200.00 from the First National Bank of Roswell to make the escrow payment provided by the contract, and became obligated to pay interest at 8% per annum thereon from January 11th, 1947, to her damage in the sum of $4.00 due to defendant's failure to perform as aforesaid.

"3. That plaintiff, Irene Adams, in haste and sacrifice, sold property of the reasonable value of $6000.00 for the sum of $5000.00, in order to carry out her contract with defendant, and thereby sustained damages in the sum of $1000.00 as the direct and proximate result of defendant's refusal to perform as aforesaid; that defendant well knew that she was making such sale in order to raise the funds required by the purchase agreement."

Exhibit "A" (To Complaint)

Wayne Adams
Real Estate
Farms—Ranches—Homes
Roswell, New Mexico
Escrow Contract

"1. Contract Agreement—

I or we Virgil Adams hereby agree to purchase from P. H. Cox under the terms of this contract the following described property—Lighthouse Laundry with all equipment complete together with two city lots 100 x 168 ft.

"2. Down Payment $200.

"3. Total Payment $20000.

"4. Terms $12500. upon completion of abstract title, etc. balance paid at rate of $200. per month until paid in full.

"5. Interest rate 6%

"6. Taxes, Rent Etc. Bills paid up in full upon possession.

"7. Date of Possession Upon approval of abstract title & deed by purchasers.

"8. Real Estate Commission—Sellers agree to pay usual commission from earnest money or money derived from this sale.

"9. Mineral & Water Rights * * *

"10. Remarks * * *

	Seller /s/ Perry H. Cox
Buyer /s/ Irene Adams	Buyer /s/ Virgil Adams
	Escrow Agent /s/ Wayne Adams
Buyer /s/ Bill Adams	Date Jan. 11, 1947"

The motion to dismiss states the following grounds:

Motion to Dismiss

"(1) That said complaint, together with the exhibit attached thereto, shows on its face that the plaintiffs have not set out facts sufficient to entitle them to any relief as against this defendant.

"(2) That said complaint seeks to set up a breach of a verbal agreement to sell real estate, on which complaint the plaintiffs are entitled to no relief at law.

"(3) That there is a misjoinder of causes of action, one of which all three plaintiffs claim to have an interest and a common cause, as set forth in the first cause of action and in the second cause of action, in which only one of the plaintiffs have any right or claim as against this defendant, and, therefore, constituting a misjoinder of the parties plaintiff as to the second cause of action and a misjoinder of causes of action as to the entire Amended Complaint.

"(4) For the further reason that the purported written contract sued on is insufficient and does not contain the elements necessary and vital to a valid and enforceable contract, and, by reason thereof, no cause of action can be based thereon and same is unenforceable.

"(5) For the further reason that the plaintiffs wholly fail to set out any breach or violation of the written agreement in their amended complaint."

The order sustaining the motion to dismiss did not specify the paragraphs the court believed good, but from the briefs we take it the action was based on the matters hereafter discussed.

■ We begin our consideration of this case mindful of the rule in Ritter v. Albuquerque Gas & Electric Co., 47 N.M. 329, 142 P.2d 919, 153 A.L.R. 273, that a motion to dismiss is properly granted only when it appears that under no state of facts provable under the claim could plaintiffs recover or be entitled to relief.

■ Tested by this rule, we are of the opinion that the action of the court as to the second cause of action was correct. The appellants say nothing in its behalf in their briefs.

It is stated in the brief of appellee that the amended complaint fails to state a cause of action for the reasons:

(a) That the contract was partly in writing and partly oral, and that it is not alleged that there was any consideration for the making of the contract.

It is true that in Flores v. Baca, 25 N.M. 424, 184 P. 532, it is held that where parol evidence is required to complete the contract it is to be regarded as an oral or verbal contract, and that the pleader must allege a consideration in order to state a cause of action. That case, however, cannot control here for it is stated in Exhibit A that there was a down payment of $200.00. The appellee seeks to destroy that fact because of the allegation in the second cause of action that one of the appellants borrowed $200.00 to put in escrow, and he says it is thus established that such payment was not made. In the event of a variance between the allegations and the exhibits the latter control. Titsworth Co. v. Analla, 25 N.M. 628, 186 P. 1079; Farmers' Cotton Finance Corporation v. Green, 35 N.M. 84, 290 P. 739; Town of Farmington v. Mumma, 35 N.M. 114, 291 P. 290. This point is ruled against the appellee.

Is the written memorandum, Exhibit A, sufficient under the Statute of Frauds?

A written memorandum must contain a sufficient description of the land, or furnish the means or data within itself which points to evidence that will identify it. Pitek v. McGuire, et al., 51 N.M. 364, 184 P.2d 647, 655, and cases therein cited.

The principal attack upon the memorandum by the appellee is the claimed insufficiency of the description "Lighthouse Laundry with all equipment complete, together with two city lots 100 by 168 feet." The memorandum does not state by its terms the city, county or state where the property is located.

The annotator in 68 A.L.R. 59 says: "Whenever land is described by a particular name or designation, such as 'home farm,' 'mill spot,' 'the A. Place,' etc., it appears to be uniformly held that parol evidence is admissible to show what land is so designated, and thus to identify the tract intended to be conveyed."

The case of Krueger v. W. K. Ewing Co., Tex.Civ.App., 139 S.W.2d 836, involved a contract of sale of property described only as "San Gabriel Apartments" and cites and quotes from a number of cases involving contracts for the sale of lands by name instead of description, and also covers the omission of city, county and state. We copy the following from page 839 of 139 S.W.2d.

"It is an obvious principle that a grant must describe the land to be conveyed, and the subject granted must be identified by the description given in the instrument itself,

or by other writings referred to. Smith v. Sorelle, 126 Tex. 353, 87 S.W.2d 703, 705; Francis v. Thomas, 129 Tex. 579, 106 S.W. 2d 257; Smith v. Griffin, 131 Tex. 509, 116 S.W.2d 1064. The above cases are examples of contracts where parties sought to describe the property by lot and block, numbers of acres, metes and bounds or boundaries, but there was not sufficient description in the contract to distinguish the property by extrinsic evidence from other real estate. But a contract, we think, may also sufficiently describe property by its common or particular name by which it is known in the locality where situated. 25 Ruling Case Law, p. 654; 18 Corpus Juris, p. 181, where it is said: 'The office of a description is not to identify the land, but to afford the means of identification, and when this is done, it is sufficient. Generally, therefore, any description is sufficient by which the identity of the premises can be established, or which furnishes the means of identification. A conveyance is also good if the description can be made certain within the terms of the instrument.'

"This court applied the above rule in the case of Crawford v. El Paso Land Improvement Company, Tex.Civ.App., 201 S. W. 233, where the contract was to convey the Angelus Hotel. See also Cunyus v. Hooks Lumber Co., 20 Tex.Civ.App. 290, 48 S.W. 1106, where the land described was 'Vanmeter Survey,' and no town, county or state was included in the description. It was held a sufficient description under the statute of frauds (Vernon's Ann.Civ.St. art. 3995). Dyer v. Winston, 33 Tex.Civ. App. 412, 77 S.W. 227, where the land was described as the 'Triangle or Cutoff pasture'; Bates v. Harris, 144 Ky. 399, 138 S.W. 276, 36 L.R.A.,N.S., 154; Henry v. Black, 210 Pa. 245, 59 A. 1070, 105 Am.St. Rep. 802, land described 'Hotel Dubuque,' suit specific performance, description held sufficient.

"From the date line of 'San Antonio, Texas,' it may be presumed that the property was located in San Antonio, Texas. Taylor v. Lester, Tex.Civ.App., 12 S.W 2d 1097; Easterling v. Simmons, Tex.Civ. App., 293 S.W. 690, writ of error refused, the deed did not state the city, county or state where the land was located. See also Sanderson v. Sanderson, Tex.Civ.App., 82 S.W.2d 1008; Petty v. Wilkins, Tex.Civ. App., 190 S.W. 531."

The case of Armijo v. New Mexico Town Co., 3 N.M. (Gild.) 427, 5 P. 709, 711, involved a deed in which the property was described as " 'A tract or parcel of land situated and being in the county of Bernalillo, Territory of New Mexico, known as the place where Jesus Maria Martin resided, being one hundred and thirty-seven yards, from north to south, wide, containing about ——— acres, bounded on the south by the lands of Christian Armijo, and on the north by the lands of M. Lopez.' "

The territorial court held that the deed was not void, that parol evidence was admissible to identify the premises in dispute and connect them with the deed, saying that the parol evidence identifies the subject upon which the deed operates, and then the estate passes by force of the deed.

In Garcia v. Pineda, 33 N.M. 651, 275 P. 370, we, on the authority of the Armijo case, supra, held the following description was sufficient to permit of identification of land and the passing of title: "'A small sod house composed of two small rooms and a small hallway, which have been erected upon the locality which corresponds with property of Antonio Silva, and which house I have sold together with the little courtyard (chorreras) as specified in this present document. First, on the south side a courtyard of ten varas; on the east seven and a half varas; on the north three varas; and west to the line which is the old public wagon road.'"

From the date line of Roswell, New Mexico, in the written memorandum, it may be presumed that the property was located in Roswell, New Mexico. Krueger v. W. K. Ewing Co., supra, and cases therein cited. We may also presume that the two city lots are the ones on which the laundry is situated or a part of the laundry premises. If not, then of course appellants' cause of action must fail as the sales contract was an entire one and not for just a part of the property.

This point is also ruled against the appellee.

Was the failure of the appellants to tender the cash payment of $12,500 as called for by the memorandum, Exhibit "A", excused by the refusal of the appellee to allow the property to be mortgaged for $7,500 as set out in paragraph 3 of the amended complaint?

The written memorandum states that $12,500 was to be paid in cash and the remainder in monthly installments of $200 and says nothing about security, while the appellants plead that it was orally agreed that the appellee would take a second mortgage for the balance and that he had verbally agreed that the property might have a first mortgage put on it to secure the Equitable Building & Loan Association for $7,500 of the cash payment. Much is said in the briefs as to whether this claimed oral agreement could be shown, but we will not decide this point. If such evidence is not admissible and the written memorandum is to control, then the appellee could not claim security for the deferred payments, nor could he object to a mortgage of the property by the appellants.

We think that the following from 3 Williston on Contracts, Rev.Ed., Sec. 881, is applicable to the facts as pleaded in this case: "It must generally be true that if one party to a contract is unable to perform unless he first receives performance from the other party which, by the terms of the

contract, is not due until the same time that his own performance is due, he cannot recover, and if he has indicated his inability to the other side, will be liable himself without the necessity of a tender. This is more clearly true when the inability relates to a performance to be rendered prior to the counter-performance. Where, however, the respective obligations are concurrent other considerations may enter. * * * All that should be necessary for the plaintiff's case is to prove that he would have been able to carry through the transaction concurrently with the defendant. If one who has contracted to buy land has but half the agreed price, but can make arrangements to borrow the remainder on the security of the land to be conveyed, there is no practical difficulty in carrying out the transaction at one instant. *The mortgage can be drawn from the buyer to the lender before the land is conveyed; then if the buyer and seller and lender meet at the same place, the seller can be paid his money while simultaneously he delivers a deed to the buyer, and the buyer delivers a mortgage to the lender.* In the same way if the buyer's money is needed to free the title which the seller must offer, a simultaneous execution of the transaction is possible if the person holding the title or encumbrance is willing to aid the seller in carrying out the bargain, and this should be held to be sufficient. The question should be dealt with purely as one of fact. Could the plaintiff have performed concurrently with the defendant? The mere fact that the plaintiff needed the assistance of a third person to enable him to do this is not proof that he could not do it. * * *" (Our emphasis.)

One of the cases cited in support of the above quoted text is Kadow v. Cronin, 97 N.J.L. 301, 116 A. 427, 428, and it strongly supports the position of appellants. It states, among other things: "What each party is entitled to is that the other shall perform at the same instant of time that he does, and in contemplation of law that is exactly what takes place at every real estate settlement, although in fact the details of the settlement may occupy one or more hours or even days in the complete performance. This is the theory upon which all so-called 'three-cornered' settlements rest, and it is sound in principle as well as essential in practice."

This point is likewise ruled against the appellee.

[redacted] Misjoinder is not grounds for dismissal. Rule 21, 1941 Comp. § 19-101(21).

The judgment will be reversed as to the first cause of action and affirmed as to the second cause of action, and the case remanded to the district court for further proceedings in accordance with the views herein expressed, and It Is So Ordered.

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

191 P.2d 716

ANDRIOLA v. MILLIGAN.

No. 5059.

Supreme Court of New Mexico.

March 25, 1948.

Rueckhaus & Watkins and Stanley W. P. Miller, all of Albuquerque, for appellant.

M. Ralph Brown, of Albuquerque, for appellee.

LUJAN, Justice.

The plaintiff brought this action to recover damages for the breach of an agreement to dig a water well. The trial was to the court without a jury and resulted in a judgment in favor of the plaintiff for $3,825.00.

From the judgment entered for this sum, defendant appeals.

We shall refer to the parties as they were designated below; the plaintiff, John Andriola, being the appellee here, and the defendant, Allen H. Milligan, being the appellant.

The parties entered into the following written agreement:

"I, Allen H. Milligan, the party of the first part agrees to set up and deepen a well for the party of the second part, John Andriola, one hundred feet (100) or less from the present depth of approximately 420 feet, if sufficient water is encountered for the sum of $500.00. If the party of the first part has to exceed the 100 additional feet, the party of the second part agrees to pay four (4) dollars per foot until sufficient water is encountered or not to exceed the overall depth of 700 feet. The party of the second part agrees to furnish all necessary casing. The party of the first part agrees to install casing in well and if there are two strings used, to pull one string of casing if the casing isn't stuck. But if there is only one string of casing used and the party of the second part decides to abandon well, the party of the first part agrees to pull casing for the sum of five dollars ($5.00) per hour. The party of the first part agrees to install pump, pipe and sucker rod for the sum of five dollars ($5.00) per hour. The party of the second part agrees to pay cash in full upon completion of the well."

W. A. Rockwell, under the supervision of the defendant, Allen H. Milligan, commenced work on the project in March, 1947. There seems to have been no serious trouble in running the casing until a depth of 583 feet was reached, when it hung. To this depth five inch casing was used. Drilling continued below the casing for 100 feet where some water was found. Then without anchoring or securing the string of casing in any way, the driller struck the casing with such force that it dropped to the bottom of the hole. As a result of such drop the casing was telescoped and crimped in a "V" shape. The defendant then inserted four inch casing in an effort to drill deeper, but many difficulties were experienced which prevented finishing the well. The work continued under the supervision of Milligan until some time in September, 1947, when the job was abandoned. In the Fall of 1947, one Van R. Turner, an experienced well driller, was employed by the plaintiff to dig a new well, approximately 225 feet from the abandoned one. Water was encountered at a depth of 678 feet with a continuous flow at the rate of from six to seven gallons per minute. The cost to plaintiff for this new project was $3,825.00.

Under point one, he argues that there is no competent evidence in the record to support the court's findings of fact. The find-

ings which the defendant complains of now are Nos. 5 and 6, and are as follows:

"No. 5. That plaintiff performed his part under said agreement but the defendant breached said agreement in that he did not drill said well in a good and workman like manner, but drilled it in a negligent and incompetent manner.

"No. 6. That the defendant's incompetence and negligence and improper drilling methods resulted in the crumping and crumbling of the casing so that when water was reached it was impossible to get proper tools through the hole to clean it in case of sanding."

There is a conflict in the evidence as to whether the proper methods were used by the defendant in drilling the well and in setting the casing. The trial court accepted the evidence of the plaintiff's witnesses upon these questions and as it is substantial the findings will not be set aside or disturbed by this court. The defendant not only failed to complete the well to a lower depth than 683 feet, but he left crumbled and telescoped casing in the hole, in such a manner as to prevent the plaintiff from drilling to a lower depth, or at all, for the purpose of developing water. Regardless of any question of negligence, defendant's inability to complete the well to a depth of 700 feet, or until sufficient water was encountered prior to reaching that depth, was due to his own operations and not to any fault of plaintiff. Where a person is employed in work of skill, the employer buys both his labor and his judgment; he ought not to undertake the work if he cannot succeed, and he should know whether it will or not. See Chico Well Drilling Co. v. Givens, 206 Cal. 468, 274 P. 966; Orr v. Forde, 101 Cal.App. 694, 282 P. 429; Jarrard v. Hill, 14 Ky.Law Rep. 575; Turner v. Hartsell, 4 Ala.App. 607, 58 So. 950; White v. Hulls, 59 Mont. 98, 195 P. 850; Blackburn v. Texarkana Gas & Electric Co., 102 Ark. 152, 143 S.W. 588; Jackson v. Creswell, 94 Iowa 713, 61 N.W. 383; Genni v. Hahn, 82 Wis. 90, 92, 51 N.W. 1096; and Spear v. Snider, 29 Minn. 463, 13 N.W. 910.

It is next urged that plaintiff did not give the defendant notice of the alleged defects in the well until some time after he had employed another driller, and that defendant did not therefore have an opportunity to remedy the defects. This argument is without merit. The defendant's own testimony shows that when he removed his rig from the well he knew that he had left telescoped and crumbled casing in the well which he was unable to pull.

Lastly, it is contended by the defendant that the court employed a wrong theory in arriving at the amount of damages assessed against him. The court specifically found that defendant breached his contract. We concur with the trial court's findings thus far. But in determining the damages to be awarded plaintiff the trial

court erroneously included $463.00, the aggregate of sums expended by him after the defendant had abandoned the well, making the correct amount due $3,362.00.

That is what the hole in the ground cost him up to the time defendant left it. It may not be worth anything, and may not have been, had it been completed to the depth of 700 feet. But manifestly, if it was worthless as a water producing well at 683 feet, that is not evidence that at 700 feet it would still not produce the necessary amount of water. Indeed, as a venture it may reasonably be said that, in one sense, it was worth up to that point what it had cost, in view of the agreement which recited "until sufficient water is encountered or not to exceed the overall depth of 700 feet." If it had been left so that it could have been utilized for drilling deeper, its worth for that purpose could have been enjoyed by plaintiff and he probably would have been liable for the work up to that point, but it was not so left. It was totally destroyed, as much so as if it had never been sunk at all. Therefore, we think the plaintiff was at the very least entitled to recover what he had expended for labor and material, plus the cost of the old hole, up to the time it was abandoned by the defendant. Ranger Cisco Oil Co. v. Consolidated Oil Co., Tex.Civ.App., 239 S.W. 648; Western Surety Co. v. City of Devils Lake, 8 Cir., 58 F.2d 161; Henry Oil Co. v. Head, Tex.Civ.App., 163 S.W. 311; and Henderson v. Foster, 232 Ky. 519, 23 S.W.2d 917.

For the error committed the judgment is set aside and a new trial ordered unless the plaintiff within ten days files a remittitur of $463.00 of the amount of the judgment rendered. If such a remittitur is filed, the judgment shall thereupon stand affirmed as to the residue. And it is so ordered.

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

191 P.2d 993

MILLER v. PHŒNIX ASSUR. CO., LIMITED, OF LONDON, et al.

No. 5027.

Supreme Court of New Mexico.

March 3, 1948.

Rehearing Denied April 23, 1948.

W. C. Whatley and Thomas K. Campbell, both of Las Cruces, for appellants.

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

COMPTON, Justice.

Appellee, G. O. Miller, instituted this suit to recover on two fire insurance policies issued by appellants covering building, contents, merchandise and equipment.

Answer was filed; liability was denied, and as an affirmative defense, appellants alleged that liability under the policy was voided on account (a) that appellee did not own the ground upon which the building was located, (b) that he did not make an inventory each twelve months, etc., (c) that proof of loss was not rendered and (d) that suit for recovery under the policy was not instituted within the twelve months next after the loss. The case was tried to the court without a jury and from an adverse judgment, appellants bring this appeal.

The matters of the affirmative defense are admitted; but appellee contends that appellants, by acts and conduct, waived these requirements, consequently, are estopped from asserting them as a defense.

It is shown in evidence that Mrs. Floyd Hackler, owner of the ground upon which the building in question was situated, leased the premises in 1934 to H. L. Chapman. The lease provided that all improvements placed upon the premises by lessee, at its expiration, might be removed. Chapman constructed an addition in such a manner as to become a part of the building known as the Rock Front Bar. In September, 1942, Chapman assigned the lease to J. C. Moon, the assignee, purchasing it for himself and appellee Miller. Thereafter, and prior to the time the policies sued on were issued, appellee acquired the lease and, at the time of the fire, was the absolute owner. Previously, for a period of several years, the interest of lessees in the building, had been insured by appellants. In 1943, without an application therefor, appellants renewed the policies covering the interest of appellee in the building. Appellee made no representations concerning the title except to tell appellants to insure his interest in the building. He never saw the policies nor knew their contents until they were delivered to him.

The Fireman's Fund policy was annual, with paid up premium. The Phoenix Assurance Company policy was for the term of three years. By agreement of the parties, appellee paid 40% of the premium and gave his note for the balance, payable to appellants' agent in equal annual instalments, one and two years after date. The agent, after deducting his commissions, remitted the premiums in full to appellants. The

agent then financed the immediate payment of the premium note through First Bancredit Corporation and thereby reimbursed himself.

The building and contents were destroyed by fire on April 2, 1944. Immediately thereafter appellants, being informed of the loss, caused an adjuster to negotiate with appellee. A non-waiver agreement was signed by them. The adjuster was then informed of appellee's title, his interest in the building and was furnished lists of equipment and invoices and other available information. The adjuster, not satisfied with appellee's claim, and subsequent to the time within which appellee was required to render proofs of loss, put appellee to the expense of furnishing certified copies of invoices. On September 13, 1944, he was required to travel from his home in Alamogordo, to Las Cruces, New Mexico to submit to an examination under oath as to his interest in the building, the cause and extent of the loss. We quote, in part, from that proceeding:

"Q. Would you have any objection to producing copies of your income tax reports showing that you had, as a matter of fact returned the income from this Rock Front Bar after Bogart had taken over? A. I don't think so.

"Q. *And you will do that whenever called on?* A. I think so.

"Q. Would you have any objection to the Internal Revenue Department of the State of New Mexico—the Sales Tax Division—*furnishing us* with copies of your sales tax reports made on the Rock Front after Doc Bogart had taken over? A. I don't think so.

"Q. Do you now consent that *we may procure from the Sales Tax Division* of the Bureau of Revenue, copies of the sales tax reports made on the Rock Front Bar for the period after Bogart took over? A. As far as I am concerned, Mr. Benson Newell is handling this.

"Q. If Mr. Newell has no objection to the Sales Tax reports *being furnished us,* you yourself will have no objection? A. If he sees fit." (Emphasis ours)

Thereafter, on October 4, 1944, by joint letter, appellee and his attorney granted appellants the authority to procure the requested records from the Bureau of Revenue. It is also shown in evidence that after demand for payment under the policies had been made, appellants retained the premiums.

The single question presented for our determination is whether, under the Doctrine of Waiver and Estoppel, appellants, by their acts and conduct, are precluded from relying upon their affirmative defense.

Waiver is the intentional abandonment or relinquishment of a known right. Smith v. New York Life Insurance Company, 26 N.M. 408, 193 P. 67. Estoppel

is the preclusion, by acts or conduct, from asserting a right which might otherwise have existed, to the detriment and prejudice of another, who in reliance on such acts and conduct, has acted thereon. Tucker v. Brown, 20 Wash.2d 740, 150 P.2d 604.

Where ownership is material to the risk such ownership must be correctly stated and as a rule the policy will be void if the subject of the insurance is on grounds not owned in fee. But this rule is modified, and we think properly so, in those cases where the interest of the insured is disclosed. Stout v. City Fire Insurance Company of New Haven, 12 Iowa 371, 79 Am. Dec. 539; Dooly v. Hanover Fire Insurance Company, 16 Wash. 155, 47 P. 507, 58 Am.St.Rep. 26. And the rule is definitely repudiated in those cases where, as here, no application was made therefor. German Insurance and Savings Inst. v. Kline, 44 Neb. 395, 62 N.W. 857; Burrows v. McCalley, 17 Wash. 269, 49 P. 508. The rule, as generally construed, means that disclosure of title, though not full, is sufficient if such disclosure is sufficiently definite to put the insurer on inquiry. Phenix Insurance Co. v. Stocks, 149 Ill. 319, 36 N.E. 408; Fame Insurance Company v. Mann, 4 Ill.App. 485; Miotke v. Milwaukee Mechanics' Insurance Company, 113 Mich. 166, 71 N.W. 463; McCoy v. Iowa State Insurance Company, 107 Iowa 80, 77 N.W. 529. Cf. Dearborn v. Niagara Fire Insurance Company, 17 N.M. 223, 125 P. 606; Smith v. New York Life Insurance Company, supra.

As has been seen, the loss occurred on April 2, 1944. Appellants have retained the premiums but did not deny liability until after contractual period of limitation had expired. They failed to refund or tender unearned premiums in their answer or at the trial. Consequently, the case does not fall within the rule announced in the well recognized case of Goorberg v. Western Insurance Co., 150 Cal. 510, 89 P. 130, 10 L.R.A.,N.S., 876. 119 Am.St.Rep. 246, 11 Ann.Cas. 801. Waiver may arise from the retention of benefits as where an insurer accepts or retains premiums after demand for payment of the loss. It is then estopped to deny liability. McConnell v. Southern States Life Insurance Company, 5 Cir., 31 F.2d 715; Insurance Company of North America v. McDowell, 50 Ill. 120, 99 Am.Dec. 497; Esch v. Holmes Insurance Company, 78 Iowa 334, 43 N.W. 229, 16 Am.St.Rep. 443. And waiver may also arise by putting the insured to trouble and expense, and this may take the form of an examination of the insured. People's Fire Insurance Co. v. Pulver, 127 Ill. 246, 20 N.E. 18; Wicking v. Citizens' Mutual Fire Insurance Co., 118 Mich. 640, 77 N.W. 275.

"Generally an insurer is precluded from asserting a forfeiture where, after acquiring knowledge of facts constituting a

breach of condition it retains the unearned portion of the premium, or fails to tender it back with reasonable promptness. * * * An insurer will not be permitted to retain unearned premiums paid and still deny liability." 16 Appleman, Insurance Law and Practice, § 9303.

To the same effect, Washington National Insurance Co. v. Scott, 231 Ala. 131, 164 So. 303; Catholic Order of Foresters v. Collins, 51 Ind.App. 285, 99 N.E. 745; Horswill v. North Dakota Mutual Fire Insurance Company, 45 N.D. 600, 178 N.W. 798; German Insurance Company v. Gibson, 53 Ark. 494, 14 S.W. 672.

Subsequent to the examination, nowhere does the record show that appellants called on appellee to produce copies of state income tax reports or other records tending to establish the loss, nor does it show that appellants made any efforts to obtain from the Bureau of Revenue copies of sales tax reports. The failure to request these records, meanwhile retaining premiums, may well have caused appellee reasonably to believe that appellants waived compliance with policy provisions now relied on to defeat recovery, or have given appellee grounds reasonably to believe that compliance therewith would not be exacted. Friedberg v. Insurance Co. of North America, 257 Mich. 291, 241 N.W. 183.

A careful consideration of the evidence is convincing that the acts and conduct of appellants induced appellee to delay action beyond the contractual period within which suit may be brought under the policy. A suit, pending negotiations to supply further evidence when notified, would have been inconsistent with the acts of the parties and their apparent intention. If appellants did not intend to waive policy restrictions relied on and negotiate further we fail to understand the effect of the examination. Mere silence, thereafter, was not enough to work a forfeiture of appellee's rights under the policy.

What has been said applies with equal force to the terms of the non-waiver agreement. A non-waiver agreement itself may be waived by conduct, the same as stipulations in the policies. Queen Insurance Co. v. Patterson Drug Co. 73 Fla. 665, 74 So. 807, L.R.A.1917D, 1091. The purpose of a non-waiver agreement is to expedite and facilitate an immediate investigation of the claim, the ascertainment of values and the loss or damage. It cannot be regarded that appellants were proceeding under the terms of the non-waiver agreement when they conducted the examination.

In our opinion, the trial court correctly concluded that appellants, by their acts and conduct, waived the stipulations urged as their affirmative defense, and being once waived, it was unnecessary that suit be instituted within twelve months next after the loss, or at any other time except within the statute of limitations. It follows

that appellants are estopped from asserting the affirmative defenses pleaded.

The judgment is affirmed and remanded, with directions to the trial court to reinstate the case upon its docket and enter judgment in favor of the appellee and against appellants and the surety on their supersedeas bond, and it is so ordered.

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

191 P.2d 996

BLACK HAWK CONSOL. MINES CO. v. GALLEGOS, Commissioner of Revenue.

No. 5044.

Supreme Court of New Mexico.

March 5, 1948.

Rehearing Denied April 23, 1948.

J. F. Woodbury and Ben Shantz, both of Silver City, for appellant.

C. C. McCulloh, Atty. Gen., William R. Federici, Asst. Atty. Gen., and Louis C. Lujan, of Albuquerque, for appellee.

LUJAN, Justice.

The appellant, as plaintiff, brought this action against appellee (Commissioner of Revenue), as defendant, under Chapter 94, Section 5, of the New Mexico Session Laws of 1939, 1941 Comp. Section 76-1428, to recover $704.05, money paid under protest, as a tax for the privilege of doing

a mining business within the State, as imposed by the provisions of 1941 Comp. Section 76-1404, subd. A.

Upon appellant's refusal to further plead within the time allowed it after sustaining a demurrer to its complaint, appellee moved the court for dismissal of the complaint. The motion was granted and final judgment entered accordingly. This is a direct appeal from the decree of dismissal.

The facts, which are admitted, necessary to be stated to understand the questions raised by appellant, by his assignments of error, may be briefly stated as follows: That the appellant is a foreign corporation, duly authorized to do business in the state; that it is and has been engaged in the business of operating a gold and silver mine in New Mexico; that prior to the month of July 1941, appellant did not report sales tax upon its mining operations as measured by its gross receipts, but following the effective date of the 1941 amendments to the Emergency School Tax Act, appellant paid its tax under protest for the months of July, August, September and October 1941; that all of the gold and silver produced by appellant during the period in question was sold to the United States mint at Denver, Colorado, in accordance with the provisions of the Gold Reserve Act of 1934, 48 Stat. 337, and the Emergency Farm Mortgage Act of 1933, 48 Stat. 41, and all amendments thereto and regulations issued under the provisions thereof; that the acts, which antedated the Emergency School Tax Act, provided that all gold produced should become on production subject to requisition by the United States, and the Executive was given power by Executive order to provide rules and regulations by which producers should sell their gold to the United States mint, under which power the Executive provided for the enforced sale of all newly mined gold to the United States mint.

The first point relied upon for reversal is that the lower court erred in granting appellee's motion to dismiss appellant's complaint for the reason that it is exempt from paying the tax in question by the express provisions of Section 76-1405 of 1941 Comp. which reads as follows:

"Exemption of governmental transactions—Constitutional exemptions.—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 thereunder; 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."

The contention is obviously wrong. At the time of the enactment of this law the question of whether deposits, or transfers, of gold and silver with the United States Mint were sales, was questioned. The early decisions of the Federal District Courts were to the effect that they were not sales, but administrative acts of the Government. Holland, Admr, Etc., v. Haile Gold Mines, 1942, 44 F.Supp. 641; Fox v. Summit King Mines, 1943, 48 F. Supp. 952. The legislature might well have been in doubt as to whether such a transaction constituted a sale and this doubt resolved into a legislative determination that such deposits "shall not be considered as sales to the government of the United States." Whether it is in fact a sale is beside the question. It is clear that the legislature intended to exclude transfers of gold and silver to the United States Mint, whether or not such transactions are sales, from the operation of the specific exemption otherwise provided in that section of the statute.

Notwithstanding such deposit results in a transfer of title, and is in effect a sale, Walling v. Haile Gold Mines, 4 Cir., 136 F.2d 102; Luke v. East Vulture Min. Co., 47 Ariz. 220, 54 P.2d 1002, the legislature intended to, and did, exclude it from the *statutory exemptions* of sales to the United States, even though the tax may be void for constitutional reasons, a question yet to be considered. The Arizona statute construed in the Luke case levied a privilege tax "upon the *gross proceeds of sales or gross income* from the business of 'mining * * * or producing * * * gold * * * .'" Laws Ariz.1935, c. 77, art. 2, § 2(c), par. 1. It exempted *all sales* to the United States, without exception, from the operation of the tax. As the tax was levied upon "sales," and the transfer to the United States was a sale, it logically followed that the gold in question was exempted by the statute from the tax, and the Arizona court so held.

The second assignment of error is as follows:

"The trial court erred in sustaining defendant's demurrer to plaintiff's complaint for the reason that sales by appellant to the United States Mint constitute transactions in interstate commerce which are exempt from taxation by the state under the Constitution of the United States and the express provisions of Section 76-1405 of the New Mexico Statutes, 1941, Annotated."

That the shipment of gold and silver to the United States Mint, across state lines to Denver, is interstate commerce, has been determined by a number of decisions of the Circuit Courts of Appeal of the United States in construing the Fair Labor

Standards Act, 29 U.S.C.A. § 201 et seq. (Canyon Corp. v. National Labor Relations Board, 8 Cir., 128 F.2d 953; Walling v. Haile Gold Mines, 4 Cir., 136 F.2d 102; Fox v. Summit King Mines, 9 Cir., 143 F.2d 926; and by one Federal District Court in Robertson v. Alaska Juneau Min. Co., D.C., 61 F.Supp. 265), but the early Federal District Court decisions were not in accord. Holland, Adm'r, v. Haile Gold Mines, supra; Fox v. Summit King Mines, supra.

Our research satisfies us that the question has not been decided by the Supreme Court of the United States, but we should, and will, accept as correct the Federal decisions here cited, to the effect that shipment of gold across state lines to a United States Mint is interstate commerce, under the Fair Labor Standards Act; and we believe it has application here. It does not follow, however, that the appellant is not liable to this tax.

It is provided by the Emergency School Tax statute:

"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:

"A. At the amount equal to the percentages hereinafter in this paragraph specified, of the gross receipts of the business of every person engaging or continuing in the business of mining, quarrying or extracting from the natural resources of this state, for sale, profit or commercial use, any oil, natural gas, carbon dioxide gas, potash, copper, gold, silver, limestone, sand, gravel, or other metalliferous or non-metalliferous mineral products or combination, or compound of mineral products, or felling or producing timber for sale, profit or commercial use; providing that coal shall not be subject to the provisions of this paragraph (A).

"Upon oil, natural gas, carbon dioxide gas and potash, at the rate of two (2) per cent of the gross receipts, and upon all other businesses specified in this paragraph, at the rate of one-half of one percent of the gross receipts.

"The measure of the tax imposed by this paragraph is the value of the entire production *in this state, regardless of the place of sale or the fact that delivery may be made to points outside of the state.*" (Our Emphasis.) Sec. 76-1404 N.M.Sts. 1941.

The following statutory definitions are explanatory of the nature of the tax:

"* * *

"(d) The term 'gross receipts' means the total receipts of a taxpayer received as compensation for personal or professional services for the exercise of which a privilege tax is imposed by this act, the total receipts of a taxpayer derived from trades, business, commerce, and the gross proceeds of sales as hereinafter defined, and without any deduction on account of losses or expenses of any kind.

* * * * * *

"(f) The term 'business' when used in this act shall include all activities or acts engaged in (personal, professional, and corporate) or caused to be engaged in with the object of gain, benefit or advantage either direct or indirect. * * *" Sec. 76-1402 N.M.Sts.1941.

The New Mexico Emergency School Tax is a tax upon the privilege of engaging or continuing in business in New Mexico. It is not limited to taxing those whose gross receipts are derived from sales of property; but it covers the entire range of business activities, with a few specific exceptions. It is sometimes measured by gross sales, but often by gross receipts for professional services, and from other businesses or occupations which are in no sense "sales" as that word is ordinarily used. It has been erroneously denominated a "sales tax" by this Court, more than once (Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416; Iden v. Bureau of Revenue, 43 N.M. 205, 89 P.2d 519), but as the Act provides, it is a privilege or excise tax; a tax upon the privilege of engaging in or continuing in business in this state.

In support of its contention that the tax in question is a "sales tax" the appellant cites Gallup American Coal Co. v. Beall, 39 N.M. 188, 43 P.2d 927, 928. The statute in question was amended materially by Sec. 1, Ch. 133 N.M.L.1941, since the decision in the Beall case. The present statute has not been before this court for construction. The amendment took from and added to the statute. Its substance was incorporated in the original statute, except the proviso with reference to the deposits of gold and silver with the United States Mint, which was added. A part of the original statute read, "* * * Nor shall such taxes apply to sales made to the Government of the United States or any of its departments or agencies * * * nor to any businesses or transactions exempted from taxation under the constitution of the United States * * *." Laws 1934, Sp.Sess. c. 7, § 202.

This court stated in the Gallup American Case:

"We think it quite unnecessary to conclude with exactitude just what is the object taxed. It may be that in the case of mining the excise is not strictly to be classified as a sales tax. In a large measure, however, it is sales that give birth

to the tax and sales that determine its amount. * * *

"The miner may produce indefinitely, storing his product, without becoming amenable to this taxation. When he sells a single ton there is an instantaneous application of this statute, according to a fixed rate applied to the price received. The total of a month's sales makes up the gross receipts. * * *

"This comprehensive revenue measure may in some of its incidents be a variance from the simple sales tax. When strict classification shall be called for, we may put it or parts of it in other category or categories. Its dominant feature, however, as to those who sell, is that for each sale there is an accession of revenue. Whether we consider the particular language used or the intent to be gathered from the nature of the tax, we conclude that sales to agencies of the United States are not to be included in the aggregate gross receipts upon which the tax is to be computed."

It is obvious that we did not determine the nature of this tax in that case. The Arizona court has said that it was not impressed with the reasons stated for our conclusion, though its conclusion—based on different reasons— was the same. Arizona State Tax Comm. v. Frank Harmonson Co., 63 Ariz. 452, 163 P.2d 667.

The price of gold is fixed under executive orders of the President and rules and regulations provided by the Gold Reserve Act of 1934. The only market for New Mexico gold is the United States Mint at Denver, Colorado. The appellant must ship its gold to that mint and accept the price paid therefor.

We have recently had occasion to consider this question (Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416), and after a review of recent decisions of the United States Supreme Court, concluded that no state can tax the gross receipts from interstate communications and transportation, or levy any other direct tax upon interstate commerce.

The fact that gross receipts from interstate commerce are factors used in calculating the tax does not necessarily label it a direct tax laid upon the sale, or upon interstate commerce. The Supreme Court of the United States has, in many cases, upheld such tax, as constitutional, in that it did not unduly burden interstate commerce, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L. Ed. 823, 115 A.L.R. 944; Wisconsin & M. R. Co. v. Powers, 191 U.S. 379, 24 S.Ct. 107, 48 L.Ed. 229; Maine v. Grand Truck R. Co., 142 U.S. 217, 12 S.Ct. 121, 163, 35 L.Ed. 994; Cudahy Packing Co. v. Minnesota, 246 U.S. 450, 38 S.Ct. 373, 62 L.Ed. 827; Postal Telegraph-Cable Co. v. Adams, 155 U.S. 688, 15 S.Ct. 360, 39 L.Ed. 311;

while in other cases it has been held unconstitutional because not fairly apportioned between local and interstate commerce, Meyer v. Wells Fargo & Co., 223 U.S. 298, 32 S.Ct. 218, 56 L.Ed. 445; Seelig v. Baldwin, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032, 101 A.L.R. 55, or in other respects unfair to interstate commerce.

If the tax in question is a direct tax on interstate commerce, it is void. On the other hand if it is not and it does not unduly burden interstate commerce, it is a valid exaction for the privilege of mining.

The tax, as the act states, is a privilege tax measured by the amount or volume of business done on account of the appellant's activities in the business of mining gold and silver. It is based upon the value of its entire production in this state, regardless of the place of sale or the fact that delivery may be made to points outside the state. The value as a basis for the tax, is the amount of gross receipts therefrom, whether or not the product is sold in New Mexico or elsewhere; and in this case it must be sold in Denver, Colorado. It is not a direct tax on the gold or its transportation in commerce. Its validity, therefore, depends upon whether it unduly burdens interstate commerce. It was stated in Western Live Stock v. Bureau of Revenue, supra [303 U.S. 250, 58 S.Ct. 549]:

"* * * 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, * * * Whether the tax was sustained as a fair means of measuring a local privilege or franchise * * *, or as a method of arriving at the fair measure of a tax substituted for local property taxes * * * 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."

The gold itself cannot be taxed, nor is its value affected by the tax. When it reaches its destination it is held by the United States as purchaser until accepted and paid for. It cannot be taxed for any purpose in Colorado, or in New Mexico, for that matter. The statute does not discriminate against interstate commerce; nor is there in it any of the vices that have condemned such statutes as violating the Commerce Clause. We are of the opinion that the facts of this case bring it within Oliver Iron Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526, 528, 67 L.Ed. 929, 930. The statute of Minnesota involved in that case provided that:

"Every person engaged in the business of mining or producing iron ore or other ores in this state shall pay to the state of Minnesota *an occupation tax* equal to 6 per cent. of the valuation of all ores mined or produced * * *." Laws Minn. 1921, c. 223, § 1.

In determining the value for taxation, the reasonable cost of separating the ore from the ore body, royalties paid, and a percentage of the ad valorem taxes levied against the mining property were substracted from the value of the ore, which was determined by the Minnesota Tax Commission, from the information which it was authorized to require, covering the activities of the company. In this case it was stated:

"We think the tax in its essence is what the act calls it,—an occupation tax. It is not laid on the land containing the ore, nor on the ore after removal, but on the business of mining the ore, which consists in severing it from its natural bed and bringing it to the surface where it can become an article of commerce and be utilized in the industrial arts. Mining is a well-recognized business wherein capital and labor are extensively employed. This is particularly true in Minnesota. Obviously a tax laid on those who are engaged in that business, and laid on them solely because they are so engaged, as is the case here, is an occupation tax. * * *

"The chief contention is that mining as conducted by the plaintiffs, if not actually a part of interstate commerce, is so closely connected therewith that to tax it is to burden or interfere with such commerce, which a state cannot do consistently with the commerce clause of the Constitution of the United States.

"* * * Practically all of their output is mined to fill existing contracts with consumers outside the state and passes at once into the channels of interstate commerce. * * * Steam shovels sever the ore from its natural bed and lift it directly into the cars. When loaded the cars are promptly returned to the railroad yards, where they are put into trains which start the ore on its interstate journey. The several steps follow in such succession that there is practical continuity of movement from the time the ore is severed from its natural bed. * * * plainly the facts do not support the contention. Mining is not interstate commerce, but like manufacturing, is a local business, subject to local regulation and taxation. * * * Its character in this regard is intrinsic, is not affected by the intended use or disposal of the product, is not controlled by contractual engagements, and persists even though the business be conducted in close connection with interstate commerce. * * *

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may

indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

This was a decision by a full court. In a dissenting opinion in a subsequent case (Pennsylvania v. West Virginia, 262 U.S.553, 43 S.Ct. 658, 666, 67 L.Ed. 1117, 32 A.L.R. 300) Mr. Justice Holmes said:

"In Oliver Iron Min. Co. v. Lord, May 7, 1923, 262 U.S. 172, ante, 43 S.Ct. 526, 67 L.Ed. [929], it was held that the state might levy an occupation tax upon the mining of iron ore equal to 6 per cent. of the value of the ore produced during the previous year, although substantially all the ore left the State and was put upon cars for that purpose by the same single movement by which it was severed from its bed. There could not be a case of a State's product more certainly destined to interstate commerce. It was put upon the cars by the same act by which it was produced. But as it was not yet in interstate commerce the tax was sustained."

This case was referred to with approval in the concurring opinion of Mr. Justice Frankfurter in Independent Warehouses Corp. v. Scheele, 331 U.S. 70, 67 S.Ct. 1062, 1073, in which he said:

"* * * And so, this Court has sustained a tax upon the mining of ore although substantially all the ore left the State and was put upon cars for that purpose by the same act by which it was produced. Oliver Iron Min. Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929, Mr. Justice Holmes joined in that opinion although 'There could not be a case of a State's product more certainly destined to interstate commerce.' "

This reference was to Pennsylvania v. West Virginia, supra, in which Mr. Justice Holmes dissented. The Minnesota tax was denominated an occupation tax, and the Supreme Court accepted this as correct. Some courts have distinguished between privilege and occupation taxes (Thompson v. Wiseman, 189 Ark. 852, 75 S.W.2d 393), but we are not able to find any substantial difference between the Minnesota and New Mexico taxes. Except in name the one difference is the fact that the taxable value in the Minnesota case is arrived at by deducting from the gross value the cost of separating the ore from the ore body, royalties and a percentage of the ad valorem taxes on the mining property. The value for taxing purposes is by no means the net income from mining, as there necessarily are many expenses incident to the business that are not deductible in determining taxable value. It is known before the ore is mined that it is destined for interstate commerce. It is taken from its natural bed and lifted into cars and started immediately into interstate commerce, a continuity of move-

ment from the lifting of the ore from its bed until it arrives in another state.

It is obvious that the only means of determining value for taxation is the sale price in interstate commerce less the items authorized to be deducted. It was the conclusion of the court that the tax was imposed with respect to the business of mining and that it was not an undue burden on interstate commerce.

The statement of the court could be applied to the New Mexico tax with perfect exactitude. The New Mexico tax is not laid on the land or the ore, nor on the ore after removal, nor on the gold after it is processed. In fact, the New Mexico mining is not so closely related to interstate commerce.

The mining business taxed, is a local business, subject to local regulation and taxation. Its character is not affected by the fact that the refined product is destined to be shipped to another state. The gold does not become an article of interstate commerce until after the mining is done, and the person engaged in it is subject to the tax. There is no discrimination against interstate commerce; and it cannot be taxed in another state.

The court's statement in the Minnesota case can be applied to this case without the change of a word and be exact, to-wit [262 U.S. 172, 43 S.Ct. 529]:

"The ore does not enter interstate commerce until after the mining is done, and the tax is imposed only in respect of the mining. No discrimination against interstate commerce is involved. The tax may indirectly and incidentally affect such commerce, just as any taxation of railroad and telegraph lines does, but this is not a forbidden burden or interference."

There is no competitive market for gold. It can be sold only to the United States or under its authority. The tax does not affect its cost to the United States or any authorized purchaser. The sole effect is to add to its production cost, as any tax on gold mines, or the business of mining gold would add to such cost.

We fail to see that this tax unduly affects interstate commerce.

It is said that under the doctrine of McCulloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, the tax is void because it is a tax upon the United States or its instrumentalities.

There are several reasons why this is not correct, the principal one being that no tax is laid upon the gold, nor is the United States affected by it. The cost to the United States is fixed, and the price not varied by state taxes or by any other incident. The appellant cites the case of Panhandle Oil Co. v. Mississippi, 277 U.S. 218, 48 S.Ct. 451, 72 L.Ed. 857, 56 A.L.R. 583. The question there decided was whether oil sold directly to the United States Navy for use in war was subject to a state tax

levied upon each gallon sold; and by a five to four decision (four of the Court's ablest justices, Holmes, Brandeis, Stone and McReynolds, dissented) it was held void. This was followed by Graves v. Texas Co., 298 U.S. 393, 56 S.Ct. 818, 822, 80 L.Ed. 1236, which held that a storage tax upon gasoline sold to the United States was void for the same reason. These cases are cited upon the assumption that the gold in question was taxed. As we have held that the tax was upon the privilege of mining, they have no application. In the Graves Case the reason for the ruling was stated as follows:

"The validity of the tax is to be determined by the practical effect of enforcement. To apply any other test of constitutionality would be to treat 'a prohibition, which is general, as if it were confined to a particular mode of doing the forbidden thing.' * * * 'It is immaterial that the seller and not the purchaser is required to report and make payment to the State. * * * The amount of money claimed by the State rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons.' "

The cost of gold to the United States is not affected by the tax. It should be stated, however, that these cases were in effect, if not directly, overruled in Alabama v. King & Boozer, 314 U.S. 1, 62 S. Ct. 43, 45, 86 L.Ed. 482.

The state of Alabama had levied a tax upon the gross retail sales of all tangible property. King & Boozer had contracted with the United States to construct certain buildings necessary for war purposes, at a cost plus consideration. They contracted for lumber to be used in the construction. It was contended that as the lumber was necessarily paid for by the United States that the sale could not be taxed. In holding that the tax was valid the court said:

"* * * So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added cost, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see Panhandle Oil Co. v. Miss., supra; Graves v. Texas Co., supra, we think it no longer tenable."

It is next asserted that the tax imposed constitutes a burden upon, and an interference with, the United States' authority to coin money, regulate the value thereof, etc.

We fail to understand just how this tax can possibly interfere in the manner sug-

gested. Gold itself cannot be taxed, and has not been. It must be delivered to the United States, or as by it directed, and at a specified price, irrespective of its cost to the producer. The various laws, orders and regulations copied in appellant's brief do not convince us that there is any merit in this contention. If it were true, gold mines are immune from ad valorem taxation and privilege and occupation taxes cannot be levied against the owners of such mines. In other words, that industry is immune from taxation.

The state has not been deprived of its power to tax gold mines or their owners by the Gold Reserve Act, or by Sec. 8 of Article I of the Constitution of the United States, as appellant asserts.

The last point relied on for reversal is that if appellant is subject to this tax, it should be at the rate of ¼ of 1% rather than at ½ of 1%, for the reason that the Legislature, in the passage of Senate Committee Substitute for Senate Bill No. 149, at the 1941 Session, violated the provisions of section 15 of article 4 of the Constitution of New Mexico, in that said original Senate Bill was so altered and amended by the passage of the committee substitute therefor as to change its original purpose.

The pertinent part of article 4, section 15 of the New Mexico Constitution reads as follows:

"No law shall be passed except by bill, and no bill shall be so altered or amended on its passage through either house as to change its original purpose. * * *"

Appellant does not cite any authority in support of this contention.

The purpose of Senate Bill No. 149, as introduced and finally passed, may be found in the title, which reads as follows:

"To provide for the raising of revenue for emergency school purposes by imposing an excise tax upon the engaging or continuing in business, profession, trades and callings for profit in this state; providing for the levy, assessment and collection of said tax; prohibiting direct advertisement of non-collection of receipts from rentals or leasing of tangible personal property; fixing status of sale to manufacturers and others; providing for resale certificates by purchasers under certain circumstances and providing penalties for misuse; providing for certain protest payments; limiting time within which re-audit may be made; giving power to administer oaths and compel testimony to the Commissioner of Revenue and the Director of the School Tax Division of the Bureau of Revenue; authorizing orders and rulings and amending Section 2 of Chapter 192 of the Session Laws of 1937, Section 3 of Chapter 192 of the Session Laws of 1937, Section 209 of Chapter 73 of the Session Laws of 1935, Section 211 of

Chapter 73 of the Session Laws of 1935, Section 313 of Chapter 73 of the Session Laws of 1935, and Section 319 of Chapter 73 of the Session Laws of 1935."

Senate Committee substitute for Senate Bill No. 149 states its purpose in exactly the same language as the original bill with the exception that certain additions were made and certain descriptive, but unnecessary, words were dropped from the title.

Many other states have identical provisions to that appearing in Article 4, Section 15, of our Constitution; and, while this specific provision of our Constitution has never been passed on by this court, it has been before the courts of many other states having similar provisions. The Supreme Court of Montana passed upon a similar constitutional provision in the case of State ex rel. Griffin v. Greene et al., reported in 104 Montana, 460, 67 P.2d 995, 997, 111 A.L.R. 770, and the court stated:

"As originally introduced, the body of the bill was identical with the bill as finally enacted, except, first, that, as originally introduced, the amount of the fee varied according to the population of the city in which the theater was operated and according to the number of theaters under the same general management, supervision, or ownership; second, as originally introduced, the bill provided that the fees 'shall be paid annually'; as finally passed, the same provision that the fees 'shall be paid annually' was still in the act, but immediately followed by a provision that they shall be paid quarterly. The body of the bill, as originally introduced, as well as that of the act as finally passed, deal with movie theaters. It is plain that the original purpose of the bill as introduced was to impose a license tax on moving picture theaters. That purpose was preserved and carried out in the bill as finally enacted. The amount of the tax and the time when payable is all that was changed in the bill as originally introduced. There was no departure from the prohibition contained in section 19, article 5, of the Constitution."

The purpose of Senate Committee Substitute for Senate Bill No. 149 was to meet an existing emergency in regard to public schools of the state, and to provide funds for the proper maintenance and support of said schools. The original purpose of the bill was preserved in the act, but the amendment only increased the amount of tax to be paid from ¼ of 1% to ½ of 1% on the gross receipts.

It is true that said Act as finally adopted is much broader than the bill as originally introduced, and much more comprehensive as to details; but we do not believe that the purpose of the bill was so changed as to violate article 4, section 15 of the Constitution. One of the main purposes of the bill as introduced was to increase the rate of taxes for the privilege of doing a mining business,

and to include other commodities therein; and the bill as passed simply broadens the scope and purpose. We therefore hold that the amendments, or changes, were mere extensions, or related details, and did not change the general purpose of the bill.

The Supreme Court of the State of Alabama has passed on a similar question several times, and in State Docks Commission v. State, 227 Ala. 521, 150 So. 537, 547, the validity of the act there under consideration was challenged as violative of that section of the Alabama Constitution which provides that "no bill shall be so altered or amended on its passage through either house as to change its original purpose." Const.Ala. 1901, § 61. The court in holding that the amendment did not violate the provisions set out, said:

"The 'purpose' of the bill contemplated in section 61 of the Constitution is the *general purpose of the bill and not the mere details through which and by which that purpose is manifested and effectuated.* The amendments were merely extensions and not changes of purpose. * * * In our opinion, the purpose of the bill was never changed throughout its passage in either house." (Emphasis ours.)

The purpose of Article 4, Section 15 of the New Mexico Constitution prohibiting the altering or amending a bill on its passage so as to change its purpose is, solely to prohibit amendments not germane to subject of legislation expressed in the title of act purported to be amended.

See Stein v. Leeper, 78 Ala. 517; Hall v. Steel, 82 Ala. 562, 2 So. 650; Alabama State Bridge Corp. v. Smith, 217 Ala. 311, 116 So. 695.

The Supreme Court of the State of Arkansas, which state also has a similar provision in its constitution as ours, passed upon this question in the case of Loftin v. Watson, 32 Ark. 414, and in upholding the validity of the act, stated:

"The purpose of the bill was to make county warrants, etc., receivable in payment of county taxes and debts, without regard to the dates of such warrants, or the purposes for which they were issued. *The original purpose of the bill was preserved in the act,* but the amendments made by the two houses limited the scope of the bill, by exceptions, and extended it so as to embrace city warrants, etc., with like exceptions." (Emphasis ours.)

A similar question to the one at bar was submitted to the Supreme Court of Colorado by the House of Representatives in the case of in re Amendments of Legislative Bills, 19 Colo. 356, 35 P. 917. The bill evidently was for the purpose of reducing the penalties and interest on delinquent taxes to one half the present rates. By amendments certain provisions of the bill were extended. The Court held that, not withstanding the amendments, the

original purpose of the bill was not changed and stated as follows:

"The house bill seeks to attain the object by amending a designated section of the revenue act. By the senate amendments the same object is sought by amendments to this and other sections of the same act. While by these amendments the provisions of the original bill are extended, the designated subject of legislation has been kept clearly in mind, and the original purpose of the bill in no manner changed."

Also see People v. United Mine Workers of America, 70 Colo. 269, 201 P. 54; Airy v. People, 21 Colo. 144, 40 P. 362; Massachusetts Mutual Life Insurance Co. v. Colorado Loan & Trust, 20 Colo. 1, 36 P. 793.

We conclude that there was no such alteration by the amendment as to change the original purpose of the bill within the meaning of Article 4, Section 15 of the New Mexico Constitution, and the court properly sustained the demurrer to paragraph No. 7 of the complaint.

Finding no error, the judgment appealed from must be affirmed. It is so ordered.

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

SADLER, Justice (dissenting).

"*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 depsoits 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." 1941 Comp., § 76-1405. (Italics added.)

The language underscored first above, denying application of the taxes levied to sales made to the government of the United States, or any agency or instrumentality thereof, is not ambiguous. It requires no construction and means what it plainly states. The prevailing opinion cannot and, indeed, does not dispute that the transaction in question is a sale. So viewed, this should end the matter and eliminate the proceeds of same from use in calculating the tax. Especially is this true since no reliance can be based on the proviso declaring "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" under the act. The prevailing opinion makes no effort to support a distinction between deposits of gold with the mint and sales to the mint,

specifically exempted by the act itself. Indeed, it states whether the transaction is a mere deposit or a sale, "is beside the question."

The majority, willingly or not, must accept the transaction for what it is—a "sale." They even cite authority holding it is in effect a sale. Walling v. Haile Gold Mines, 4 Cir., 136 F.2d 102. They argue, however, that in as much as this is not strictly a sales tax but rather a privilege tax, it can be sustained even though the amount of the tax is augmented by *sales* to an agency or instrumentality of the United States. Since the function of the sale as one merely to augment the amount of the tax and the character of the tax as one for the privilege of carrying on the business of mining, both were well known to the legislature, why then was the language first underscored above placed in the act? It was an idle gesture to do so if its plain mandate may be avoided in the manner employed by the majority.

Of course, this language of immunity was incorporated to avoid the patent constitutional objection that one sovereignty may not tax another, its agencies or instrumentalities, without the other's consent. If the act does the very thing the questioned language was designed to prevent, then does not the statute again become subject to the constitutional barrier it was employed to surmount? Obviously so.

The language of the *proviso* was added by amendment in 1941, L.1941, c. 133, § 1, in an apparent effort to take away the immunity given in so far as the same might arise from a sale of gold or silver. The identical language of this *immunity* as found in L.1934 (Sp.Sess.) c. 7, § 202, was construed in Gallup American Coal Co. v. Beall, 39 N.M. 188, 43 P.2d 927. The act was a predecessor of L.1935, c. 73, and imposed a privilege tax on mining companies as well as other persons and corporations for the privilege of doing business. The same contention was made there as here, namely that since the tax is upon the privilege of carrying on business and not upon the sale, the immunity claimed is untenable. The court ruled against this contention and, among other things, said:

"Here is a plain provision that none of the taxes levied by the act (including certainly the tax of one-fourth of one per cent. on the gross receipts of coal mining) shall apply to sales made to the government of the United States, or any of its departments or agencies. Yet it is claimed by the state that in order to interpret this provision we must first determine the exact character of this excise; that we will find it not to have been laid upon any sale, nor upon gross receipts, but upon the privilege or business of coal mining; and that consequently the exempting language is inappropriate and inapplicable. * * *

"This comprehensive revenue measure may in some of its incidents be a variance from the simple sales tax. When strict classification shall be called for, we may put it or parts of it in other category or categories. Its dominant feature, however, as to those who sell, is that for each sale there is an accession of revenue. *Whether we consider the particular language used or the intent to be gathered from the nature of the tax, we conclude that sales to agencies of the United States are not to be included in the aggregate gross receipts upon which the tax is to be computed.*

"We therefore find appellant's first claim of error to be well taken." (Italics added.)

The majority notice this case and obviously overrule it in the opinion filed. They attempt to justify the contrary holding by asserting that the statute there construed has since been materially amended. They are challenged to point out a single respect in which it has been amended, *material* to the present controversy. The legislative fiat carried in L.1941, c. 133, § 1, 1941 Comp. § 76-1405, declaring a sale to the government shall not be deemed a sale—certainly, this cannot be intended as the "material" amendment spoken of. If so, it is wholly inocuous.

Transparency of the majority's effort to impute a state of indecision to the legislature as to whether the transaction involved constitutes a sale; and to explain the statutory declaration it was not to be deemed a "sale" as a mere legislative resolving of a doubtful question, readily appears when we read the cases cited to support the speculation indulged, namely, Holland v. Haile Gold Mines, D.C., 44 F.Supp. 641, and Fox v. Summit King Mines, D. C., 48 F.Supp. 952. An examination of these cases discloses a holding that the acquisition of the gold by the government, if deemed a commercial transaction at all, would appear to be an "administrative act" of the government rather than a "shipment in commerce" by the defendant mining company. In other words, the court was concerned in determining whether the Company, engaged in gold mining in South Carolina, in sending its gold where the government might direct, as required by the Gold Reserve Act, was "engaged in interstate commerce"—not, as the majority would seek to persuade, whether the transaction, when completed, constituted a "sale."

The prevailing opinion cites and places some reliance upon the case of Arizona State Tax Commission v. Frank Harmonson Co. Metal Products, 63 Ariz. 452, 163 P.2d 667, 669. That the Supreme Court of Arizona in its opinion in this case, considered our holding in Gallup American Coal Co. v. Beall, supra, definitely opposed to theirs in the case mentioned, is demon-

strated by the following language in its opinion, to-wit:

"Under provisions similar to our statute, the supreme court of New Mexico came to the conclusion that the proceeds of sales to the United States, as reflected in the gross income of the taxpayer, should be eliminated for tax purposes. Gallup American Coal Co. v. Beall, 39 N. M. 188, 43 P.2d 927. We are not impressed with the reasons stated in that case in support of the conclusion."

Plainly, the Arizona court does not approve of our reasoning in the Beall case. It is needless to add that in reaching the conclusion we did in that case we rejected the reasoning relied upon by it in the case just quoted from. Seemingly, the majority in the case at bar have been persuaded to give the reasoning of the Arizona case a belated acceptance. It is worth mentioning that the opinion of a California Court of Appeals in M. G. West Co. v. Johnson, 20 Cal.App.2d 95, 66 P.2d 1211, accords with the opinion of this court in Gallup American Coal Co. v. Beall, supra. Cf. Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416; Landis v. Ormsbee, 51 N.M. 358, 184 P.2d 433.

If the mere circumstance that the tax involved is a privilege tax imposed for engaging in business in New Mexico could make any difference, as already indicated, it was known to the legislature to be such when it incorporated the language exempting application of the tax to sales "made to the government of the United States or any agency or instrumentality thereof," etc. Accordingly, it was a futile and meaningless thing to employ such language if its effect was to be nullified by some magic inhering in its designation as a "privilege" tax.

"To use the number of gallons (of gasoline) sold the United States as a measure of the *privilege tax* is in substance and legal effect to tax the sale." (Emphasis mine). Panhandle Oil Company v. Mississippi, infra.

Nor is the immunity thus granted in any way qualified in scope by the absence of injury in the application of the tax to sales to the government of the United States or its agencies. If the legislature had intended thus to restrict the exemption extended, it would have employed language appropriate to that end. The only exception is sales to "a corporate agency or corporate instrumentality" of the United States—not sales to the United States, "if injured" thereby. It is worthy of note, too, that decisions of the United States Supreme Court place no such limitation on the immunity of the United States, its agencies and instrumentalities, from state taxation by confining it to cases where injury to the sovereign taxed can be shown. The decisions simply hold the sovereign, its agencies and instrumentalities, shall not

be taxed. Panhandle Oil Company v. State of Mississippi, 277 U.S. 218, 48 S.Ct. 451, 453, 72 L.Ed. 857. See, also, annotations of questions involved in 56 A.L.R. 587, supplemented in 140 A.L.R. 621.

In my opinion the judgment should be reversed and the cause remanded with a direction to the trial court to award recovery of the amount of the tax paid under protest and for further proceedings not inconsistent with the views herein expressed. Convinced, as I am, that the amount of appellant's tax may not be augmented by including in the calculation of same the proceeds of sales of gold to the United States' mint, I withold opinion on several other questions resolved in the majority opinion and interposed by appellee as obstacles to recovery by appellant of the tax paid.

I dissent.

McGHEE, J., concurs.

192 P.2d 307

GUTHRIE v. THRELKELD CO. et al.
No. 5079.

Supreme Court of New Mexico.
April 12, 1948.

W. C. Whatley and T. K. Campbell, both of Las Cruces, for appellants.

A. L. Carlton and J. H. McBroom, both of El Paso, and J. Benson Newell, of Las Cruces, for appellee.

McGHEE, Justice.

The appellee filed a claim under the Workmen's Compensation Act in the District Court of Dona Ana County for an injury sustained while working as a cook for a construction crew on a moving train between Dawson, New Mexico, and Tucumcari, New Mexico. We will refer to the parties as they appeared in the trial court.

The defendants joined in the following answer:

Answer

"Come the defendants, Threlkeld Company, a corporation, and Hartford Accident and Indemnity Company, a corporation, and for answer to complaint herein, state:

"1. That the plaintiff and defendants herein are non-residents of the State of New Mexico and the alleged injury suffered by the plaintiff was, if at all, received as the result of a claimed accident occurring in either Quay County or Colfax County, New Mexico, and therefore this Court is without jurisdiction to try the issue tendered

and the venue is in either Quay or Colfax County, New Mexico.

"And further answering, said defendants state:

"1. That they admit that plaintiff was on the date alleged an employee of the defendant Threlkeld Company.

"2. That they deny each and every other allegation contained in the complaint.

"Wherefore, defendants pray that said complaint be dismissed and that they recover the cost herein expended by them."

The trial court overruled the plea to the jurisdiction and venue on the ground that by answering to the merits the defendants had entered their general appearance. The defendants then asked for a jury trial and the jury found that the plaintiff had received a compensable injury, and that she was totally and permanently disabled as a result thereof.

The sole error assigned by the defendants is the overruling of their plea to the jurisdiction on the ground that the venue of the case was in either Quay or Colfax county.

The applicable venue statute is Sec. 57-915, 1941 N.M.S.A., as amended by Laws of 1943, Ch. 15, Sec. 1, and reads:

"In the event that an employer has filed in the office of the clerk of the district court the bond or other undertaking or certificate of court which, as provided, relieves him from the necessity of giving the same, such claim may be filed in the office of the clerk of the district court of any county within the judicial district wherein the occupation or pursuit is carried on in which the workman is employed when injured, as the claimant may elect. In the event the employer has not so filed such bond, undertaking, or certificate, such claim may be filed in the office of the clerk of the district court of any county in the judicial district where the injury occurred or where the claimant or such employer resides, as the claimant may elect, Provided, however, that if the claimant elects to file his claim in any district court of this state, outside the district in which he was injured, a general appearance by all of the defendants in said action shall be considered and treated as a waiver of venue and shall confer upon such court full and complete jurisdiction to hear, try, and adjudicate said matter upon the merits as completely as if the same were filed in a district court of the judicial district in which the injury occurred."

The claim shows on its face that the defendants were nonresidents, that the defendant Hartford Accident and Indemnity Company was the insurer of the employer and that the accident which caused the injury did not occur in Dona Ana County or the Third Judicial District, so that all matters necessary to a determination of the

venue question appeared on the face of the claim.

Was it the intent of the legislature to limit the entry of a general appearance to the voluntary act of the defendants, or did it have in mind the entry of a general appearance as had been defined in our decisions prior to the adoption of the 1943 amendment which contains the provision relating to the general appearance?

In Dailey v. Foster, 17 N.M. 377, 128 P. 71, 72, this court, following the Boulder, Colorado, Sanatorium v. Vanston, 14 N.M. 436, 94 P. 945; and Fowler v. Continental Casualty Co., 17 N.M. 188, 124 P. 479, said:

"If the appearance be for the purpose of objecting to the jurisdiction of the court, and is confined solely to the question of jurisdiction, then the appearance is special; but any action upon the part of the defendant, except to object to the jurisdiction, which recognizes the case as in court, will amount to a general appearance."

We have consistently followed the rule of the Dailey case as will be seen by an examination of the following cases: State, ex rel. v. Huller, 23 N.M. 306, 168 P. 528, 1 A.L.R. 170; Crowell v. Kopp, 26 N.M. 146, 189 P. 652; Luna v. Cerrillos Coal Co., 29 N.M. 647, 226 P. 655; Noble v. McKinley Land & Lumber Co., 30 N.M. 294, 232 P. 525; Christian v. Lockhart, 30 N.M. 484, 239 P. 285.

The district courts have general jurisdiction of all causes not excepted in the constitution, and by legislative act they have exclusive original jurisdiction of the subject matter of claims filed under the Workmen's Compensation Act. The county in which they are to be tried is a mere matter of venue which is waived if not raised. Albuquerque & Cerrillos Coal Co. v. Lermuseaux, 25 N.M. 686, 187 P. 560. For a discussion of the distinction between jurisdiction and venue, see Peisker v. Chavez, 46 N.M. 159, 123 P. 2d 726, and Industrial Addition Association v. Commissioner of Internal Revenue, infra.

The defendants contend that the provisions of our rules of civil procedure apply to pleadings in workmen's compensation cases, and that by the terms of Rule 12 (b), Sec. 19-101 (12) (b), N.M.S.A., it was permissible to join the plea of improper venue with a plea to the merits. They overlook our statement in Hudson v. Herschbach Drilling Co., 46 N.M. 330, 128 P. 2d 1044, that these workmen's compensation acts are sui generis and create rights, remedies and procedure which are exclusive; that they are in derogation of the common law and are not controlled or affected by our rules of procedure in suits at law or actions in equity, except as provided therein.

Our Rule 1. excepts special statutory and summary proceedings where ex-

isting rules are inconsistent therewith. So far as pleadings are concerned, the Workmen's Compensation Act is complete in itself and the provisions thereof have not been modified by our rules. By its terms the only pleading allowed on the part of a defendant is an answer, and an amendment to the claim or answer may only be made by leave of the trial court at or before any hearing, and then only on such terms as may be allowed by the court. Sec. 57-913, 1941 N.M.S.A. This provision imposes on a defendant the burden of pleading his legal defenses and his plea to the merits in his answer, or take his chances on being allowed to later plead to the merits if the trial court holds that his legal exceptions are not well taken.

Our long line of decisions holding that any appearance of the defendant, except to question the jurisdiction of the court, constituted a general appearance, must have been known to the legislature when it enacted Sec. 1 of the 1943 Act, supra, and if it had intended that the claim might be filed and judgment rendered thereon in any county only upon the free consent of the parties, it should have used apt language to express such intent. For an example of such legislation, see Industrial Addition Association v. Commissioner of Internal Revenue, 323 U.S. 310, 65 S.Ct. 289, 89 L.Ed. 260.

Indeed, the language of the statute, viz., that "a general appearance by all of the defendants * * * shall be *considered and treated* as a waiver of venue," more especially the portion thereof which we have underscored, is suggestive of a legal consequence quite independent of intent or desire. Cf. Salazar v. Garde, 37 N.M. 352, 23 P.2d 370.

The defendants had a good plea under their first defense. Instead of standing on it they chose to also plead to the merits, and, we must hold, thereby entered their general appearance. In view of the finding of general disability by a jury and the judgment rendered thereon, they will have to pay the plaintiff the amount of the judgment and interest, plus a fee of $400 to her attorneys for their services in this court.

The judgment is affirmed, and it is so ordered.

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

192 P.2d 310

EIGNER et al. v. GEAKE et al.

No. 5078.

Supreme Court of New Mexico.

April 8, 1948.

M. Ralph Brown, Dist. Atty., Harry D. Robins, Asst. Dist. Atty., Simms, Modrall, Seymour & Simms, W. A. Keleher, A. H. McLeod, and Ernest Corey, all of Albuquerque, for appellants.

Wilson & Whitehouse and Louis C. Lujan, all of Albuquerque, for appellees.

McGHEE, Justice.

On December 14, 1943, the Board of County Commissioners of Bernalillo County entered an order closing a county road. On January 19, 1946, the petitioners filed their petition in the district court for a writ of certiorari to review such action, stating, among other things that they had no knowledge of such action until about July 1, 1945. An order for the issuance of the writ was forthwith issued, whereupon the respondents (appellants here) filed their motion to dismiss the petition and to quash the order for the writ upon several grounds, but in view of the disposition we will make of the case only one ground need be stated, which reads:

"That the plaintiffs are guilty of laches and are therefore barred from filing the petition."

We do not have a rule or statute in this state fixing the time within which

a petition for a writ of certiorari must be filed to review the action of a Board of County Commissioners.

The matter of laches in applying for a writ of certiorari to review proceedings in the district court was considered by this court under the head of "On Motion for Rehearing" in Gallup Southwestern Coal Co. v. Gallup American Coal Co., 39 N.M. 94, 96, 40 P.2d 627, 629, but as only three members of the court were then participating, and they could not agree, the establishment of a rule was left for future action.

A petition for a writ of certiorari to review the proceedings of a justice of the peace must be filed within thirty days. Appeals from probate court orders and judgments must be taken within ninety days; a limit of three months is set for appeals from final judgments of the district courts and the suing out of writs of error.

The courts of many states where a statute or court rule does not limit the time, hold that a petition for certiorari must be filed within the time for taking appeals. We have given serious consideration to the matter and have determined that absent a court rule or statute unless exceptionally good cause exists for tolling the time, a party who delays more than three months in applying for a writ of certiorari is guilty of laches. There appears to be no good reason, absent exceptional circumstances, why a party should have more time to ask for the writ of certiorari than he would have to take an appeal or sue out a writ of error in an ordinary case.

According to the statement of the petitioners they learned of the claimed illegal acts of the respondents on or about July 1, 1945, yet they delayed filing their petition in the district court until January 19, 1946, and there is nothing offered to excuse the long delay, except the statement in their answer brief that they were trying to settle the matter. This is not a sufficient excuse to toll the time.

The judgment will be reversed and the cause remanded to the district court with instructions to set aside its former order denying the motion to dismiss and enter a new one sustaining the motion on the ground of laches, and it is so ordered.

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

192 P.2d 311

STOUT et al. v. BARTLETT.

No. 5085.

Supreme Court of New Mexico.

April 8, 1948.

Harris, Williams & Johnson, of Hobbs, for appellant.

Brand & Rose, of Hobbs, for appellees.

McGHEE, Justice.

The appellees, plaintiffs below, are real estate agents in Hobbs, New Mexico, and were awarded judgment against the appellant for their services in effecting a sale of properties owned by him in that city. The case was tried to a jury and we will hereafter refer to the parties as they appear in the trial court.

The defendant has made three assignments of error, the first of which reads:

"That the Plaintiffs, having pleaded a general listing of the properties with them by Defendant and that they procured a purchaser and that Defendant sold to the purchaser procured by them and the Defendant having admitted such general listing, but specifically denying procurement of the purchaser by the Plaintiffs or that Defendant sold to a purchaser procured by the Plaintiffs, the Court committed error in denying the Defendant the right to show on the trial of said cause that he had already contacted said purchaser long prior to such listing and was still negotiating with such purchaser at the time of such listings

and that such negotiations had never been terminated."

The record shows that the defendant was allowed to freely introduce evidence that prior to the listing he and the purchaser had negotiated for the sale of the properties and that such negotiations had not been broken off at any time. The plaintiffs admitted the prior negotiations but introduced evidence to the effect that the defendant and W. P. Clark, who finally purchased the properties, had broken off all negotiations and that they again interested Clark and were the procuring cause of the sale, although they were not present when the deal was closed. It was on such issues that the case was submitted to the jury under proper instructions, and a verdict returned for the plaintiffs. This assignment is without merit.

The second assignment of error reads:

"That the Court erred in refusing to instruct the Jury to return a verdict for the Defendant for the reason there was not sufficient evidence to show that the Plaintiffs introduced the purchaser to the Defendant in the first instance and that said evidence failed to show that the negotiations had between the purchaser and the Defendant, prior to the time that the property was listed for sale with the Plaintiffs, had been terminated and that the plaintiffs were the efficient and procuring cause of reinstating such negotiations and that the Plaintiffs' evidence conclusively showed only an attempt on their part to appropriate as their own a purchaser with whom the Defendant had already been negotiating for the sale of said property prior to the time that the property was listed for sale with them."

There is a sharp conflict in the evidence as to the matters raised by the motions for a directed verdict, and as the plaintiffs' evidence on this point was substantial the trial court properly denied the motions. This assignment is likewise without merit.

The third assignment of error is based on the plaintiffs' attorney asking the defendant what business he had been engaged in and his answer "Dr. Pepper Bottling Company," by reason of the fact that the defendant had received adverse publicity because of certain illegal sugar transactions. The question was proper, was not objected to and there is not even an intimation that the plaintiffs were in any way responsible for such illegal transactions or the resulting publicity. This assignment is likewise without merit.

The case was fairly submitted to the jury and there is substantial evidence to support the verdict. The judgment will, therefore, be affirmed, and it is so ordered.

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

192 P.2d 312

VEALE v. EAVENSON et al.

No. 5084.

Supreme Court of New Mexico.

April 12, 1948.

W. Peter McAtee and Joseph E. Roehl, both of Albuquerque, for appellants.

Harry O. Morris, of Albuquerque, for appellee.

McGHEE, Justice.

The appellee, plaintiff below, was awarded the sum of $408.56 as the result of a collision between an automobile being driven by him and a truck owned by the appellants, defendants below. The trial court orally announced its findings and conclusions at the conclusion of the trial and a few days thereafter signed a judgment that had been initialed by the attorneys for the parties. Neither party requested findings of fact or conclusions of law prior to the signing and entry of the judgment on May 24, 1947. An

order granting an appeal was filed on June 23, 1947, and a supersedeas bond was given. On Sept. 17, 1947, a stipulation was filed providing that, subject to the approval of the trial court, findings of fact and conclusions of law might be entered and incorporated into and made a part of the record to be filed in this court. On September 19, 1947, the trial court entered an order reciting that as neither of the parties had theretofore requested findings and conclusions they had waived specific findings and conclusions under our Rule 52(B) (a) (6), 1941 Comp. § 19-101, and refusing to make them. On October 17, 1947, the appellants filed and tendered to the trial court specific findings of fact and conclusions of law, and on November 13, 1947, the trial court entered an order refusing to pass upon them because of the failure of the appellants to make such requests prior to the entry of the judgment, and for the further reason that the order granting the appeal had been entered and that, therefore, it had lost jurisdiction to comply with the request.

The first assignment of error is that the complaint fails to state a cause of action. The complaint contains the following allegations:

"1. That all parties are residents of Bernalillo County, New Mexico.

"2. That on January 24, 1947, the defendant, Carrol L. Eavenson, did negligently and unlawfully drive a 1942 G. I. type Ford truck, owned by defendant, Clarence Dan Eavenson, into and against the 1941 Oldsmobile automobile owned and driven by plaintiff, John H. Veale.

"3. That said accident occurred at the intersection of Central Avenue and San Pasquale Avenue, near the City of Albuquerque, in said County of Bernalillo.

"4. That at all times herein mentioned the defendants, Carrol L. Eavenson, Clarence Dan Eavenson and Howard Akin, were partners engaged in the business of excavating and hauling sand and gravel; and that at the time of said accident, said Ford truck was being driven by defendant, Carrol L. Eavenson, in pursuance of the business of said partnership, hauling sand and gravel.

"5. That as a result of said negligence on defendants' part, plaintiff has suffered damage in the total sum of $576.56, determined as follows: $366.56 for repairs to plaintiff's automobile; $210.00 for loss of use of plaintiff's automobile for a period of 21 days following said accident, while same was being repaired.

"Wherefore, plaintiff prays for judgment against defendants and each of them for $576.56, together with costs."

Section 19-101, rule 8(a) provides that "a pleading which sets forth a claim for relief, * * * shall contain proper allegations of venue * * * a short and plain

statement of the claim showing that the pleader is entitled to relief."

Does the complaint meet this test? It charges, in effect, that the defendant Carrol L. Eavenson negligently and unlawfully drove the truck of the defendants into and against the automobile owned and being driven by the plaintiff; it states where the collision occurred and that the defendants were partners engaged in the business of excavating and hauling sand and gravel; that the car was at the time being driven in pursuance of the business of the partnership, and the amount of damage claimed.

While we did not adopt Federal Rule, 84, 28 U.S.C.A. following section 723c the complaint here substantially followed Form 9 of the Appendix of Forms adopted by that rule for such a state of facts. All that is required by our Rule 8(a) is a short and plain statement of the claim. We think the complaint in this case meets this requirement. If the defendants desired a definite statement or a bill of particulars they could have filed a motion therefor under Rule 12 (e). They evidently thought that the complaint gave them sufficient information for they waited until the case got to this court before raising the question. This assignment is without merit.

The appellants urge that the trial court erred in failing to make findings of fact and conclusions of law. Rule 52(B) (a) (1) provides that upon the trial of any case by the court without a jury, the trial court shall make written findings of fact and conclusions of law and file them with the clerk, but subsection (6) provides that a party will waive them if he fails to make a general request therefor in writing, or if he fails to tender specific findings and conclusions. As above stated, no such request was made until long after the judgment had been entered and the appeal allowed. This assignment is also without merit.

The appellants also urge that the trial court erred in refusing to pass upon their requested findings of fact and conclusions of law filed several months after the appeal had been allowed and a supersedeas bond had been given.

Upon the entry of the order allowing an appeal and the giving of the supersedeas bond the trial court lost jurisdiction of the case except for the purpose of perfecting the appeal to this court. In contemplation of law it was pending here. Abeytia v. Spiegelberg, 20 N.M. 614, 151 P. 696. See also Pankey v. Hot Springs National Bank, 42 N.M. 674, 84 P.2d 649, and 24 C.J.S., Criminal Law, § 1716. In addition we held in Damon v. Carmean, 44 N.M. 458, 104 P. 2d 735, that findings of fact and conclusions of law filed after the entry of judgment came too late and could not be considered on appeal.

The state of the record as above set out relating to lack of findings and conclu-

sions precludes a review of the other assignments of error, which are, in substance, that the judgment should have been for the defendant on the evidence. We had a similar situation in Alexander Hamilton Institute v. Smith, 35 N.M. 30, 289 P. 596, 597, and there stated:

"Most of appellant's assignments of errors resolve themselves into this, that the judgment should have been for the defendant on the evidence. But it was for the district judge, and not for this court to determine what conclusions the evidence would warrant. If the defendant desired a review of the whole case in this court, he should have had the facts found, as well as the conclusions of law dependent upon them, and we could then have determined whether the conclusions were well founded. This court sits, not to try cases de novo, but as a court for the correction of errors. See Murphy v. Hall, 26 N.M. 270, 191 P. 438; Morrow v. Martinez, 27 N.M. 354, 200 P. 1071; Merrick v. Deering, 30 N.M. 431, 236 P. 735; Trustees of Town of Torreon v. Garcia, 32 N.M. 124, 252 P. 478. * * *" See also Damon v. Carmean, supra, on this point.

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

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

192 P.2d 315

LILLIBRIDGE v. COULTER.

No. 5081.

Supreme Court of New Mexico.

April 20, 1948.

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

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

COMPTON, Justice.

The appellee, plaintiff below, and the appellant, defendant below, were business partners. The trial court found that following the sale of appellee's interest in the business to a third party and the dissolution of the partnership, Lillibridge and Coulter agreed that the amount due Lillibridge in the settlement of their partnership affairs was $1,500.00, which Coulter later refused to pay, and rendered judgment accordingly. The parties waived written findings of fact and conclusions of law and only general findings as above stated were included in the judgment.

The first assignment of error is that the judgment is contrary to the facts and is unsupported by the evidence. If the defendant desired a review of the evidence in this court, he should have had the facts found as well as the conclusions of law dependent upon them, and we could then have determined whether the conclusions were well founded. This court sits, not to try cases de novo, but as a court for the correction of errors. Alexander Hamilton Institute v. Smith, 35 N.M. 30, 289 P. 596; Damon v. Carmean, 44 N.M. 458, 104 P.2d 735. In view of the state of the record we will not review the evidence.

The second assignment of error is that the court refused to permit the ap-

pellee to answer the following question propounded on cross-examination:

"If this was simply an agreement in which you sold your interest to Mr. Phipps why did you have Mr. Coulter sign that?" (Meaning the dissolution agreement.)

The scope of cross-examination is largely a matter resting in the sound discretion of the trial court and we can not say that the court abused such discretion in sustaining an objection to this question. Krametbauer v. McDonald, 44 N.M. 473, 104 P.2d 900.

The appellant next claims that the court erred in refusing to permit the dissolution agreement to be introduced in evidence during the cross-examination of the appellant. It was admitted in evidence as a part of the appellant's case. This assignment is also without merit.

The fourth assignment is that the court erred in refusing to allow a witness who had testified concerning a conversation had with the appellant to be cross-examined concerning another conversation with the parties to this case. The record shows that Thomas H. Boyle had been called by the appellee and had testified to a specific statement made by the appellant to the effect that if the appellee had been patient with him that he, appellant, would have paid the money, but now that suit had been filed he would not pay any of it unless the court gave judgment against him. On cross-examination the witness was asked about an entirely different conversation between the parties to this action. The trial court sustained an objection to the question on the ground it was not proper cross-examination, with the statement that any witness might be called when the appellant put on his case. The court did not err in its ruling. Krametbauer v. McDonald, supra.

The judgment will be affirmed and the case remanded to the district court with instructions to enforce its judgment, and to also render judgment against the sureties on the supersedeas bond, and it is so ordered.

BRICE, C. J., did not participate.

LUJAN, SADLER, and McGHEE, JJ., concur.

192 P.2d 553

THWAITS v. KENNECOTT COPPER CORPORATION, CHINO MINES DIVISION.

No. 4990.

Supreme Court of New Mexico.

April 14, 1948.

J. B. Newell, of Las Cruces, for appellant.

Woodbury & Shantz, of Silver City, for appellee.

Caswell S. Neal, of Carlsbad, amicus curiae.

PER CURIAM.

The original opinion is withdrawn on Motion for Rehearing and the following substituted:

BRICE, Chief Justice.

The appellant, widow of a workman accidentally killed in the course of his employ--

ment, filed her claim for compensation in the district court, which, upon motion of appellee, was dismissed because "It fails to state a claim under the Workmen's Compensation Act of New Mexico upon which relief can be granted."

The alleged grounds for compensation are as follows:

"The undersigned hereby asks judgment for compensation under the Workmen's Compensation Act of New Mexico, for the death of her husband Eugene Bostick Thwaits, who was injured on November 14th, 1944, while working as a brakeman upon an ore train of the defendant corporation, and who died as a result of said injuries on the following day, to-wit: November 15, 1944;

"That at the time of receiving said injuries the decedent was receiving average weekly earnings of $60.00; that at the time of his death he had dependent upon him your claimant and three minor children then living with decedent and this claimant.

"That under the provisions of Sec. 57-918 N.M.Statutes Ann.1941, Sub-sec. 5 of Sub-sec. (2) (a), the claimant being the surviving widow with three dependent children would be entitled to receive $33.00 per week; that said defendant company has been paying to claimant the sum of $18 per week, asserting that said amount is the maximum to be paid under the statute applicable to the instant case; that by agreement between respective counsel said amount is being paid and received without prejudice to claimant's right to litigate this question.

"Plaintiff states that at the time her husband was injured he was riding on the rear platform of a caboose on said ore train; that said platform was not equipped with reasonable safety devices consisting of guard rails to prevent employees from falling or slipping off the said platforms; and as this claimant is informed and believes and upon such information and belief states the fact to be that the injury to her husband was the direct result of the failure of said Company to provide such safety device. That said Company since said accident has installed such safety devices upon caboose cars of the kind which decedent was riding at the time he received his fatal injuries.

"That should the court find that said defendant company was negligent in failing to provide proper safety devices as hereinabove alleged and that such failure caused the death of the decedent, then claimant would be entitled to an increase of 50% in the compensation payable to decedent's dependents."

The grounds alleged for dismissal are as follows:

"That it does not appear from said claim that the death of the workman Eugene Bostick Thwaits, resulted from the failure

of the employer to provide safety devices required by law or that the death of said workman resulted from the negligence of the employer in failing to supply reasonable safety devices in general use in the industry for the use or protection of the workman.

"That it appears from said claim that defendant has, since the date of the death of said workman, been paying to plaintiff the sum of Eighteen Dollars ($18.00) per week, the maximum amount required to be paid under the Workmen's Compensation Act of New Mexico."

The Court sustained the motion to dismiss upon each ground stated.

The question presented in the briefs of the parties is whether the appellant is entitled to $18 per week for three hundred weeks, as the Court concluded, or $33 per week for that number of weeks, as appellant asserts.

The following statutes bear upon the question:

"(a) * * *

"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, 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 * * * to be computed on the following basis, and distributed to the following persons:

"1. To the child or children, if there be no widow or widower entitled to compensation, twenty-five [25] per centum of earnings of deceased, with ten [10] per centum additional for each child in excess of two [2] with a maximum of sixty [60] per centum, to be paid to their guardian.

"2. To the widow or widower, if there be no children, forty [40] per centum of earnings, not to exceed a *maximum com-*

pensation of sixteen dollars ($16.00) per week.

"3. To the widow or widower, if there be one child, forty-five [45] per centum of earnings.

"4. To the widow or widower, if there be two [2] children, fifty [50] per centum of earnings.

"5. To the widow or widower, if there be three [3] children, fifty-five [55] per centum of earnings.

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

The proviso in Sec. 57-918(a) (2), as follows, "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) dollars per week," determines this question against appellant. It is *otherwise specified* in Sec. 2 following that the widow or widower if there be no children is entitled to a maximum compensation of $16 per week. The proviso, therefore, does not apply to this paragraph, but as it is not *"otherwise specified"* in paragraphs 3, 4, 5 and 6, to these paragraphs the proviso does apply.

The trial court was correct in holding that the appellant and three children are entitled to normal compensation at the rate of $18 per week for 300 weeks.

The charge that the deceased at the time of his injury was riding on the rear platform of a caboose on an ore train not equipped with reasonable safety devices, consisting of guard rails to prevent employees from falling or slipping off the platform, and that his death was the direct result of such failure to provide such safety device, was the second ground for appellant's claim of compensation.

The statutes of New Mexico applicable to this claim for compensation are the following:

"* * * In case an injury to, or death of, a workman results from the failure of the employer to provide the safety devices required by law, or in any industry in which safety devices are not provided by statute, if an injury to, or death of, a workman results from the negligence of the employer in failing to supply reasonable safety devices in general use for the use or protection of the workman, then the compensation otherwise payable under this act shall be increased by fifty per centum (50%). Provided further, that any additional liability resulting from any such negligence on the part of the employer shall be recoverable from the employer only and not from the insurer, guarantor or sureties of said employer under this act except that this shall not be construed to prohibit employers from

insuring against such additional liability." N.M.Sts.1941, Sec. 57-907.

The injured workman's compensation is increased fifty per cent if his injury results (1) from the failure of the employer to provide the safety devices required by law, and (2) or from the negligence of the employer "in failing to supply reasonable safety devices in general use for the use or protection of the workman," if in any industry safety devices are not provided by statute.

The first question is whether guard rails around the platform of a caboose attached to a train of ore cars, to prevent employees from falling off, is a safety device required by law.

The New Mexico mining laws in question were enacted in 1933. Following Sec. 67-2001, supra, a statute in general terms requiring safety devices, are many provisions requiring the use of specific safety devices, methods, and processes to safeguard mine employees against injury or death; among which is the following:

"All fly wheels, gears, belts, and all exposed moving machinery parts that are liable to cause injury, or dangerous parts of machinery used in and about a mine shall be appropriately guarded to prevent injuries to attendants or other persons. Stairs, *platforms,* and dangerous walks in or about the mine shall be provided with *rails,* fences, and gates." (Our emphasis) Sec. 67-2816, N.M.Sts.1941.

The word "rails" is defined in Webster's International Dictionary as follows:

"A bar of timber or metal extending from one post or support to another, as a guard or barrier, as in fences, balustrades, staircases, etc. * * *. A construction of bars or posts, a fence, etc."

According to the claim filed by plaintiff, the workman, who was her husband, was riding on the rear *platform* of a caboose attached to an ore train, which was not equipped with reasonable safety devices, consisting of guard rails, to prevent employees from falling or slipping off the platform; and that his injury and death were the direct results of the failure of the company to provide such safety devices.

The question is whether the word "platforms" as used in the statute quoted includes a platform on a caboose attached to an ore train that is being operated "in or about a mine." The statute does not limit the word "platforms" to any particular kind, such as stationary ones; but it necessarily applies to any structure known as a platform in use in or about a mine on which workmen must necessarily go in the performance of their labors.

Indeed, the platform of a caboose without guard rails, attached to a moving

train, is a much more dangerous place to be or work than is a stationary one. It would be an unreasonable construction of this statute to say that the word "platforms" should not include the platform in question. We are of the opinion that the specific provision of the statute quoted applies to the platform of a caboose attached to an ore train then being operated in or about the appellant's mine in connection with its mining operations.

It was held in Janney v. Fullroe, 47 N.M. 423, 144 P.2d 145, that a violation of this section of the statute by the employer, which resulted in an injury to a workman, entitled the latter to the fifty per cent additional compensation provided by law. See Sec. 57-907, supra.

The employer had failed to properly guard exposed gears of machinery in which the workman's arm was caught and injured.

The allegations in the claim regarding the cause and manner of the death of the workman bring the case within the purview of Sec. 57-907 and Sec. 67-2816, supra; and if proven will entitle the claimant to the fifty per cent additional compensation provided by the former statute.

While this part of the claim was presented to the district court, and denied by it, and the court's action thereon assigned as error, it is not argued in appellant's brief, and was therefore abandoned. Candelaria v. Gutierrez, 30 N.M. 195, 230 P. 436. But this court is not without jurisdiction to review the question, and may do so in its discretion and on its own motion, if the judgment of the trial court is inherently and fatally defective.

We stated in Baca v. Perea, 25 N.M. 442, 184 P. 482, 484:

"* * * It is true this court has held in many cases that it will not examine a record, unless exceptions have been taken and the error complained of is called to the attention of the trial court. Neher v. Armijo, 11 N.M. 67, 66 P. 517; De Baca v. Wilcox, 11 N.M. [346], 352, 68 P. 922; Fullen v. Fullen, 21 N.M. 212, 153 P. 294. There is a well-recognized exception to this rule, to the effect that the court will notice, without exception or presentation, jurisdictional and other matters which may render a case inherently and fatally defective and require reversal. This exception was stated in the cases above referred to, and also in the case of Goode v. [Colorado Inv.] Loan Co., 16 N.M. 461, 117 P. 856, and in 3 C.J. p. 894, the general rule is stated, and on page 905 of the same work will be found an exception, which is that the question whether the pleadings support and warrant the judgment is one which arises on the record proper, and may be tested by writ of error or appeal from the judgment without any exception.

"Where a judgment is rendered on an answer which clearly fails to state facts sufficient to constitute a defense to a good complaint, we think such judgment is inherently and fatally defective, and that no exception to the rendition of the same is necessary."

In State ex rel. Burg v. City of Albuquerque et al., 31 N.M. 576, 249 P. 242, 248, we said:

"Ordinarily this court will not review a question not raised in the court below (State v. Ellison, 19 N.M. 428, 144 P. 10), or presented to the Supreme Court by assignment of error (Weggs et al. v. Kreugel et al., 28 N.M. 24, 205 P. 730); or one not argued or presented in the briefs of the parties (Hawkins v. Berlin, 27 N.M. 164, 201 P. 108; Armstrong v. Concklin, 27 N. M. 550, 202 P. 985), or a new and original question raised on motion for a rehearing (Ellis v. Citizens' Nat. Bank, 25 N.M. 319, 193 P. 34, 6 A.L.R. 166), except in a case where the judgment of the district court is inherently and fundamentally erroneous (Baca v. Perea, 25 N.M. [at page] 443, 184 P. 482; Crawford v. Dillard, 26 N.M. 291, 191 P. 513)."

Also see: Schaefer v. Whitson, 32 N.M. 481, 259 P. 618; Jaffa v. Lopez (on rehearing), 38 N.M. 290, 31 P.2d 988; State v. Garcia, 19 N.M. 414, 143 P. 1012; State v. Diamond, 27 N.M. 477, 202 P. 988, 20 A.L.R. 1527; Kemp v. Williams, 30 N.M. 299, 232 P. 1078; Springer Ditch Co. v. Wright, 31 N.M. 457, 247 P. 270.

In Baca v. Perea, supra, we held that a judgment rendered on an answer to a good complaint, that did not state facts that constituted a defense, was inherently and fatally defective. In the case before us a judgment was entered dismissing a good complaint upon a motion that stated no grounds for dismissal. There is no substantial difference between the two cases.

The ends of justice require us to pass upon the question, though not presented in appellant's brief.

We are of the opinion that the trial court erred in sustaining appellee's motion to dismiss, and that the judgment entered was inherently and fatally defective.

The cause is reversed and remanded with instructions to the district court to set aside its judgment, reinstate the cause upon its docket, overrule appellee's motion to dismiss and proceed with a consideration thereof not inconsistent herewith.

It is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

192 P.2d 557

MAFFETT v. EMMONS.

No. 5077.

Supreme Court of New Mexico.

March 22, 1948.

Rehearing Denied May 5, 1948.

Owen B. Marron and Alfred H. McRae, both of Albuquerque, for appellant.

Simms, Modrall, Seymour & Simms and Joseph E. Roehl, all of Albuquerque, for appellee.

COMPTON, Justice.

Appellant seeks review of an adverse judgment arising out of a suit to collect a note which reads as follows:

"$8,467.68 Albuquerque, N. M., July 10, 1946—On Demand—After Date, I, We, Or Either Of Us, Promise To Pay To The Order Of Virgil I. Strickland, Hot Springs, N. M. at The First National Bank, Hot Springs, N. M.—Eight Thousand Four

Hundred Sixty Seven And 68/100—Dollars at its office with interest from Date until paid, at the rate of 5 per cent per annum, with ten per cent additional on amount unpaid, should this note be placed in the hands of an attorney for collection. Value Received. This note is payable at the rate of $50.00 per month including interest at 5% per annum. Payments commencing August 10, 1946. The Makers, Endorsers and Sureties Hereof, Hereby severally waive protest, demand and notice of protest and non-payment, in case this note is not paid at maturity, and agree to all extensions after maturity, without prejudice to the holder.

S/ John J. Emmons

Address 301 North Second Street,
Albuquerque, New Mexico."

On the reverse side appear the following endorsements:

"Date	Interest	Principal	Balance
7/17–46	$35.28	$14.72	$8452.96
9/6–	35.22	14.78	8438.18
11/12–46	77.19	22.81	8415.37"

Subsequently, Strickland having been declared to be an incompetent, appellant qualified as guardian of his estate and, under the assumption that the instrument was a demand note, declared the whole indebtedness due and payable.

The trial court, sensing an ambiguity, admitted evidence as to the agreement of the parties, then held the instrument to be an instalment contract and rendered judgment only for the instalments due.

The question to be determined is whether the instrument is payable on demand.

In the construction of instruments of this character, we turn to the following well recognized rule:

"A bill or note, the same as any other written instrument, must be construed as a whole, so as to give effect to every part of it, if possible. The contract must be collected from the 'four corners' of the document, and no part of what appears there is to be excluded; and it has been suggested that, inasmuch as indorsements are made on the back of a negotiable instrument, it may be said that the purport of the instrument is to be collected from the 'eight corners.' Further, every word should be given such effect as will tend to harmonize the whole writing, if possible. * * * Anything written or printed on a note prior to its issuance and relating to its subject matter must be regarded as part of the contract represented by the instrument and is to be given due weight in the construction thereof." 10 C.J.S. Bills and Notes, § 42, page 479.

Tested by this rule, there presently is seen a patent ambiguity. Most courts hold a note, payable on demand, is instantly due. Consequently, the note in question matured July 10, 1946, concurrently with its issuance. It is also payable at

determinable future times commencing August 10, 1946. Thus, we have a collateral agreement incorporated in a negotiable instrument which deprives it of the simplicity of form characteristic of negotiable paper. With this uncertainty as to maturity we are unable to apply the rule in such manner as would reasonably tend to harmonize the whole writing. This conclusion is sustained by the construction placed thereon by the parties. They treated it as an instalment contract.

Where an instrument is ambiguous the construction of the parties will govern. Cf. Trigg v. Arnott et al., 22 Cal.App.2d 455, 71 P.2d 330; Scholbe v. Schuchardt, 292 Ill. 529, 127 N.E. 169, 13 A.L.R. 247; Barron v. Boynton et al., 137 Me. 69, 15 A.2d 191; Collateral Liquidation Inc. v. Renshaw, 301 Mich. 437, 3 N.W.2d 834, 140 A.L.R. 1386; Banking Commission v. Townsend, 243 Wis. 329, 10 N.W.2d 110, and Annotations appearing at 155 A.L.R. 218.

Having concluded that the instrument is an instalment contract, and since it contains no provision accelerating its maturity, it is our opinion that appellant is entitled to maintain her action only for past due instalments. Cf. Crowe v. Beem, 36 Ind.App. 207, 75 N.E. 302; Whittier v. First Nat. Bank of Sterling, 73 Colo. 153, 214 P. 536; Llewellyn Iron Works v. Littlefield, 74 Wash. 86, 132 P. 867, Ann.Cas. 1915A. 959.

In support of her contention appellant cites Bank of America Nat. Trust & Savings Ass'n v. Schumacher, 6 Cal.App.2d 651, 45 P.2d 239. Schumacher had issued a note payable on demand and then relied upon contemporaneous writings to alter its character, asserting that the instrument was an instalment contract. The instrument upon its face was complete and fully explained the contract of the parties and the court so held. But here, uncertainty and ambiguity appear within the instrument itself. That case is readily distinguishable and we find no fault with the decision.

The judgment will be affirmed and it is so ordered.

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

192 P.2d 559

STATE v. JONES.

No. 5068.

Supreme Court of New Mexico.

April 6, 1948.

Rehearing Denied May 3, 1948.

William H. Darden and William P. Kearns, Jr., both of Raton, for appellant.

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

LUJAN, Justice.

Appellant was tried and convicted of murder in the first degree and his punishment was fixed at death by electrocution. He appeals from the verdict and judgment.

The material facts are substantially as follows: On March 5, 1947, between the hours of ten and eleven o'clock in the forenoon, appellant was picked up by Jess V. Larson on U. S. Highway No. 85 at the outskirts of the city of Pueblo, Colorado, who then proceeded as far as Walsenburg, Colorado, where they stopped for 25 or 30 minutes, then resuming their trip south. When they reached a point approximately one and a quarter mile on this side of the Colorado line and within the State of New Mexico, appellant drew his gun, pointed it at Larson, and ordered him to pull over on the side of the road and stop, where he robbed him of his money in the sum of $80.00. Appellant took charge of the car and drove it from that point.

When they reached the outskirts of the City of Raton, New Mexico, appellant commanded Larson to lie down on the floor board of the car, but instead he grabbed the steering wheel and in so doing he slipped and fell, whereupon appellant hit him over the head with his gun. The gun discharged but neither was hit. Although the blow did not render Larson unconscious, he remained down on the floor board. While he was in this position, the appellant drove through the City of Raton and on out on Highway No. 87 for about twenty or twenty-five miles and turned off on the Kiowa road, driving some five miles from the junction before stopping the car next to a cement culvert.

The appellant then compelled Larson to crawl headfirst into the culvert and himself crossed immediately to the other side, where, from a stooped position, he fired four or five shots into Larson's head and body as he lay therein in a prostrate and helpless condition. Thereupon, and without pausing to ascertain whether Larson was alive or dead, the appellant fled the scene of his crime and, travelling by a circuitous route, reached Springfield, in the State of Illinois, where he was apprehended on March 28, 1947. There, he signed two de-

tailed confessions covering his movements which culminated in the murder. After receiving detailed information from the police department at Springfield, Illinois, the sheriff's office in Raton located the deceased's body.

The first point relied upon by appellant for reversal is that the trial court erred in refusing to sustain his motion to quash the information because it did not conform to the provisions of Section 42-604(1) of the New Mexico Statutes, 1941 Compilation, which reads as follows:

"All informations shall be subscribed by the district attorney. Except in cases where the defendant has been held to answer in a preliminary examination, the information shall be verified by the oath of the prosecuting attorney or that of the complainant or of some other person. When the information is verified by the district attorney, it shall be sufficient if the verification is upon information and belief."

The verification made by T. A. Griffith, the sheriff of Colfax County, is as follows:

"T. A. Griffith being duly sworn upon oath states: That he has read the foregoing information knows the contents thereof and that he verily believes the same to be true. (signed) T. A. Griffith."

The appellant was arraigned on April 7, 1947, and instead of entering a plea elected to stand mute, whereupon the trial judge directed that a plea of not guilty be entered for him. The motion to quash the information was not filed until April 16, 1947.

Paragraph (2) of Section 42-604, supra, reads:

"No objection to an information on the ground that it was not subscribed or verified, as above provided, shall be made after moving to quash or pleading to the merits."

The appellant seeks to void the bar of this statute by the claim that his standing mute and having a not guilty plea entered in his behalf by the trial court is not a pleading to the merits within the contemplation of the statute just quoted. Section 42-652, 1941 Comp., provides:

"If the defendant refuse to answer the indictment or information by demurrer or plea, a plea of not guilty must be entered."

If by standing mute a defendant could nullify our statutes on criminal procedure endless confusion and delays would result. We must hold that when the appellant stood mute and had a plea of not guilty entered for him, he waived any objection to the form of the verification. See State v. Kusel, 29 Wyo. 287, 213 P. 367; Jordan v. United States, 9 Cir., 299 F. 298; Trimble v. State, 61 Neb. 604, 85 N.W. 844.

Under point two appellant urges that the court erred in overrruling his motion for a change of venue filed on April 16,

1947. It was supported only by his affidavit. He relies strongly on the case of State ex rel. Tittman v. McGhee, 41 N.M. 103, 64 P.2d 825. The question in that case was whether a party who had disqualified the resident district judge in a case could also disqualify the judge of another district who had been designated by the Chief Justice. In discussing the question Justice Brice cited cases relating to change of venue and applied the reasoning of those cases to the question before the court in that case. He also referred to our statute, now Section 19-505, Comp.1941, relating to a second change of venue. He did not, however, discuss the effect of Section 2, Chapter 60, Session Laws of 1929, now appearing as Section 19-504, Comp.1941, which reads:

"Upon the filing of a motion for change of venue, the court may require evidence in support thereof, and upon hearing thereon shall make findings and either grant or overrule said motion."

This section was added as an amendment to the change of venue statute then existing. By its plain terms the trial court may hear witnesses on the hearing, as was done in this case, and may grant or deny the motion, subject, of course, to a review here in the event of an abuse of a sound discretion. Four witnesses were called and examined on the issues raised by the motion for change of venue. The trial court made findings of fact, the substance of which was that the inhabitiants of Colfax county were not prejudiced against the appellant, that no reason existed why he could not obtain a fair and impartial trial in the county and that he could, in fact, obtain such a trial there. A careful examination of the record shows that the findings are supported by substantial evidence and that there was no abuse of discretion in denying the motion. This is all that the appellant could ask. Haddock v. State, 141 Fla. 132, 192 So. 802.

Under points three and four, appellant argues that the court erred in admitting certain confessions made and signed by him because, (1) the corpus delicti had not been proved, and (2) because they were not voluntarily made. We have examined the record and find that it had been established at the time of the introduction of the confessions that Larson was in fact dead, and that his death had been criminally caused by another. This sufficiently proved the corpus deliciti. State v. Chaves, 27 N. M. 504, 202 P. 694; State v. Dena, 28 N. M. 479, 214 P. 583. The state clearly showed the voluntary nature of the confessions before they were admitted in evidence. It was not until the appellant took the stand and himself fully corroborated in detail, everything set out in the confessions that he stated on re-direct examination that his confession followed the statement of a police sergeant in Springfield, Illinois, that if he would "shoot straight and come clean", it would go a lot easier with him.

The appellant did not request an instruction that if the jury believed the confessions were induced by a hope and expectation of clemency caused by the claimed statement of the officer, they should disregard them under the rule approved in State v. Anderson, 24 N.M. 360, 174 P. 215. The error, if any, in the admission of the confessions was rendered harmless when the appellant took the stand and as a witness in his own behalf testified to the same facts they detailed. State v. Talamante, 50 N.M. 6, 165 P.2d 812; Robinson et al. v. United States, 61 App.D.C. 370, 63 F.2d 147.

Under point five, appellant argues that the court erred in admitting in evidence certain photographs taken at the scene of the crime. They were introduced and admitted as a group. His objections were that, (1) they were calculated to arouse and inflame the minds of the jury; (2) they were taken by non-professional photographers; (3) the proper foundation was not laid for their introduction; and (4) the evidence which they attempted to support had already been fully developed and that they were therefore irrelevant.

The photographs show the locus criminis; the height and width of the culvert, and the body of deceased before and after it had been taken out from under the culvert, and we do not see how they could have misled the jury in any way. They merely gave the jury a better description than could have been given by words. They cannot be characterized as gruesome or inflammatory. The body of the deceased after it had been taken out from beneath the culvert lay on its side and the wounds on the head and body could not be seen. We cannot hold that they had such a tendency to so create unfair prejudice that it was the duty of the court to exclude them. The fact that they were not taken by a professional photographer does not render them inadmissible in evidence. In order to warrant admission in evidence of photographs, if otherwise competent, it is only necessary to show that they are a true likeness of the objects they purport to represent. This may be shown by the persons who made them or by any other competent witness. Kortz v. Guardian Life Ins., Co. of America, 10 Civ., 144 F.2d 676. Before the admission of the photographs in question, testimony was introduced by the State to the effect that they accurately represented the objects appearing therein.

By the plea of not guilty appellant imposed upon the state the burden of proving, beyond a reasonable doubt, every material issue in the case. Appellant testified that he had stopped the car next to the culvert, ordered the deceased to crawl into it head first and then himself crossed to the opposite side from which point, and in a stooped position, he had fired four or five times at the head and body of deceased. The pictures show with

the exception of the body lying next to the culvert, exactly what he detailed in his confessions and testimony. This tended to corroborate the testimony of state witnesses. State v. Woods, 62 Utah 397, 220 P. 215; King v. State, 108 Neb. 428, 187 N.W. 934; Snowden v. State, 133 Md. 624, 106 A. 5.

We are satisfied that the defendant was accorded all of the rights he was entitled to under the law, that he is guilty as charged, and that no error of a prejudicial character was committed in his trial. The judgment will be affirmed. It is so ordered.

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

192 P.2d 836

JOHNSON v. BONNELL.

No. 5076.

Supreme Court of New Mexico.
March 9, 1948.

Rehearing Denied May 11, 1948.

George A. Shipley, of Alamogordo, for appellant.

Frazier & Quantius, of Roswell, for appellee.

COMPTON, Justice.

This is a suit in assumpsit. Appellee sought to collect the balance due on the purchase price of warehouses, fixtures, cottages, garage building, wood shed, truck, lease-holds, and stock of merchandise consisting of hardware, located at Ruidoso, New Mexico. Appellant answered, denying the indebtedness asserted against him. Further answering, he set up fraudulent misrepresentations by appellee as an inducement for making the purchase. Appellee's reply put in issue all material facts raised by the affirmative defense. The case was tried to the court without a jury. Judgment was rendered for appellee and it is from this judgment appellant brings this appeal.

It is the contention of appellant that appellee represented that the stock of merchandise had an inventory value of not less than $15,000, that the representation was material and was relied upon by him. On the other hand, appellee contends that the stock of merchandise, together with all other property, was sold in a lump sum, irrespective of inventory value. The controversy grows out of the value of the stock of merchandise.

At the conclusion of the trial the court made the following pertinent findings of fact:

"4. No inventory of the stock of merchandise was made by the parties prior to the agreement of sale and purchase. The plaintiff expressly refused to negotiate the sale on an inventory basis, and consented to make the sale on a lump sum basis only for his equity and interest in the whole properties and business. The defendant in person, and with his advisor, had opportunity to survey, inspect and examine the property, including the stock of merchandise, as to kind and quantity apparently to such extent as he desired. The defendant was experienced in the hardware business, and Mr. Champion, whom defendant consulted in the matter was widely experienced in such business. Within four or five days after the sale and purchase agreement the defendant knew the full extent of the property, including the stock of merchandise which was then listed as to articles and quantity in his inventory taken immediately after going into possession.

"6. That no warranty was made by the plaintiff as to any particular amount of

merchandise and no misrepresentation was made by the plaintiff concerning the stock of merchandise; that the stock of merchandise was open to the inspection of the defendant and his brother-in-law, Gerald D. Champion, each of whom were experienced in the hardware business; that the plaintiff refused to deal on an inventory basis, and insisted upon a lump sum sale, regardless of inventory; that the plaintiff has repeatedly demanded that the defendant pay the remainder of $5500.00, but the defendant refused to pay the same, and said amount is justly due and owing to the plaintiff with interest thereon at the rate of six per cent per annum from June 23, 1945, until paid.

"7. The defendant and his advisor, Champion, were both familiar with the hardware business, and they questioned the price first demanded by plaintiff and beat down that price, and they had ample opportunity to examine and inspect for their own information and guidance although they knew plaintiff would deal only for lump sum sale, and repeatedly they questioned and beat down the purchase price placing no reliance upon the expressed opinions of the plaintiff as to value. Defendant and Champion did inspect and look over the stock and were not deterred from doing so as fully as they pleased, and defendant understood plaintiff was asking cash only for his 'equity' in the whole property, and plaintiff did not warrant or represent as a fact that any certain inventory value of merchandise was there in stock."

The foregoing findings and the court's refusal to make certain requested findings are assigned as error. This brings the case within the rule so frequently announced that findings of fact if supported by substantial evidence will not be set aside. Therefore it is necessary to review the evidence to determine this question.

Previous to negotiations, Gerald D. Champion, a creditor of appellee, and a brother-in-law of appellant, called appellee from Tularosa, making inquiry if the property were for sale, stating that a party there was interested in buying it. Appellee informed him that he would sell for the sum of $36,000. Champion informed him that the party would be in Ruidoso the next day. The following morning, appellant arrived and immediately began negotiations for the purchase, casually inspecting the stock of merchandise at the time. Appellee renewed the offer of $36,000. Appellant requested and was given time to consider the proposition. The following day he returned and negotiations were continued, appellant again inspecting the merchandise.

Champion's account was approximately $20,000, less a discount of 10%. It was suggested by appellee that if appellant would pay the Champion account that he

would sell his equity in the business, and the property for the sum of $18,000. Appellant requested time to consult Champion, stating that he and Champion would return the following morning if they were interested. They arrived about 8 or 8:30 on the morning of the 23d of May, 1945, when a further inspection of the property was made. The three consulted together while negotiating. Upon inquiry by appellant as to the value of the stock of merchandise, appellee gave it as his opinion that it would inventory from $15,000 to $18,000, but stated that he would not sell on an inventory basis. He refused to negotiate, except a lump sum sale of $18,000 for himself and the assumption by appellant of the Champion account.

While the negotiations were pending, Champion, after having made further inspection of the merchandise, told appellee that it was his opinion that the value of the stock would not exceed $10,000 or $11,000. Appellee, then relying upon the experience and superior judgment of Champion, offered to sell for the sum of $11,000 if appellant would assume the Champion account. This was agreeable and the offer as made was accepted. A cash payment of $500 was then made. Appellant took possession of the stock of merchandise and the next day, without the assistance of appellee, completed an inventory and continued to operate the business. Possession of the remainder of the property was to have been delivered within 30 days and upon payment of the balance of the consideration. On June 15th, at the request of appellant, appellee executed bills of sale to all the property. Appellant made a cash payment of $5,000 and offered to give an order on Champion for the balance. Whereupon, appellee requested appellant to have Champion deposit the balance to his credit in a bank in Alamogordo, which was agreeable. Appellee, assuming that the balance had been so deposited, delivered possession of the property on June 21st. Appellant immediately refused to pay the balance, claiming that the inventory had been extended and that the value of the stock was less, by $7,715, than represented by appellee.

The authorities presented by appellant support the proposition that if a vendor speaks, he must speak the truth. This is conceded to be the rule. But these cases cannot be regarded as authority in support of appellant's claim, as appellee did not negotiate on an inventory basis.

Appellant and Champion were experienced in hardware values. They inspected the merchandise, or at least had a fair opportunity to do so and pursued negotiations on a lump sum basis. This, and appellee's failure to extend inventories for some 30 days, has no plausible explanation, unless it can be said that appellee's contention is the correct one. It is also significant that appellant offers no explanation

as to what his attitude would have been had the inventory value materially exceeded appellee's estimate. For all the record says, such excess value would have passed to him under the agreement. This is inconsistent with a sale on an inventory basis. Under the facts and circumstances appearing, appellant cannot be heard to complain that he has been defrauded. We appraise the representation of appellee as mere opinion, expressed in such manner that no reasonably prudent person could be deceived thereby. This conclusion finds support in Bell v. Lammon, 51 N.M. 133, 179 P.2d 757, and Hartzell v. Jackson, 41 N.M. 700, 73 P.2d 820.

We have noticed all assignments of error but the conclusion reached renders further discussion unnecessary. The findings of facts are supported by substantial evidence and the findings support the judgment. It is obvious that the conclusion of the trial court that there was no fraud is substantiated by the findings and evidence.

The judgment will be affirmed and the cause remanded with directions to the trial court to reinstate the case upon its docket, render judgment in favor of appellee and against appellant and the sureties upon his supersedeas bond, and it is so ordered.

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

McGHEE, J., dissenting.

McGHEE, Justice (dissenting).

I know of nothing more useless than a long, lone dissent based on the facts, so I content myself by saying that, in my opinion, judgment should have gone against the plaintiff on his own testimony. I dissent.

193 P.2d 405

STATE v. COUCH.

No. 4946.

Supreme Court of New Mexico.

Dec. 31, 1946.

On Rehearing May 20, 1948.

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Caswell S. Neal, of Carlsbad, and C. Melvin Neal, of Hobbs, for appellant.

C. C. McCulloh, Atty. Gen., and Thos. C. McCarty, Asst. Atty. Gen., for appellees.

George L. Reese, Jr., Sp. Asst. Atty. Gen., for appellee, on rehearing.

HUDSPETH, Justice.

Appellant was convicted by a jury of the crime of voluntary manslaughter and

sentenced to the penitentiary for a term of not less than seven nor more than ten years, from which he prosecutes this appeal.

The appellant and his wife resided in a small cottage, the property of appellant, surrounded by vacant lots, situate in Hobbs, Lea County, at the time and prior to the commission of the homicide. Appellant had complained to the police that during the absence of himself and wife parties had repeatedly entered his cottage for the purpose of copulating; that he had put additional locks on the doors of the cottage; and shortly thereafter on June 24, 1945, and June 27, 1945, in the nighttime, parties had driven by his cottage in automobiles and thrown rocks, some of them the size of a man's fist, against his house, and injured the building. The third attack was made on the residence of appellant about midnight June 30th, 1945. On that occasion immediately after two rocks struck the house, appellant fired two shots from a shotgun, through windows of his house, which caused the death of Charles Vaughan and the destruction of one eye of Robert Langford, who had previously lost the other eye while hunting. These boys were both sixteen years of age and approximately five feet and eleven inches tall. The deceased weighed about 150 pounds. They and another boy were riding on the running boards of the automobile, which was traveling at a slow speed. Other rocks were found in the car—and one of the three boys riding on the running boards testified he had not thrown the rock held in his hand when the shot struck him. There were no street lights in the vicinity of the cottage, although a gas torch at an oil well a mile away gave some light at times.

Appellant, a machinist, who had been promoted to foreman of the shop where he was employed, discussed with his boss the matter of the intrusions into his home, which had greatly disturbed his wife. The boss suggested that the intruder might be someone dissatisfied with his advancement to the foremanship, and advised him to wait before he did anything.

After the house was "rocked" on the night of June 27th, which occurred between 12:00 and 1:00 o'clock, appellant called the police and two officers immediately responded. They saw the rocks and the scars on the pine siding of the walls, and heard a full report of the previous occurrences, including the intrusions and the evidence left by the intruders in appellant's cottage. Appellant inquired of the Chief of Police the following Thursday evening as to developments in the case and was advised that nothing had been learned as to the identity of the parties. On the following Saturday night the killing occurred.

The state's witnesses testified to the three assaults on the house, and that the

shots were fired immediately after the two rocks struck the house on Saturday night.

Appellant and his wife testified that they attributed the assaults on the house to their unknown enemy, who had entered their cottage during their absence. Appellant testified, in part, as follows:

"A. Our bed room, our bed set right in front of two West windows and we kept those two windows down and the shades pulled at all times, and the South window the one on the West corner next to our heads we kept it down all the way, and on the East side of the double window, the window farthest away from the bed, we kept it up four, five or six inches just for a little air to come through.

"Q. How long had you done that? A. Since shortly after we noticed the house being entered.

"Q. Why did you do that? A. I did not know who was coming in and prowling around, and we were afraid to lay there with the windows open.

"Q. Did you have the house air conditioned? A. No, sir.

"Q. You did that all through the summer? A. Yes, sir.

"Q. Had you and your wife discussed whether or not what had been her attitude about what you ought to do? A. She wanted to leave and move away from Hobbs, as she said she could not stand it any longer, and I said I had worked hard on the job I had and hated to just pick up and run off and leave it. We had worked hard to get our place fixed up as nice as it was.

"Q. Did you have any idea who might be causing this trouble? A. No, sir."

Appellant's assignment of errors are based upon alleged errors in instructions of the court to the jury and the refusal of requested instructions.

In addition to the defense of habitation, appellant relies upon 1941 Comp. Sec. 41-4712 (Laws 1891, Chap. 65, Sec. 1), which declares to be a felony the unlawful and malicious destruction or injury of a building on the land of another, and 1941 Comp. Sec. 41-2413, which follows:

"Killing in defense of person or property, apprehending felon, suppressing riot, or preserving peace.—Such homicide is also justifiable when committed by any person in either of the following cases:

"First. When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling-house in which such person shall be.

"Second. When committed in the lawful defense of such person, or of his or her husband, wife, parent, brother, child, master, mistress, or servant, when there shall be reasonable ground to apprehend a de-

sign to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished; and

"Third. When necessarily committed in attempting by lawful ways and means to apprehend any person for any felony committed; or lawfully suppressing any riot; or in lawfully keeping and preserving the peace. (Laws 1853–1854, p. 86; C.L. 1865, ch. 51, § 5; C.L. 1884, § 692; C.L. 1897, § 1069; Code 1915, § 1471; C.S. 1929, § 35–318.)"

Appellant assigns error based on the use by the court in its instruction on justifiable homicide of words of limitation on the right of appellant to kill.

After quoting the first paragraph of Section 41-2413, appellant's counsel maintain: "This statute gives a man the right to kill another who is committing a felony upon his home, he being therein. No qualification upon the right exists. If a felony is being attempted or committed and the violator is killed while engaged therein, the killing is justifiable. No limitation upon the degree of force used is material. No actual necessity or apparent necessity to kill to prevent it is necessary. If the killing occurs while such a felony is in progress, the legislature has said it is justifiable."

It is argued that since paragraphs 2 and 3 of this section contain qualifying limitations on the right to kill that the legislature intended there should be no limitation when one was resisting an attempt to commit the crimes listed in the first paragraph.

The Attorney General suggests that a later statute, 1941 Comp. Sec. 41-2411 (Laws of 1907, Chap. 36, Sec. 11) modifies the first paragraph of Section 41-2413, which reads as follows: "41-2411. Justifiable homicide—Defense of self, family, or property.—Any person who shall kill another in the necessary defense of his life, his family or his property, or in legal defense of any illegal proceedings against himself, his wife or family, shall be adjudged not guilty. (Laws 1907, ch. 36, § 11; Code 1915, § 1469; C.S. 1929, § 35-316.)"

This section is part of an act of twenty-three sections defining murder and other crimes and repealing, by number, fifteen sections of the Compiled Laws of 1897 and "all other acts and parts of acts in conflict herewith." Laws 1907, c. 36, § 23.

The Territorial court in the case of Territory v. Matson, 16 N.M. 135, 113 P. 816, 819, held that the words "All acts and parts of acts in conflict herewith" added nothing to the repealing effect of the later legislation.

We lately considered the subject of repeals by implication in the case of Levers v. Houston, 49 N.M. 169, 159 P.2d 761;

and State v. Melendrez, 49 N.M. 181, 159 P.2d 768, where there appear discussions of the subject.

In the earlier case of State ex rel. County Com'rs, San Miguel County v. Romero, 19 N.M. 1, 140 P. 1069, we held: "Syl. A subsequent statute, treating a subject in general terms, will not be held to repeal by implication an earlier statute, treating the same subject specifically, unless such construction is absolutely necessary in order to give the subsequent statute effect."

In the late case of Robinson v. United States, 8 Cir., 142 F.2d 431, 432, the following language is quoted with approval from United States v. Zenith Radio Corp., D.C.Ill., 12 F.2d 614: "'It is elementary that where there is, in an act, a specific provision relating to a particular subject, that provision must govern in respect to the subject as against general provisions in the act, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates. Endlich, Interpretation of Statutes, § 216; Swiss National Insurance Co. v. Miller, 53 App.D.C. 173, 289 F. 571, 576; Washington v. Miller, 235 U.S. 422, 428, 35 S.Ct. 119, 59 L.Ed. 295; United States v. Nix, 189 U.S. 199, 205, 23 S.Ct. 495, 47 L.Ed. 775; Townsend v. Little, 109 U.S. 504, 519, 3 S.Ct. 357, 27 L.Ed. 1012. This rule is particularly applicable to criminal statutes in which the specific provisions relating to particular subjects carry smaller penalties than the general provision.'"

The older statute is more specific, particularly as to resisting an attempt to commit a crime; and we do not deem it repealed by Section 41-2411 and only modified or qualified to the extent that the word "necessary" appearing in the later statute should be given effect.

Other courts have interpreted the language of the first paragraph, Section 41-2413, quoted above, as if the word "necessary" appeared in the statute. See Collegenia v. State, 9 Okl.Cr. 425, 132 P. 375, and Viliborghi v. State, 45 Ariz. 275, 43 P.2d 210.

In Russell v. State, 61 Fla. 50, 54 So. 360, 361, the court said:

"The general charge of the trial judge is eminently correct and fair to the defendant as far as it extends, though it does not cover fully the first paragraph of section 3203, Gen.St.1906 [F.S.A. § 782.02], defining justifiable homicide. That paragraph is as follows: 'When resisting any attempt to murder such person, or to commit any felony upon him or her, or upon or in any dwelling house in which such person shall be.' * * *

"It seems to be clear, however, that one assaulted in his dwelling house would not be justified in killing the aggressor, unless he

had reasonable ground to believe, and did believe, that unless he killed the aggressor a felony would be committed upon him or her, or upon or in the slayer's dwelling. The general law on this subject is given in the case of State v. Patterson, 45 Vt. 308, and in the note to that case in 12 Am.Rep. 200–212."

Another case involving a similar statute is that of Bowen v. State, 164 Miss. 225, 144 So. 230, 232, in which the court, after quoting from 30 C.J., Section 264, page 84; 40 C.J.S., Homicide, § 109, said:

"Our own statutes provide such justification in clause e of section 988, Code of 1930, wherein it is provided that the killing of a human being shall be justifiable. '(e) When committed by any person in resisting any attempt unlawfully to kill such person or to commit any felony upon him, or upon or in any dwelling-house in which such person shall be.' * * * Her testimony as to what happened, and how it happened, warranted her in resorting to the shotgun as a means of ejecting the deceased, and as a means of protecting herself and her home from violation.

"The home is one of the most important institutions of the state, and has ever been regarded as a place where a person has a right to stand his ground and repel, force by force, to the extent necessary for its protection. In early English law, it was a man's castle to which he might retire and defy the whole world. Officers could not enter, but must wait outside to even serve processes of arrest upon the occupant of the house. A great English statesman in an outburst of oratory has declared that a man's home is his castle wherein the King could not enter against the owner's consent; that the winds might enter, the rain might enter, but the King and his officers could not enter it; and that, no matter if the home was so poor as to be insufficient to exclude the elements, it remained a man's stronghold."

The Supreme Court of Missouri in State v. Taylor, 143 Mo. 150, 44 S.W. 785, 788, interpreted a similar statute and said:

"That 'one's dwelling house is his castle' is a maxim of the common law. This was ruled in Semayne's Case, 5 Coke['s Rep.] 91 A.: 'The house of every one is his castle, and if thieves come to a man's house to rob or murder, and the owner or his servants kill any of the thieves in defense of himself and his house, it is no felony, and he shall lose nothing.' 3 [Thos.] Coke['s Rep.], 188. The principle is of feudal origin, and essentially necessary in the early history of England, when men were compelled to defend themselves in their homes, by converting them into fortified castles. It will be observed that in Semayne's Case the right to kill was limited to the resistance of the commission of a felony. It is insisted by defendant that at

common law one was justifiable in killing a mere trespasser upon his dwelling house. We do not so understand the sages of the law.

"Thus, Lord Hale, in his Pleas of the Crown, (1 Hale, P.C. [484]), says: 'I come to consider what the offense is in killing him that takes goods or doth injury to the house or possession of another. And herein there will be many diversities as, first, between a trespassable act and a felonious act, and between felonious acts themselves.' * * *

"Let us inquire as to our own country. Dr. Wharton, in his work on the Law of Homicide, in section 541, under the head of 'Protection of Dwelling House,' says: 'When a person is attacked in his own house, he need retreat no further. Here he stands at bay, and may turn on and kill his assailant if this be apparently necessary to save his own life; nor is he bound to escape from his house in order to avoid his assailant.' 'In this sense, and in this sense alone, are we to understand the maxim that "every man's house is his castle."' 'An assailed person, so we may paraphrase the maxim, is not bound to retreat out of his house to avoid violence, even though a retreat may be safely made. But he is not entitled, either in the one case or the other, to kill his assailant unless he honestly and nonnegligently believes that he is in danger of his life from the assault,' or when a felonious assault is being made upon the house, as to commit burglary, arson, or other felony therein or against its inmates. This statement of the law is abundantly sustained by Archb.Cr. Law, p. 221, and the authorities there cited; Reg v. Bull, 9 Car. & P. 22. See, also, People v. Walsh, 43 Cal. 447; Carroll v. State, 23 Ala. 28, [58 Am.Dec. 282]; De Forest v. State, 21 Ind. 23; State v. Patterson, 45 Vt. 308; Morgan v. Durfee, 69 Mo. 469, [33 Am.Rep. 508].

"It may as well be noted that, if the aggressor is about to commit a felony, it is wholly immaterial whether it is a felony at common law or by statute. In either case the owner of the house may protect himself or his house from the perpetration of a felony against either, without retreating therefrom. Davis, Crim.Law, p. 156. The foregoing view of the law has been adopted by the general assembly of this state in defining justifiable homicide. State v. O'Connor, 31 Mo. 389. Section 3462, Rev.St. 1889, provides that: 'Homicide shall be deemed justifiable when committed by any person in either of the following cases: First, in resisting any attempt to murder such person or to commit any felony upon him or her or in any dwelling house in which such person shall be,' etc.

"We have thus gone at length into a review of the law upon this subject, and we deduce from the decided cases and the standard authors that a mere civil trespass upon a man's dwelling house does not

justify him in slaying the trespasser; that the owner may resist the trespass, opposing force against force, but he has no right to kill unless it becomes necessary to prevent a felonious destruction of his property or the commission of a felony therein, or to defend himself against a felonious assault against his life or person; that if he kills without reasonable apprehension of immediate danger to his person or property, but in the heat of passion aroused by the trespasser, it will be manslaughter. * * *"

In Gray v. Combs, 7 J.J.Marsh., Ky., 478, 23 Am.Dec. 431, 435, the court said: "Indeed, Blackstone himself, 4 Com. 180, holds this language: 'Such homicide as is committed for the prevention of any forcible and atrocious crime, is justifiable by the law of nature, and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared in statute 24 Hen. VIII., c. 2.' He then cites the Jewish law, which punishes no theft with death, yet justifies homicide in cases of nocturnal housebreaking: 'If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him; but if the sun be risen, then shall blood be shed for him.' He then cites the law of Athens, where, if any theft was committed by night, it was lawful to kill the criminal if taken in the fact, and the transcription of the same law into the Roman twelve tables, and concludes thus: 'which amounts very nearly to the same as is permitted by our own constitutions.' "

In another leading case, Foster v. Shepherd, 258 Ill. 164, 101 N.E. 411, 416, Ann. Cas.1914B, 572, p. 577, the following appears: "* * * * And so, if one is committing acts in or about a dwelling, which reasonably and in good faith are believed to manifest a felonious intent, a man having the right of defense as to such dwelling may resort to force to repel the attack or prevent the felony, and his act may be justified, under the law of self-defense, although it might afterwards turn out that no felony was, in fact, contemplated, but the only design was to frighten the persons in such dwelling. Reins v. People, 30 Ill. 256; Greschia v. People, 53 Ill. 295."

Morrison v. Commonwealth, 74 S.W. 277, 24 Ky.Law Rep. 2493, 67 L.R.A. 529, 543: "Nor does the law require that there shall be actual danger to one's habitation to justify killing in defense of it; but it does require that there shall be reasonable ground for apprehending a design to commit a felony upon such habitation, and that there shall also be reasonable ground for believing the danger imminent that such design will be accomplished. Stoneman v. Com., 25 Grat., Va., 887."

The facts in State v. Terrell, 53 Utah 314, 186 P. 108, 112, 25 A.L.R. 497, are some-

what similar to those in the case at bar. A twelve-year-old boy was shot by the defendant while he was burglarizing a rabbit pen. Defendant relied upon defense of habitation. The court, after discussing the law and the instructions, said: "As heretofore pointed out, homicide is justifiable under our statutes 'when committed in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise to commit a felony.' In this class of cases the authorities are practically unanimous that the slayer need only act upon appearances, and it is sufficient if he acts in good faith and has reasonable grounds to believe, and does believe, that under the circumstances his legal rights are being feloniously invaded and the necessity exists for the force used by him in the prevention of crime. Michie on Homicide, § 116, p. 374, vol. 1; New Orleans & N. E. R. Co. v. Jopes, 142 U.S. [18,] 19, 12 S.Ct. 109, 35 L.Ed. 919."

See also Com. v. Beverley, 237 Ky. 35, 34 S.W.2d 941; Newman v. State, 58 Tex. Cr.R. 443, 126 S.W. 578; 21 Ann.Cas. 718, page 724; Annotations: 25 A.L.R. 508, 32 A.L.R. 1541, and 34 A.L.R. 1488; 40 C.J.S., Homicide, §§ 101, 109 and 110; 26 Am.Jur., Homicide, §§ 153 and 155.

While no law, ancient or modern, countenances wanton slaying—the protection and security of life being the most vital interest of society—the law of defense of habitation and the resistance to the commission of a felony thereon invoked by appellant gives the householder the right to kill the aggressor, if such killing is necessary or apparently necessary to prevent or repel the felonious aggression.

The defense of habitation alone, without a statute making it a felony to unlawfully and maliciously injure a house, as pointed out in State v. Patterson, supra, and many other cases, gives the householder the right to meet force with force, and "an attack upon a dwelling, and especially in the night, the law regards as equivalent to an assault on a man's person, for a man's house is his castle."

The same rule limiting the amount of force which may be lawfully used in defense of other property does not apply in defense of habitation.

In State v. McCracken, 22 N.M. 588, 166 P. 1174, 1176, the opinion of the court by Mr. Justice Roberts quotes Wharton on Homicide (3rd Ed.) § 526: " 'While the law justifies the taking of life when necessary to prevent the commission of a felony, one cannot defend his property, other than his habitation, to the extent of killing the aggressor for the mere purpose of preventing a trespass.' "

See also State v. Bailey, 27 N.M. 145, 198 P. 529, and State v. Waggoner, 49

N.M. 399, 165 P.2d 122. Chief Justice Sherwood in the case of Morgan v. Durfee, 69 Mo. 469, 33 Am.Rep. 508, after stating that defendant's rights were of a two-fold nature, defense of his habitation and defense of his person, said:

"In Pond v. People, 8 Mich. 150, a very well considered case, where the accused was tried for murder and found guilty of manslaughter, the death having occurred from a gun-shot wound, at the out-house of the prisoner where his servants slept, near his dwelling, and it was insisted that he was only charged with excusable or justifiable homicide, Campbell, J., remarked: 'The first inquiry necessary is one which applies equally to all grounds of defense; and is whether the necessity for taking life, in order to excuse or justify the slayer, must be one arising out of actual or imminent danger; or whether he may act upon a belief, arising from appearances which give him reasonable cause for it, that the danger is actual and imminent, although he may turn out to be mistaken. Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion. But the rules which make it excusable or justifiable to destroy it under some circumstances are really meant to insure its general protection. They are designed to prevent reckless and wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of those whom they wantonly attack and put in peril or fear of great injury or death; and such rules, in order to be of any value, must be in some reasonable degree accommodated to human character and necessity. They should not be allowed to entrap or mislead those whose misfortunes compel a resort to them. Were a man charged with crime to be held to a knowledge of the facts precisely as they are, there could be few cases in which the most innocent intention or honest zeal could justify or excuse homicide. * * * The prisoner who is to justify himself can hardly be expected to be entirely cool in a deadly affray, or in all cases to have great courage or large intellect; and he cannot well see the true meaning of all that occurs at the time; while he can know nothing whatever * * * concerning the designs of his assailant any more than can be inferred from appearances.' These views are remarkably well expressed, * * *

"And this right of defending one's dwelling is in some sense superior to that of the defense of his person; for in the latter case it is frequently the duty of the assaulted to flee, if the fierceness of the assault will permit, while in the former a man assaulted in his dwelling is not obliged to retreat, but may stand his ground, defend his possession, and use such means as are absolutely necessary to repel the assailant from his house, even to the taking of life. Pond v. People, supra, and cases cited; 3

Greenl.Ev., Secs. 65, 117; State v. Patterson, 45 Vt. 308, s.c., 12 Am.Rep. 200; Parsons v. Brown, 15 Barb.,N.Y., 590."

And in this case, if appellant has been personally attacked with stones, under the common law, it would have been his duty to flee rather than shoot. State v. Sipes, 202 Iowa 173, 209 N.W. 458, 47 A.L.R. 407. But a felonious attack on his habitation at midnight by unknown persons whose purpose in making the attack was only a matter of surmise, gave the appellant the right to instantly meet force with force, and if reasonably necessary, slay the aggressor.

In Cook's Case, 79 Eng.Rep.Reprint 1063, where it is said everyone must defend his own house, the distinction is noted between killing a known person in the daytime while he is unlawfully attacking a habitation, and the killing of an unknown person at night, the first being manslaughter and the latter justifiable homicide.

Mr. Justice Cardozo, in People v. Tomlins, 213 N.Y. 240, 107 N.E. 496, 498, Ann. Cas.1916C, 916, commenting upon the right of one to stand his ground in his own dwelling, quoted from Jones v. State, 76 Ala. 8, 14: "Whither shall he flee, and how far, and when may he be permitted to return?"

And in Bohannon v. Commonwealth, 8 Bush, Ky., 481, 8 Am.Rep. 474, 477, the court said: "It was misleading to instruct the jury, under the proof in this prosecution, that Bohannon's right of self-defense did not arise until he had 'done everything in his power to avoid the necessity' of slaying his adversary. He might have avoided such necessity by secreting himself so that he could not be found, or by abandoning his home and seeking safety in some remote part of the country; but under the law he was not required to resort to either of these methods of securing his personal safety."

One may not be driven from his home by a midnight felonious attack thereon, or a series of felonious attacks, calculated to instill fear and apprehension, or mental suffering beyond endurance. The record contains evidence, some of which is quoted above, that appellant and his wife, who were wholly free from fault, suffered intensely from apprehension of violence at the hands of the unknown intruder into their home; and, that they conjectured that the same party was responsible for the later attacks upon it.

The automobile has changed the habits and customs of criminals, as well as other folk, since frontier days. The modern assassin instead of lying behind a log, shoots his victim from a high-powered car and speeds away. The persistence of the assailants tended to inflame the fear in the mind of appellant of assassination. Appellant could only infer the motive from the

deeds, since he knew not the identity of his enemy, and ignorance serves to increase rather than lessen fear. "Like the greatest virtue and the worst dogs, the fiercest hatred is silent." It was a reasonable apprehension that there was at least one bold, reckless and dangerous criminal involved, and the offenses of the intruder and the midnight attacks on the house were not such as are usually perpetrated by juveniles; nor did appellant have reason to believe that the man who had entered his house had enlisted the services of juveniles in making the midnight attack upon his home.

When the police officers visited appellant's home on Wednesday night prior to the tragedy they directed their inquiries to the ascertainment of the identity of the enemy or enemies of appellant, and no one suggested that juveniles might be involved.

There are cases reported where juveniles have been shot while committing burglary, like Viliborghi v. State, supra; State v. Terrell, supra, and People v. Silver, 16 Cal.2d 714, 108 P.2d 4, and while engaged with men in committing other offenses in the night, like Patten v. People, 18 Mich. 314, 333, 100 Am.Dec. 173, and Higgins v. Minaghan, 78 Wis. 602, 47 N.W. 941, 11 L.R.A. 138, 23 Am.St.Rep. 428, but counsel have cited no case, and we have found none, where the facts were similar to those in the case at bar.

The connection, if any, between the intruder into appellant's home and the midnight attacks thereon is of small moment, since the matter should be considered solely from the viewpoint of appellant at the time the fatal shot was fired. And it was not unreasonable for him to surmise that both were designed by the same person.

Whether the amount of force used by appellant was more than the attack warranted was a question for the jury to determine, under proper instructions from the court. And the most difficult point to impress on the minds of the jury in this class of cases is that the danger, or apparent danger, must be considered from the standpoint of the prisoner at the time the shot was fired. In the language used in State v. Roybal, 33 N.M. 187, 191, 262 P. 929, 931: "That the danger was to be judged, not according to the actual facts as they developed at the trial, but according to the facts as the jury might find that they appeared to the appellant at the time."

While all the authorities agree that the jury should put themselves in the place of the prisoner, surrounded by the circumstances and exposed to the influences to which he was exposed, it is realized that it is difficult for the jury while deliberating on this question not to consider facts later proved but not known to the prisoner at the time. In fact, Professor Wharton uses as

a comparison: "A test about as inapplicable as would be that of the jury who deliberate on events after they have been interpreted by their results."

The learned trial judge fell into reversible error in refusing requested instruction relating to appellant's right to act in view of the condition of his wife and the effect the repeated assaults had upon her. Testimony had been given tending to prove alarming impairment of the health of appellant's wife, and he was entitled to have the issue submitted to the jury under proper instructions from the court. State v. Hughes, 43 N.M. 109, 86 P.2d 278; State v. Walton, 43 N.M. 276, 92 P.2d 157.

In the case of Patten v. People, supra, the mother of the defendant was in feeble health and the fear and excitement caused by threats and conduct of rioters near the habitation produced upon her alarming effects. The court said: "* * * I can see no sound reason why the danger to the mother from their conduct should not have excused the conduct of defendant towards them to the same extent as if the danger to her life had resulted from an actual attack upon her person, or the like danger to the defendant from an attack upon him. And the defendant would, I think, have the right to resort to the same means of protection in the one case as in the other."

A similar case is that of Higgins v. Minaghan, 78 Wis. 602, 47 N.W. 941, 943, 11 L.R.A. 138, 23 Am.St.Rep. 428, 433, from which we quote: "2. We do not think the defendant was bound to notify the charivari party that their shooting, noise, and tumult were causing terror and fright to his wife and children, and were seriously injuring them in mind, body, and health. This was the third night these persons had been engaged in these unlawful and criminal proceedings. On the first night they came the defendant had warned them away, and directed them to desist. The rioters themselves knew, or should have known, that their acts and conduct about the house, in the night, were well calculated to produce terror and fright, and injuriously affect the defendant's family. This was the direct, necessary, and almost inevitable consequence of their acts. * * * So we think it was error to charge that the defendant was bound to inform the charivari party of the fact that their riotous conduct was endangering the life of his wife and children, before taking effectual means, by shooting or otherwise, to drive them away. The circuit judge evidently held that the defendant had no right to fire into the body of rioters without notice, and without having commanded them to disperse; but upon the undisputed facts of the case the law imposed upon him no such duty."

Appellant had no time or opportunity to notify the assailants, and being without knowledge of their identity or their purpose in making the attacks at night, reasonably feared personal violence at their hands if he had exposed his person.

Appellant complains that the court erred in instructing the jury "that the killing must be done for prevention of a felony and not as a punishment for felony already committed." The facts in this case are that the first and fatal shot was fired immediately after rocks struck the home of appellant, when the car was forty-eight feet from appellant's house, and the second shot was fired after the automobile on which the deceased and others were riding had traveled thirty-six feet at a rate of ten to fifteen miles per hour on a street in front of appellant's house. The car never stopped. The shot from appellant's gun struck one of the boys before he had thrown the rock which he held in his hand. Other rocks were found in the car. The time between the two shots was about two seconds, according to the testimony of the state's witness.

When one's home is attacked in the middle of a dark night by persons riding in an automobile, the householder, being unable to determine what weapons the assailants have, is not obliged to retreat but may pursue his adversaries till he finds himself out of danger. Two seconds is not too long in a case of this sort within which the householder might reasonably expect further attack. It was reversible error to give such an instruction where it was not apparent whether they were intending to abandon the attack. Hayner v. People, 213 Ill. 142, 72 N.E. 792; Wilson v. State, 46 Tex.Cr.R. 523, 81 S.W. 34; Palmer v. State, 9 Wyo. 40, 59 P. 793, 87 Am.St.Rep. 910; People v. Lewis, 117 Cal. 186, 48 P. 1088, 59 Am.St. Rep. 167; State v. Manns, 48 W.Va. 480, 37 S.E. 613; 26 Am.Jur. p. 262, 40 C.J.S., Homicide, §§ 97, 101, pp. 956, 960.

In the case of People v. Silver, 16 Cal. 2d 714, 108 P.2d 4, 8, the Supreme Court said:

"We are of the opinion that the instructions were erroneously given. When the charge to the jury, though a correct statement of legal principles, is extended beyond such limitations so as to cover an assumed issue which finds no support in the evidence it constitutes error. People v. Savinovich, 59 Cal.App. 240, 244, 210 P. 526. * * *.

"Where errors in instructions occur, the question always arises as to whether or not they are prejudicial. Here it may be said that where the proof of a defendant's guilt is clear, and no extenuating circumstances appear, such errors may not be prejudicial. But where a case, such as the one at bar, is what may be termed a

'close' case, and where the erroneous instructions concern matters vital to the defense of the defendant, and may have resulted in a miscarriage of justice, we are of the opinion that such errors must be regarded as prejudicial and should result in a new trial for the defendant."

Appellant assigns error based upon an instruction, in part, as follows: "The statutes of New Mexico provide that the unlawful and malicious destruction of or injury to a building located upon lands to which any person has a good and indefeasible title under the laws of the United States or New Mexico is a felony and any person found guilty of the malicious destroying or injuring of any such building is punishable by imprisonment in the penitentiary. *The injury to such building, however, to be felonious, must be of a substantial character, that is to say, one which lessens the utility or value of the building.*" (Italics ours.)

Appellant complains that by the addition of the last sentence and use of other language of like import in the instruction the Court deprived him of a substantial defense. The testimony of the state's witnesses disclosed that the stones thrown by deceased and his companions had done some damage to the dwelling of appellant, and he contends that the statute is plain and that it was error for the court to import the last sentence quoted above into the statute.

Chief Justice Roberts in the case of Harrison v. Harrison, 21 N.M. 372, 155 P. 356, 360, L.R.A.1916E, 854, said:

"The fundamental rule in construing statutes is to ascertain and give effect to the intention of the Legislature. This intention, however, must be the intention as expressed in the statute, itself, and where the meaning of the language used is plain, it must be given effect by the courts. This is a universal rule. 36 Cyc. 1106.

" 'The Legislature must be understood to mean what it has plainly expressed, and this excludes construction.' Lewis' Sutherland Statutory Construction, § 366."

See also Vukovich v. St. Louis, Rocky Mountain & Pacific Co., 40 N.M. 374, 60 P.2d 356; Moruzzi v. Federal Life & Casualty Co., 42 N.M. 35, 75 P.2d 320, 115 A.L.R. 407; Griffith v. Humble et al., 46 N.M. 113, 122 P.2d 134; Giomi et al. v. Chase et al., 47 N.M. 22, 132 P.2d 715.

The English courts have a similar rule. Maxwell on the Interpretation of Statutes, Eighth Edition, p. 14 states: "It is but a corollary to the general rule in question, that nothing is to be added to or to be taken from a statute, unless there are similar adequate grounds to justify the inference that the Legislature intended something which it omitted to express (1). 'It is a strong thing to read into an Act of Parliament words which are not there, and, in the absence of clear necessity, it is a wrong

thing to do' (m). 'We are not entitled to read words into an Act of Parliament unless clear reason for it is to be found within the four corners of the Act itself' (n)." Citing: (1) Tindal C. J.; (m) Lord Mersey, Thompson v. Goold, 79 L.J. K.B. 911; (n) Lord Loreburn L.C., Vickers v. Evans, 79 L.J.K.B. 955.

The language of this statute is plain, its meaning clear. When the whole statute is considered we find that the amount of the injury or damage suffered by the owner is not the measure of the crime. On the contrary, it arbitrarily says: the unlawful and malicious destruction or injury of a building "is hereby declared a felony." 1941 Comp. § 41-4712. It makes fence cutting a felony, although a wire fence may be mended at small cost. If the Legislature had intended to fix a minimum of injury which would constitute a felony they, presumably, would have made it definite like the dividing line between grand and petit larceny. The fact that the penalties are drastic, will not, standing alone, authorize exception therefrom of acts within the spirit and letter of the law. "It is safer to adopt what the legislature have actually said, than to suppose what they meant to say." United States v. Chase, 135 U.S. 255, 10 S.Ct. 756, 758, 34 L.Ed. 117.

Since the state makes the laws they should be construed most strongly against it and in favor of the prisoner if they are ambiguous. Section 5609, Sutherland Statutory Construction (3rd Edition) says: "The doctrine of giving penal statutes a strict construction is founded upon the public policy of protecting the interests of those being punished. * * * A different standard may be applied in each different case. * * * Another point of demarcation is where the penalty is measured by culpability or some arbitrary standard on the one side, and where the penalty is measured by actual damages on the other."

This statute, N.M.1941 Comp. Sec. 41-4712, was enacted in 1891. The bill was amended and, no doubt, was given due consideration. It might be noted that the roster of the Legislature of 1891 bears the names of the men who became the first United States Senators from New Mexico —both able lawyers—and also the name of the first Governor of this State.

38 C.J. 365, Sec. 12, says: "The value of the property injured or destroyed is immaterial, in the absence of an express provision excluding property of less than a certain value, * * *." Citing: Ashworth v. State, 63 Ala. 120; Heron v. State, 22 Fla. 86; Moody v. State, 127 Ga. 821, 56 S.E. 993; Holder v. State, 127 Ga. 51, 56 S.E. 71.

The suggestion was made in argument that these old statutes enacted in a sterner period of the history of the commonwealth are not adapted to the age of the automo-

biles and delinquent youth. We can only point out that the legislature enacts the laws.

After a careful consideration of the entire statute we are of the opinion that the import of words is not necessary to express the obvious and plain meaning of the Legislature, and that the use of the sentence in the instructions to which objections were made by appellant was prejudicial error. State v. Sisneros, 42 N.M. 500, 82 P.2d 274; State v. Lang, 87 N.J.L. 508, 94 A. 631, 10 A.L.R. 4.

For the reasons stated, the judgment of the trial court will be reversed; with instructions to grant appellant a new trial; and

It is so ordered.

BRICE and LUJAN, JJ., concur.

BICKLEY, J., not participating.

SADLER, C. J., dissents.

SADLER, Chief Justice (dissenting).

I disagree with the holding of the majority that the court erred in refusing defendant's requested instruction relating to his right to act in view of the condition of his wife and the effect that prior assaults on their home had produced on her. This requested instruction is found in paragraph VIII of defendant's requested instructions and reads: "Evidence has been introduced tending to prove that the series of offenses have been committed by the deceased and other parties against the home of the defendant and that as a result thereof the defendant's wife had become extremely nervous and her health by reason thereof was failing, the defendant had the right to take such steps as would appear to a reasonable and prudent man under all of the facts and circumstances to stop the molestation to which he and his wife were being subjected and if you believe from the evidence or have a reasonable doubt thereof that such evidence is true and that it appeared to the defendant under all of the facts and circumstances as a reasonable man that the only way in which the disturbances could be stopped was by acting in the manner in which he acted, then it will be your duty to acquit the defendant."

As written this requested instruction shows such poor draftsmanship that the omission of some language or erroneous transcription of other is suggested. The form of it alone as it appears in the transcript would justify the trial court's action in denying the request. But this is not my only objection to it. It is bad in substance for its generality. It covers the defendant's acts with blanket authority to choose the means of redressing a wrong, then gives it into the hands of the jury to speculate upon the wisdom and justification of the means employed. A likely result—as many ideas as there are jurors.

I think an instruction on the effect of these prior assaults on the wife's health and physical condition, insofar as the same could be shown to have influenced defendant's actions, would have been proper. Possibly, all that is meant by the language of the prevailing opinion is that *some* instruction should have been given. If so, I agree with it. But such is not its language. Where given, however, the instruction should be properly safeguarded by a statement of the limitations attending an exercise of the right of defense of person, property, family or habitation. Not left, as it is by the refused instruction in a practical application by the jurors, to a consideration and guess by each as to what he would have done if he had stood in the defendant's shoes.

The majority opinion says it was reversible error for the court to instruct the jury "That the killing must be done for prevention of a felony and not as a punishment for felony already committed"—where it was not apparent whether they (the deceased and his companions) were intending to abandon the attack. This is to say it was not issuable before the jury whether the attackers had abandoned the attack. I disagree with this appraisal of the testimony. Indeed, I think the jury justifiably could have believed that the deceased and his companions had abandoned the attack and that they were fleeing from the scene in the car conveying them when defendant fired the second shot. Such a finding is within the jury's verdict.

Nor do I favor the literal construction adopted by the majority in interpreting the statute making it a felony maliciously to destroy or injure any building on lands to which another has a good and indefeasible title. 1941 Comp. § 41-4712. The trial court instructed the jury as follows: "The statutes of New Mexico provide that the unlawful and malicious destruction of or injury to a building located upon lands to which any person has a good and indefeasible title under the laws of the United States or New Mexico is a felony and any person found guilty of the malicious destroying or injuring of any such building is punishable by imprisonment in the penitentiary. *The injury to such building, however, to be felonious, must be of a substantial character, that is to say, one which lessens the utility or value of the building.*" (Italics mine.)

The majority opinion holds so much of the foregoing instruction as is italicized is erroneous. In other words, the extent of the injury to be inflicted is immaterial as I read and understand the majority view. I think this construction of the statute is too narrow and wholly unwarranted, especially in view of the fact that under the laws of this state one may kill when resisting an attempt to commit a felony. See 1941 Comp. § 41-2413. It

would be injustice of the rankest sort for the court to have to instruct a jury that an accused was justified in killing a deceased known to be attempting nothing more serious than to scratch some paint off a building with a pocket knife. I think reason must be read into all of these statutes. In my opinion, it is unreasonable to eliminate from the statute in question inquiry into the extent of the injury attempted. This leaves it still open to the jury to view the matter from the standpoint of appearances and knowledge reasonably to be imputed to him, defendant, as of the moment of the offense.

I see no error in the court's instruction quoted last above.

For the reasons given I dissent.

On Rehearing.

PER CURIAM.

This cause coming on to be heard on rehearing, Chief Justice BRICE, Mr. Justice LUJAN and Mr. Justice SADLER sitting, and the Court having heard the oral arguments and considered the briefs of counsel and being well and sufficiently advised in the premises, presents a division of opinion as follows: Mr. Justice SADLER remains of the same opinion expressed in his dissent from the original opinion and thinks the opinion filed should be withdrawn and the judgment appealed from affirmed; Mr. Chief Justice BRICE and Mr. Justice LUJAN think the opinion on file should stand as written, thus adhering to the views entertained by them at the time they expressed their concurrence by signing the same.

Wherefore, it thus appearing that a majority of the Court cannot be secured favoring the withdrawal of the opinion filed (if in fact it could be secured from a full court), and the Court being without right under the decision rendered in Flaska v. State, 51 N.M. 13, 177 P.2d 174, to call in justices or judges not participating in the original decision, to participate in the consideration of this motion, the opinion heretofore filed, reversing the judgment and remanding the cause with instructions to grant appellant a new trial, will stand.

It is so ordered.

193 P.2d 418

PECOS VALLEY ARTESIAN CONSERVANCY DIST. v. PETERS.

No. 5053.

Supreme Court of New Mexico.

May 4, 1948.

O. O. Askren and Richard G. Bean, both of Roswell, for appellant.

Harold Hurd and L. O. Fullen, both of Roswell, for appellee.

BRICE, Chief Justice.

This action in equity was brought by the appellant to enjoin the appellee from irrigating land by the use of water from a well drilled by him that tapped the Roswell Artesian basin.

This is a second appeal of the case. See the same case, 50 N.M. 165, 173 P.2d 490, 505.

It is alleged substantially by appellant that appellee drilled a well that drew water

from the Roswell Artesian Basin, and with the water from such well irrigated about 285 acres of land, without any permit from the State Engineer. That there was at the time this well was completed, and at the time this suit was filed, no unappropriated water in the Roswell Artesian basin. That the removal of water from the well for the purpose of irrigating appellee's land has and will injure the users of water who have legally appropriated all the water within the boundaries of the Pecos Valley Conservancy District, by decreasing the amount of water they are entitled to use under their several prior appropriations, and which they require for the production of crops and upkeep of their farms, and for other lawful uses. That such use of water will effect an irreparable injury upon those legally entitled to the use of water from the Roswell Artesian basin. The appellant asked for a perpetual injunction against appellee restraining him from the use of water from the well in question.

The appellee answered in substance that he had drilled his well and had applied the water to a beneficial use. That at that time his well was outside the boundaries of the Roswell Artesian basin as defined and declared by the State Engineer, and outside the boundaries of appellant district as it had been established. He denied that there was no unappropriated water in the artesian basin. He stated that after drilling the well and beneficially applying the water, the State Engineer had extended the boundaries of the artesian basin to include his well; that in compliance with the New Mexico statutes he had filed in the State Engineer's office a declaration of ownership of the water right for the use of water from said well sufficient to irrigate 285.6 acres of land; and that his water right was valid and subsisting. The principal question involved is whether there is any unappropriated water that can be withdrawn from the artesian basin through the appellee's artesian well, and be legally used to irrigate his land.

This is an appeal from a trial on the merits. After hearing the evidence the Court made and entered the following decision:

"Findings of Fact

"1. That the so-called Roswell Artesian Basin underlying portions of the surface of the counties of Chaves and Eddy is one continuous basin.

"2. The defendant, Frank Peters, in July, 1942, drilled an artesian well in the N E ¼ S E ¼, Section 22, T 12 S, R 24 E, N. M. P. M., for the purpose of irrigating lands in Sections 22, 23, 26, 27, T 12 S, R 24 E.

"3. That shortly after the defendant commenced said well one of the directors of the Pecos Valley Conservancy District heard about the drilling of the well and one of the directors individually advised the defendant that if he tapped the artesian aqui-

fer the District would bring suit to restrain his use of the water.

"4. That the District did nothing in its official capacity at that time nor until after the well was completed to prevent the drilling of the well by the defendant nor the use of the water from the well until this suit was filed.

"5. That the well brought in by the defendant produces approximately 2,000 gallons of water per minute under pump when in use.

"6. That at the time of the drilling of the well on the lands described, these lands were not within the exterior boundaries of the Pecos Valley Conservancy District as previously fixed by the District Court of Chaves County, nor within the exterior boundaries of the Roswell Artesian Basin, as then declared by the State Engineer of New Mexico.

"7. That the well of the defendant involved in this action taps and draws its entire supply of water from said Roswell Artesian Basin.

"8. That the boundaries of the Pecos Valley Conservancy District have not been enlarged or extended since first defined and set out in 1931, but that the boundaries of the Roswell Artesian Basin have been enlarged several times and extended by declaration of the State Engineer since the original boundaries were fixed by the State Engineer in 1931.

"9. That after the water from the defendant's well had been applied to beneficial use, the State Engineer on October 1, 1942, declared and extended the boundaries of the Roswell Artesian Basin to include the lands and well of the defendant and other lands.

"10. That after drilling the well and applying to beneficial use waters therefrom and after the extension of the boundaries of the Roswell Artesian Basin by the State Engineer, the defendant filed in the office of the State Engineer a declaration of water rights on 380 acres of land in quantities of 2,000 gallons of water per minute, which declaration was subsequently amended to show 285.6 acres.

"11. The defendant has used and applied to beneficial use water from the well on 285.6 acres since August 15, 1942, and is continuing to use said waters beneficially.

"12. That defendant's use of the water from his well has not resulted in injury of or detriment to other users of water of the Roswell Artesian Basin or decrease in the amount of water they are entitled to use under their several permits and prior appropriations. Testimony of expert witnesses offered by plaintiff established the fact that the water table in the Basin has been generally downward throughout the time readings have been taken of specified wells except in the years when excessive recharge of the Basin came through flood water in the area, but there is no proof that any wa-

ter user has suffered damage or diminution of the supply of water to which he is entitled.

"13. That there are a number of leaking wells in the plaintiff District and throughout the Artesian Basin which have not been plugged, and that the water being wasted thereby is more than sufficient, if conserved to supply to this defendant sufficient water to meet his declaration of beneficial use.

"14. That the bringing into operation of the defendant's well has not decreased the amount of water available to any of the prior appropriators and that the water used by defendant's well is so small as to be insignificant in so far as its effect on other appropriators is concerned.

"15. That some of the waters of such basin had been theretofore and were on the 8th day of September, 1931, appropriated to beneficial use under the laws of the State of New Mexico as found and established by the decree of the District Court of Chaves County, New Mexico, organizing and incorporating the plaintiff District on said date.

"Conclusions of Law

"1. That the defendant, Frank Peters, was acting in good faith at the time of the drilling of said well, and at the time of the appropriation of waters from said well to beneficial use, and that the drilling of said well was not in violation of any sound conservation policy.

"2. That the plaintiff District as a matter of law is not to prevail in its complaint against the defendant because of the fact that the defendant's well has not deprived prior appropriators of water to which they were entitled.

"3. That there was unappropriated water within the area in which defendant's well was drilled at the time of the defendant's first beneficial use of water upon the lands described in the amount of 2,000 gallons of water per minute for 285.6 acres.

"4. That the defendant, Frank Peters, has a valid and existing right to the waters of the Roswell Artesian Basin to the extent of 2,000 gallons per minute for the irrigation of 285.6 acres, said right subject to and not to be exercised to the detriment of any other persons having prior, valid and existing rights to the use of waters from said Roswell Artesian Basin.

"5. That the injunction prayed for is denied."

Whereupon judgment was entered in favor of defendant, and plaintiff's bill was dismissed.

Appellant asserts: "The burden of proof is upon defendant to establish that his use of water does not interfere with the use of other appropriators having prior and superior rights; that is to say, the defendant has the burden of proving the existence of surplus water available for his appropriation."

Appellee asserts that is not the law or the rule of evidence applicable in this case; "that if Peters were the plaintiff and seeking to establish his rights as against prior users—in this instance the Conservancy District, claiming to represent all the users of water out of the Artesian Basin—the rule announced would probably apply. But when the District is plaintiff, attacking the right of Peters and asking an injunction, and Peters is compelled to defend against the attack, then the burden is first on the District to prove the amount and extent of use of water claimed under the permits of prior appropriators, and this proof being made, the burden shifts to Peters to show that there is sufficient water, over and above the amount proved to belong to prior users under their permits as prior appropriators, to supply his subsequent appropriation."

The appellant concedes that if there is unappropriated water in the Roswell Artesian Basin to the extent of appellee's claimed right, it has no cause of action. It was stated in the first opinion, "It (plaintiff) may lose on the facts, as for instance by proof there are surplus waters subject to appropriation * * *."

Ordinarily one who asserts a fact in his pleading that must be proved to establish a cause of action, has the burden to prove it. There have been certain rules established by the Supreme Court of California regarding the burden of proof in cases like the present one. Without reviewing all the California cases, we quote from the following:

"The general rule in this state as to the burden of proof is laid down in Section 1981 of the Code of Civil Procedure as follows: 'The party holding the affirmative of the issue must produce the evidence to prove it; therefore, the burden of proof lies on the party who would be defeated if no evidence were given on either side.' However, when one enters a field of water supply and seeks by appropriation to take water from such supply on the claim that there is more than sufficient for all reasonable beneficial uses by those who have the prior and preferential right, it would seem to comport with the principles of fairness and justice that the appropriator, in whatever way the issue may arise, should have the burden of proving that such excess exists. We therefore reaffirm the rule to that effect in the Miller case. [Miller v. Bay Cities Water Co., 157 Cal. 256, 272, 107 P. 115, 122, 27 L.R.A., N.S., 772.]" Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486, 498.

This doctrine was extended in Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972, 991:

"For the guidance of the trial court on the retrial of this case, and in future cases, the rule as to the burden of proof under the

new policy should be stated. In the Peabody Case, supra, 40 P.2d 486, at page 498, it is stated: (Here follows the above quotation from the Peabody case). This rule, placing the burden on the appropriator who seeks to take water from a particular water field to show that there is a surplus, does not relieve the riparians and appropriators, who are already in the field, from the burden of proving the quantity of water that they have been using, and that such amount is necessary for their reasonable beneficial purposes. The rule throws on the new appropriator the burden of proving the existence of a surplus from which it can extract the quantity it desires from either the surface or subterranean flow without injury to the uses and requirements of those who have prior rights. In the present case, while it is true the burden was on appellant to prove the existence of a surplus, that burden did not come into existence until after the respondent riparians first proved the amount required by them for reasonable beneficial purposes. This primary burden the riparians did not sustain. The evidence as to the existence of a purported surplus will be discussed more fully hereafter."

This rule seems to us to be expedient and fair, and we adopt it in this state.

In City of Lodi v. East Bay Municipal Utility Dist., 7 Cal.2d 316, 60 P.2d 439, this same rule was followed.

In Carlsbad Mutual Water Co. v. San Luis Rey Development Co., 78 Cal.App. 900, 178 P.2d 844, 853, it is said on this question:

"Of course, before the plaintiff could invoke the power of a court of equity to restrain the diversion of water above its lands, it would be necessary for it to show first, that there was a wrongful diversion of water above its lands, and second, that the amount wrongfully diverted would be rightfully used by plaintiff and that the water is being used or would be used for reasonable and beneficial purposes. Modoc Land & Live Stock Co. v. Booth, 102 Cal. 151, 156, 36 P. 431; Miller v. Bay Cities Water Co., 157 Cal. 256, 107 P. 115, 27 L.R. A., N.S., 772 * * *."

In the trial of a similar case (Allen v. California Water & Telephone Co., 29 Cal. 2d 466, 176 P.2d 8) testimony was taken for five months, and among other things the court found therefrom the amount of acreage owned by the individual plaintiffs and appearing cross defendants, the amount of water reasonably required for present and future beneficial use for each parcel of overlying land. Also see on this question Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra; City of Lodi v. East Bay Municipal Utility Dist., supra.

It should be stated that each of the parties cites the California cases upon this

question as supporting his contention, and we are satisfied with the rule adopted there.

It follows that appellant must have proved the quantity of water legally appropriated by its water users; and the quantity within their appropriations now necessary for their reasonable use. If appellant introduced substantial evidence to prove these facts, the burden of proof then shifted to appellee to establish that there is surplus water which he may beneficially use.

An action of this kind is of the nature of a suit to quiet title to realty. Harris v. Chapman, 51 Idaho 283, 5 P.2d 733; Whitcomb v. Murphy, 94 Mont. 562, 23 P.2d 980; Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra; and a decree herein is binding on all water users within the Conservancy District, notwithstanding none as individuals were parties to the suit (Pecos Valley Conservancy Dist. v. Peters, supra), as according to that decision, the appellant is the agent of all its water users, with authority as such agent to bind them and their property in this action as effectively as if they were parties in fact.

Without reference to the findings of the court which support the decree, we will review the testimony to ascertain whether appellant established a prima facie case, irrespective of the substantial evidence rule. If we find it did not, then of course the decree will have to be affirmed.

H. S. Cave, a geologist, testified substantially as follows: I am familiar with the Roswell Artesian Basin. From the Sacramento mountains to the west there are porous, permeable beds covering 4000 square miles that extend to within some four miles of Roswell, into which water from rainfall and snow passes, and follows down the incline until stopped in the Roswell artesian basin, or reservoir, and that is the source of the artesian water supply in the Pecos Valley. Before any artesian wells were drilled the water escaped through forced openings and made several small rivers that emptied into the Pecos River. Among these are the Berrendos and the North and South Spring Rivers near the city of Roswell. The water table has lowered, as is shown by the fact that all the rivers have ceased to flow. This indicates that the amount of water taken out has been greater than the intake. There is ample evidence to show that the reservoir receives large quantities of recharge. In my opinion the Peters well taps this Roswell basin, and affects every well in the artesian basin. The basin is approximately 7 miles wide and 60 miles long and comprises about 420 square miles. It extends from a point 7 miles north of Roswell to the mouth of Seven Rivers in Eddy County. The eastern limit is the escarpment that parallels the Pecos River on its east side. There is now more water being taken out than is coming in by recharge.

During years of abnormal rainfall the basin fills up, but the over all picture is a net loss. The basin consists of continuous limestone beds that are porous and permeable. The water moves through these beds because of intercommunication. The general movement of the water is eastward and southeastward. There is a barrier or fault that deflects a very large portion of the artesian water to the north to the Roswell area, which receives more water than further south. The greatest decline in the head of the artesian water is in the south end of the area and the greatest annual fluctation is found there also. The amount of recharge depends upon the quantity of rain and snow run-off from the west. The same principle applies as to water in rivers. The quantity of water for use depends upon its recharge by rainfall and run-off. Periodically the water level is increased by excessive rainfall, while in time of low precipitation the water level lowers with use. There is a recharge in the winter when there is no irrigation, but use and discharge of water ordinarily exceeds the recharge. As the water stored was depleted by the drilling of wells, the drainage into the rivers ceased, and later the wells ceased to flow. Now the wells generally are being pumped. This shows that the hydrostatic head has been depleted and not restored to its initial point. No further development of water can be made without injuring all of the existing wells. I base this statement upon the fact that the wells must now be pumped while at first the water flowed from them. They have had to put in larger casings and larger pumps to get the same amount of water. Larger wells produce more water and permit more efficient use. I cannot answer how much the water in the artesian basin, and the water level, is affected by leaky wells unplugged. If there is any considerable number of them, it would reduce the water in the artesian basin, and this waste reduces the water available for irrigation. There is waste of water both above and below the ground from leaky wells, which tends to waterlog the lands. As the head increases during the winter the underground leakage increases and prevents a rise in the artesian head. Underground leakage from wells, may in some sections, form a major portion of the draft upon the artesian reservoir and without proper steps to remedy such losses the artesian supply may be completely dissipated. There were a considerable number of leaky wells in the district at the time the Peters well was drilled. I don't know how many. The rigid conservation of water in one section will benefit all, just as waste and misuse is detrimental. Additional appropriations or expansion should not be permitted until such time as additional drafts upon the reservoir will not interfere with the rights of present water users.

Charles V. Theis, a hydrauligist, testified substantially as follows: I am a member of the U. S. Geological Survey in charge of the ground water investigations in New Mexico. Since 1926 the Roswell Artesian water levels have been essentially constant except in the north part of the basin where the Berrendo wells declined until the big rains of 1941. The withdrawing of water from the artesian basin will affect to a slight extent every well. It draws from the same basin. The Berrendo well is on the outskirts of the basin. We came to the conclusion several years ago that except in the Berrendo well there was no discernable lowering of the water levels. They would vary from year to year but after ten years their level was just about the same as it was in the beginning of the report. This applies to the whole basin so far as my observation goes. The effect the Peters well (which taps the basin) has on the nearest well would be too small to be observed. We could observe the effect of fifty wells of the size of the Peters well.

Charles A. Miller, a consulting geologist, testified as follows: I am interested in the location of oil properties. I have had some occasion to study the subsurface of the Pecos Valley. The water comes from snowfall and rainfall that travels over the exposed part of the San Andreas area. In my judgment the Peters well taps the artesian basin. There are observation wells maintained by the Water Conservancy District. One is located on the Berrendo. In 1927 the water stood at a point 15 feet below the surface. The following year at 15.6 feet, the next year at 17 feet; in 1940 it rose materially. After that it again lowered and the trend is still down. Another Berrendo well showed the water 14.6 feet below the surface in 1942; 20.9 in 1943; 13.2 in 1944. Since the year 1940 the over all trend, including 1945, is down. If they are drawing more water out than the intake they are doing damage to the reservoir. According to my theory the Peters well is inflicting injury to all the wells because it is drawing from a common reservoir and the statistics show it is lowering. It would be difficult to figure the amount of water that is caught in the artesian basin. The intake area covers about 4000 square miles. Some of it goes into the Pecos River and is carried away. I only know of the recharge by the rise and fall of the recording wells which change from season to season, year to year, and month to month. Years ago these wells flowed but they have long since ceased to flow. This indicates a lowering of the reservoir.

E. G. Minton, Jr., assistant Artesian Well Supervisor, testified: The spot measurements at the time of various recorder wells indicate the water was lower last summer (1946) than it was in 1945. It comes back in the winter. Last year it was about the same in some areas but in the Artesia area it was lower. No permits for the purpose

of irrigation have been granted since 1931. Two new wells have been drilled in Roswell, two in Artesia, and two by the Government at the Walker Air Field. 1945 and 1946 were dry years. During the twelve years I have been in office it has gone up and down. We got a nice recharge during the flood but since then it has dropped off some. The boundaries have been extended five times. There are approximately 1000 artesian wells tapping the Roswell Artesian Basin.

Curtis Allman, the manager of the John Tweedy irrigated farms of 1800 acres, has irrigated these farms for 29 years. He stated that he could not tell that his water supply had diminished since the Peters well was drilled. The owners of the 13 other wells nearest the Peters well gave substantially the same testimony as to their respective wells.

Frank Peters, the appellee, testified substantially as follows: I have lived in Chaves County for 30 years. I attempted to get a permit from the State Engineer's office before I started drilling this well, which was refused because my well was outside the artesian basin as then designated. The Engineer told me he would like to see a test made at my place. After I drilled the well I filed a declaration of water right with the State Engineer. The first one was not acceptable and I filed a second which was accepted. A certified copy has been introduced in evidence. Those witnesses who testified that their water supply was not affected by my well, own the nearest wells to mine. While I was drilling the well—or after it was completed, I was told by one of the commissioners of the Conservancy District that the District would protest my right to the use of water. The well cost me about $10,000. After the well was brought in I used the water for irrigation.

Dr. A. D. Crile, former president of the Board of Commissioners of the Conservancy District from its organization in 1932 until 1940, testified: I familiarized myself with the district and found many defective wells. I had been studying this artesian basin since 1912. I helped Mr. Feidler and Mr. Nye with their work in the preparation of the book that has been read in evidence. As a result of this work the law was enacted authorizing the organization of conservation districts for the purpose of conserving water. With the assistance of Scott Andrews and Cliff Smith we made machinery with which we plugged many of the wells after we had found a mud that would do the work. I ascertained the leakage from wells by a device that was put down in the well. A systematic investigation was made. Old abandoned wells that were not in use were first plugged. Every well 30 years old or over was under suspicion, and of these about fifty per cent were leaking. Of 1280 wells over 30 years old, 630 or 640

have been plugged and the remainder have not. We assumed conservatively that the loss from leakage was an average of 200 gallons a minute per well. These leaking wells were making a heavy draft on the basin. To the best of my knowledge and experience from checking wells, there is today at this time in our artesian basin 300 wells that need repairing or plugging and in my judgment are leaking 60,000 gallons of water a minute. We did not plug wells that leaked less than 200 gallons a minute. These wells that need plugging cause a lowering of the water table, and are wasting more and more water as time goes on, and should be plugged. The district has the money, equipment and every thing to do it with. I say there are 300 wells that need plugging because there are 1280 wells over 35 years old. Of those we checked, fifty per cent were leaking. 240 have been plugged since I was a member of the board. I base my judgment on 25 years work and 8 years testing wells. I did not test all the wells.

M. Y. Monical, chairman of the Board of the Conservancy District, testified as follows: At the direction of the Board I contacted Mr. Peters and told him that if he went to the artesian aquifer in drilling his well that we would protest it. I told him three times at least. When he made his application to the State Engineer for the use of the water, we protested it. The Peters well was outside the boundaries of the Conservancy District.

Charles Theis, recalled by appellant, testified as follows: I wish to correct a statement I made yesterday that may be misunderstood. I have checked on water levels in artesian wells from reports made during the last two years. These have just been made available to me. I stated that with the exception of the Berrendo observation well, the water levels of two other observation wells have shown no downward trend from 1926 to 1940 and had risen in 1941 and later began to fall. This statement is true as to water levels as the water stood in December 1945, which was about the low point of earlier years. In December 1945 the mesne level in Orchard Park was 3536 above sea level as against 3529 in December 1927; and the Artesia well in 1945 was 3386.8 feet, as against 3385 feet in December 1934. It must be remembered that the recharge caused by heavy rains in 1941 was unprecedented. The decline from winter highs in the last few years has been very large. The loss at Orchard Park was five feet; in the Artesia well it was 11½ feet from December 1944 to December 1945, which was the latest available record. The summer water levels have declined very greatly in the last few years and indicate an alarming condition. The Berrendo well has declined about four feet in the last two years; the Orchard Park well about 20

feet, and the Artesia well shows a similar rate of fall. The rate of draft on the reservoir at the present time is alarming and although the present storage in the reservoir is not excessively low the present draft may soon affect it greatly.

The fact that the water table rises and falls is not so alarming to us as to some of the witnesses. It is public knowledge that for five years precipitation has been subnormal, and the last three years can be classed as "drouthy years." Irrigation projects generally in the state have suffered from the shortage of water from this cause. But there is an ample supply available in the Roswell district, even though some of it may be classed as storage water. It is quite certain that there will always be water for irrigation from these wells so long as water or snow falls from the clouds over the intake area, though at times the supply may be deficient, as in cases of diversion from flowing streams. We do not mean to say that there is available water for new appropriations. We are advised by counsel that the boundaries of the artesian basin have been extended so that in the future the control of appropriations will be initially through proceedings in the office of the State Engineer.

No attempt was made by appellant to prove the amount of water appropriated by water users owning wells that tapped the artesian basin, or the amount they are entitled to use. It may be, and probably is, true that many of the water users are wasting water, or use more than they are authorized by law to use, or irrigate more land than their appropriations cover, or there is waste of water through leaky wells that can be saved if plaintiff will use ordinary diligence in plugging them. However this may be, the burden was upon appellant to establish the amount of water which owners of wells existing at the time the Peters well tapped the basin, were legally entitled to use. If that had been done, the appellee would have been burdened with proving that there was unappropriated water to which he was entitled, however difficult it would have been to do so.

The appellant did not make a prima facie case, and we are not able to say that the trial court erred in dismissing the bill.

The decree of the District Court should be affirmed, and it is so ordered.

LUJAN and COMPTON, JJ., concur.

SADLER, Justice (specially concurring).

I concur in the result. The trial court found a fact which was a matter of common knowledge, namely, that the Peters well tapped the water of the Roswell Artesian Basin. It did not find as a fact that there was surplus water within the basin subject to appropriation, although concluding as a matter of law that there was un-

appropriated water "within the area" where the Peters well was drilled at the time in question "in the amount of 2000 gallons of water per minute for 285.6 acres." Just what is meant by this conclusion is difficult to understand. At the time in question it was a fact so well known as almost, if not quite, to warrant the trial court in taking judicial notice of same that there were no surplus waters in said basin subject to appropriation. How, then, there could be surplus water in the "area" of this well drilled into a basin having no surplus waters is something that would stand explanation.

The exhaustive Fiedler reports completed in 1931 were based on an extensive study of the waters of the artesian basin. New Mexico appropriated $5,000 to furnish colloboration of our State Engineer with the U. S. Geological Survey in the work incident to preparation of these reports. They are referred to in the dissenting opinion of then justice and present Chief Justice Brice in the former appeal of this case reported at 50 N.M. 165, 173 P.2d 490, 514, as "public records in the office of the State Engineer" and quoted arguendo to sustain his dissenting position. Mr. Fiedler, in his report, touching the existence or not of surplus waters in this artesian basin, says:

"The total draft, both above and below the ground, due to wells is therefore probably in excess of 200,000 acre-feet a year. A comparison with the 165,000 acre-feet of flow from springs and other natural outlets from the reservoir estimated as being available for use in the artesian area would seem to indicate that the present rate of withdrawal is probably not over 30,000 to 40,000 acre-feet in excess of the safe yield."

And again at page 284 of this report Mr. Fiedler states: "Ground-water supplies, in common with other sources of water supply, are not inexhaustible. *Because of the increased demand for water for irrigation the safe yield of the artesian reservoir has been exceeded.*" (Emphasis mine.)

The situation arising from overdrafts on the water supply of the basin so long ago as 1931 was such that Mr. Fiedler concludes the Chapter of his report entitled "Legal Provisions Governing the Use of the Ground Water" (Page 290 of Report) with the pertinent observations:

"Further general draft upon the Artesian reservoir should be prevented. * * * *Additional appropriations of water* for new land or for land that was formerly irrigated and has been abandoned because of insufficient water *should not be granted.*" (Emphasis mine.)

The author of the prevailing opinion on this appeal thought enough of this report to refer to it as a "public record" in the office of the State Engineer and to quote from it. At that time, in 1931, the fact that all the waters of the artesian basin available for

the purpose already had been appropriated to beneficial use was a matter of such general knowledge that the Tenth Regular Session of the Legislature made the following recitation in the preamble to L.1931, c. 70, then in session appropriating $20,000 for plugging leaky wells as a means of conserving the diminishing water supply, to-wit:

"Whereas, the boundaries of the Artesian Reservoirs, situated in Chaves and Eddy Counties in the Pecos Valley extending southward from above the city of Roswell, have been scientifically and definitely determined; and

"Whereas, *all of the waters of said reservoirs have been beneficially appropriated* and have been made available by the drilling of several hundred artesian wells, many of which have been in use for a long period of time, and because of the disintegration, or rusting of the casings in many of the same the waters which would otherwise be stored in said reservoirs are finding outlet to the surface through the upper strata of the earth or flowing into porous sub-strata where they cannot be used and thereby materially diminishing the water supply and depleting and destroying the value of the lands irrigated therefrom." (Emphasis mine.)

Furthermore, a long established policy of the office of State Engineer has held Roswell Artesian Basin closed to additional filings since 1931 because of prior appropriation of all available waters to beneficial use as shown by the Fiedler report. A policy so long maintained could hardly have escaped public notice especially in the very heart of the artesian basin to which it relates.

The foregoing observations are made only to demonstrate that in so far as the decree under review rests upon the assumption that there are, or at the time of the drilling of the Peters well there were, surplus waters in the Roswell Artesian Basin subject to appropriation, it rests on a false assumption resulting from failure on the part of the plaintiff (appellant) to produce proof of the fact established by the Fiedler report, recognized also by the State Engineer and declared as well by the Legislature in the preamble to L.1931, c. 70—either by invoking judicial notice by the trial court of such fact or by its establishment through other means.

Until the later decision of the Supreme Court of California in Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., 3 Cal.2d 489, 45 P.2d 972, prior decisions of that court seemingly would have cast the burden on the defendant, Peters, in the case at bar to establish that there was a surplus of water in the artesian basin available for appropriation. Miller v. Bay Cities Water Co., 157 Cal. 256, 272, 107 P. 115, 122, 27 L.R.A., N.S., 772 and Peabody v. City of Vallejo,

2 Cal.2d 351, 40 P.2d 486, 498. However, in the Peabody case, supra, the rule as laid down in the two earlier cases is modified in the respect pointed out in the majority opinion and there is no disposition on my part to challenge same. It should be said, however, that a practical application of the rule will preclude injunctive relief against unlawful raids on the existing water supply of any artesian basin. This is so because of the sheer expense to a plaintiff of making the hydrographic survey and furnishing the proof essential in establishing the prima facie case necessary to shift the burden to subsequent appropriator of showing there is a surplus. Until the plaintiff has made out his prima facie case, he will not be entitled to enjoin.

It requires but a moment's reflection to satisfy the mind that the foregoing observation is true. In a suit to adjudicate the waters of the Cimarron river pending for many years in the district court of Colfax County in which the present Chief Justice while judge of the fifth judicial district by designation sat as trial judge there were approximately two hundred and fifty defendants. The actual trial consumed nearly two months. It was a statutory suit to adjudicate waters of the Cimarron stream system brought by the Attorney General under authority of the act hereinafter referred to. Under the rule this day approved on where the burden of proof lies, if an individual water user from that stream instead of the state had instituted suit against a subsequent appropriator, who happened to be without right and a trespasser because there was no surplus water subject to appropriation, before having injunctive relief what must he do?

First, he would have to guage the stream over a period of years to ascertain and prove the quantity of water subject to appropriation. Having done so, he would then have to survey, or cause to be surveyed, every acre of land of the 250 appropriators using water from the stream and establish by proof what a reasonable use of water thereon would demand. In the event such proof showed no surplus, then *and only then,* he might enjoin; otherwise not. The cost of such a procedure would run literally into thousands of dollars. No litigant with sound reason would undertake it. Nevertheless, this seems a difficulty inhering in the very nature of the litigation and one which the legislature alone can remedy. It presents an issue almost as difficult to establish as if one alive today were called upon to prove himself a lineal descendant of Adam.

Our legislature evidently sensed and attempted, although inadequately, to alleviate this burden when it enacted as a part of L.1907, c. 49 (Secs. 18 to 21), provision for hydrographic surveys of stream systems in New Mexico appropriating several thousand dollars to cover the cost thereof, and

authorizing suits by the Attorney General to adjudicate the waters of any stream system, directing the cost of same including that of the hydrographic survey, to be taxed against the private parties to such suits in proportion to the water rights allotted. See 1941 Comp., Secs. 77-401 to 77-411. Resort to this statute, in most instances, for an adjudication of the waters of an entire stream system or artesian basin, would seem to furnish the only escape from an otherwise impossible burden.

The prevailing opinion states that an action of this kind is in the nature of a suit to quiet title to realty, citing Harris v. Chapman, 51 Idaho 283, 5 P.2d 733, Whitcomb v. Murphy, 94 Mont. 562, 23 P.2d 980 and Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist., supra. In procedural respects, yes—fundamentally, no. The contention was strongly urged on us in the former appeal by counsel for the defendant (appellee) and accepted by the present Chief Justice in his dissent, that this is a suit to adjudicate water rights. We rejected the contention. The conservancy district owns neither land nor water rights and sues only by virtue of its statutory duty to conserve waters of the artesian basin supplying its water users. Of course, as the plaintiff it must prove the facts entitling it to recover the judgment prayed for. In that respect, it is like a suit to quiet title to real estate. So, also, it is like an action to recover on a note.

One has only to compare this suit with a real suit to adjudicate water rights to be impressed by the points of distinction. One is impressed more by differences than by similarities. See City of Pasadena v. City of Alhambra, Cal.App., 180 P.2d 699, especially portion of the opinion supporting paragraph 9 of the syllabi. The cases cited to support the supposed analogy disclose the disparity. If seeking a true analogy, we would come nearer finding it as respects status of the conservancy district as plaintiff in a suit by a bailee of personal property to protect same against conversion or damage by third parties. The plaintiff there is not the owner, it is true, but is charged by the law of bailment with conserving and protecting the property in custody. So, here, the plaintiff owns neither land nor water right, but as a statutory corporate agency of the water users within the district, it is charged by law with the duty of conserving their water supply.

As well may be inferred from the foregoing, a strong impression prevails in my mind that the judgment in defendant's favor rests fundamentally on the false assumption that surplus waters exist in Roswell Artesian Basin subject to appropriation to beneficial use. Nevertheless, the plaintiff having failed to sustain its burden of making out a prima facie case that all available waters in the basin had already been appropriated to beneficial use

when the Peters well was drilled, my concurrence in the result based on that single ground is herewith noted.

A. W. MARSHALL, District Judge, concurs.

193 P.2d 624

THOMAS et al. v. MYERS et al.

No. 5119.

Supreme Court of New Mexico.

May 20, 1948.

Seth & Montgomery, of Santa Fe, for appellants.

Watson, McIntosh & Watson, of Santa Fe, for appellees.

McGHEE, Justice.

The appellees sold a tract of land to the appellants and agreed to convey it in fee simple and furnish an abstract showing that they were vested with a good and merchantable title.

An abstract was furnished which disclosed that previously the appellees had secured a decree quieting title to the land contracted to be conveyed. It further showed that in the caption of the complaint in the quiet title suit a number of defendants were impleaded as follows: "Unknown Heirs of the Following Named Deceased Persons, to-wit," and that here followed a list of names of 178 persons alleged to be deceased, who in their respective lifetimes were alleged to claim some right, title or interest in the premises adverse to the plaintiffs.

After the abstract had been examined the appellants advised the appellees that they were unable to convey a good and merchantable title to the land for the reason that they should not have grouped all of the alleged deceased persons as set out above, but that they should have been specified individually under the style of "Unknown Heirs of ———, deceased," inserting the name and repeating such designation in substantially that form each time in connection with the unknown heirs of each such deceased person.

This declaratory judgment action was then brought to determine the validity of the decree quieting the title and the rights of the parties.

The appellants filed a motion to dismiss the complaint on account of the manner in which the unknown heirs had been named in the caption, as above set out. The trial court denied the motion to dismiss, and as it was agreed that the factual matter set out in the complaint was true, judgment was rendered that the naming of the defendants as above set out was a sufficient compliance with the statutes and rules of court, and that the unknown heirs of the deceased persons named in the quiet title complaint were bound by the decree.

The applicable rule is found in Sec. 25-1302, of which we quote the part material to a decision here: "The plaintiff must file his complaint in the district court, * * *. Any or all persons whom the plaintiff alleges in his complaint he is informed and believes make claim adverse to the estate of the plaintiff, the unknown heirs of any deceased person whom plaintiff alleges in his complaint in his lifetime made claim adverse to the estate of the plaintiff, * * * may be made parties defendant to said complaint by their names, * * * such unknown heirs by the style of unknown heirs of such deceased person, * * *."

The appellants feel that their position is sustained by Rule 19-101, rule 4(g) NMSA 1941, the material part of which, for the purpose of this case, reads: "In suits to quiet title or in other proceedings where unknown heirs are parties, * * * it shall be sufficient to use the following form in the notice of pendency of action: 'Unknown heirs of the following named deceased persons;' then follow with the names of the various deceased persons whose unknown heirs are sought to be served; * * *."

The notice of suit pending is published and is the process by which the defendants are warned to come into court and assert their interests, if any they have, and it is more likely that they will see this notice than that they will keep an eye on the complaints filed in the district court and thus see that their interests are not cut off.

The appellants rely largely upon the case of Priest et al. v. Bd. of Trustees of Town of Las Vegas, 16 N.M. 692, 120 P. 894, where it is stated that statutory provisions for the service of process upon unknown claimants by publications in actions to quiet title will be strictly construed. In that case the plaintiffs sought to cut off the rights of patentees to the land who were in actual possession by claiming that they were included as defendants as unknown claimants, but the court held that this could not be done. We do not consider that case as authority for the position of the appellants here.

It has been almost the universal practice to name unknown heirs as parties defendant under the style and designation as urged by the appellants in these quiet title suits, and we can well appreciate the hesitancy of their able attorneys to approve a title where this unorthodox form was followed. This is especially true where other attorneys had refused to approve the title to other lands included in the same quiet title action.

After a consideration of the rules and authorities, we have reached the conclusion that to force a litigant to follow the course urged by the appellants would serve no useful purpose and that it is not required by a fair construction of the rule. We hold that the complaint in the quiet title action was sufficient, and the judgment of the district court will be affirmed, and it is so ordered.

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

194 P.2d 266

ERB v. HAWKS.

No. 5065.

Supreme Court of New Mexico.

June 2, 1948.

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

Noble & Spiess, of Las Vegas, for appellee.

BRICE, Chief Justice.

The plaintiff (appellee), a real estate broker, recovered a judgment against defendant (appellant) for $2325.00 for services (as it is alleged) in securing a purchaser for defendant's ranch.

It is admitted by the answer and found as facts by the trial court that plaintiff was a real estate broker doing business in Las Vegas, New Mexico; that he was employed by defendant on the 10th day of January 1945 to procure a purchaser for defendant's ranch; and that defendant agreed to pay plaintiff five percent of the selling price of the ranch as commission if he succeeded in securing such purchaser; and that defendant sold the ranch to one Walter Young of San Angelo, Texas, for $46,500.00.

The trial court further found as facts that plaintiff procured Young as a prospective purchaser, showed him a portion of the ranch, and placed him in contact with defendant, after notifying defendant that he had shown Young the ranch, and that he was placing Young in contact with defendant for further negotiations; that plaintiff was the procuring cause of the sale of defendant's ranch to Young, and that plaintiff was entitled to recover $2325.-00 for which judgment was entered.

There are a number of assignments of error, but the only point presented here—a determination of which will be decisive of the issues—is whether there is substantial evidence to support the trial court's finding that plaintiff was the procuring cause of the sale to Young. Stacey v. Whalen, 33 N.M. 577, 273 P. 761.

In determining this question we must search the record for substantial evidence to support the finding, and if we find that it is supported by such evidence

the judgment should not be disturbed, otherwise the case should be reversed. There is practically no conflict in the testimony. The witnesses were fair, and we have no doubt testified honestly and correctly as to the facts.

The substance of the testimony on the question follows: The plaintiff testified that Walter Young was sent to him by C. O. Walling, a Texas real estate broker, as a prospect for the purchase of a New Mexico ranch. He showed the property to Young, and after some negotiations he gave Young a letter of introduction to defendant, and sent defendant the following telegram:

"Showed Walter Young of San Angelo Ojitos Frios. He will contact you in Colorado Springs."

Plaintiff stated in the letter (which defendant denied having received) that Young expressed a desire to talk to the owner and that the writer referred him to defendant "for further instruction concerning the matter of the ranch." These negotiations began March 10, 1945. Plaintiff saw Young in Las Vegas in June 1945, and Young made an offer to lease the ranch if given an option to buy at $5 an acre. The defendant refused the offer, and plaintiff made no further attempt to sell to Young, though he saw him several times thereafter. He did not communicate with defendant, because he and Young had "quit negotiating" with him. He tried to sell the ranch to other prospects.

C. O. Walling, the Texas broker who sent Young to plaintiff, testified: In February 1946 he came with Young to Southern Colorado with a view of selling him a ranch, and showed him several ranches. At one time Young stated, "Mr. Walling I like your New Mexico holding better, the 10,300 acres ranch near Las Vegas." He referred to the defendant's ranch. At various times during their inspection tours Young discussed the defendant's ranch. He stated that he had been interested in it since he had inspected it with the plaintiff. After inspecting some Colorado ranches they went to Colorado Springs. Young stated he would contact other real estate brokers, and when he was through inspecting he was going to see the 10,300 acre ranch near Las Vegas that plaintiff had shown him. Mr. Walling then left Young at Colorado Springs.

The defendant testified substantially as follows: He had listed his ranch for sale with several brokers, among them the plaintiff and Mr. Haigler of Colorado Springs. Young communicated with him over the telephone, and did not present plaintiff's letter of introduction. He made no definite offer except the offer to lease, made through plaintiff. He saw plaintiff in Las Vegas June 4, 1945 and he said nothing about Young still being interested in buying the ranch, and he did not under-

stand that plaintiff was still trying to sell to him. He was in Las Vegas and Mr. Haigler called him from Colorado Springs and told him that he had Young as a customer, and could sell the ranch to him. It was this call and the efforts of Mr. Haigler that brought about the sale. He received no offer from Young, or from Mr. Erb or Mr. Walling in Young's behalf, offering to buy the property. He knew Young was the same man that plaintiff had shown the ranch to. He never saw plaintiff while closing the sale with Young in Las Vegas.

W. A. Haigler testified that the ranch in question was listed with him for sale in 1935. He met Young in January 1946 at his office in Colorado Springs. He showed him five Colorado ranches. Young stated he was not interested in them but was interested in New Mexico ranches. He told Young of the plaintiff's ranch and he asked if it was the Ojitos Frios ranch, and was told that it was. He said Mr. Erb had taken him to the improvements, and that he had visited the ranch alone. He called defendant who was in Las Vegas and told him he had Young as a prospect for the purchase of the ranch. He took Young to Las Vegas, conducted him over the ranch and closed the trade between the parties. On the way down Young told him of his dealing with the plaintiff, and asked him what would be the plaintiff's status in the deal. He told Young that he was dealing with an honorable man (referring to defendant), and if plaintiff had any claim he need have no concern, if such claim was justified. He did not say to Young that plaintiff would get a commission.

The following letters passed between the parties:

Defendant to plaintiff, dated March 17, 1945:

"I have heard nothing from your San Angelo man since I talked to you over the phone Thursday morning, so evidently he was not very anxious to buy a ranch. When I talked with him on Wednesday evening I made him a special price to be accepted or rejected right then, and he wanted me to come down there before he would make a statement as he said he wanted to know where the lines were and what the taxes amounted to. I could see no reason to spend $50.00 and two or three days time without having something more definite to work on. * * *"

Defendant to plaintiff, dated March 28, 1945:

"The other day when you wrote to me about Mr. Reynolds going out to Ojitos Frios you also wrote that you had heard nothing further from Mr. Young. At that time and since then I have thought of writing to you to ask if you saw Mr. Young the morning we had our talk over the phone, or if you went to the hotel and left

a message for him. "When I talked with Mr. Young over the phone I had told him that I would get in touch with him. He wanted me to come down there but I did not want to go unless he made me a definite offer on the ranch, however I did tell him that I would let him hear from me the next day. Then I tried for some time to reach you by phone but discovered that you had no phone where you lived, and so called you the next morning. If you did not see Mr. Young or if he did not get your message, then I should drop him a line.

* * * * * *

"Let me hear from you if you get a renter or buyer prospect."

Plaintiff to defendant, dated June 2, 1945:

"Mr. Walter Young, of San Angelo, Texas, was in our office this afternoon and requested me to submit the following offer on the Ojitos Frios Ranch to you, as follows: He will take the ranch on a two year lease at $1,800.00 per year with an option to buy at the expiration of the two years for $5.00 per acre. * * * Should this offer be acceptable to you, he is desirous of adjusting matters regarding the ranch and would like to meet you in Las Vegas and draw up an agreement on or about June 15th. * * *

"Harold, please advise if you will be able to meet Mr. Young, so that I in turn may advise him to be here. * * *"

Defendant to plaintiff, dated June 4, 1945:

"* * * I cannot consider the offer which Mr. Young made to you on the terms mentioned in your letter. "When I talked with your party in Springer he seemed to be a likely prospect and I wonder if you followed it up, whether you sell him my place or some other ranch. I feel that my price of $5.25 per acre is a reasonable price, as we paid $5.00 per acre for the unimproved land on considerable of the ranch, before the new house was built."

Plaintiff to defendant, dated September 30, 1945:

"Harold, before taking the matter up further with Mr. Lagae or other prospective buyers, please be assured of our desire and willingness to co-operate in every detail with you on the sale of your property, and to carry out your wishes in such matters, if possible.

"However, before proceeding further I would be pleased to have you inform me if you wish to have the undersigned continue in his efforts to contact a prospective buyer with the idea in view of culminating a sale of the Ojitos Frios Ranch. Also, if it is your desire that this Agency list your property, that you outline and clearly define the terms under which you will sell.

"Trusting you will be disposed to informing us completely on the above mentioned matters, with kindest regards, etc."

Defendant to plaintiff, dated September 28, 1945:

"* * * To outline and clearly define the terms under which I will sell the ranch at this time would necessitate notifying anyone to whom such an open offer might be made, whether or not any inquiries were received, in the event of any decision to make any change in terms. It seems to me that it is better to have offers of purchase made by prospective buyer, as I have previously done."

The plaintiff testified that the defendant told him to ask $5.25 per acre for the ranch of 10,300 acres, but that he would sell for $5.00 per acre, or $51,500.00; but he never secured an offer from Young.

The question is not what inferences or conclusions this court, or the writer of this opinion, would have reached from the evidence quoted, but whether there is to be found substantial evidence to support the questioned finding, viewing the situation and testimony in the aspect most favorable to the plaintiff. Valdez v. Salazar, 45 N.M. 1, 107 P.2d 862; City of Roswell v. Hall, 45 N.M. 116, 112 P.2d 505; Holton v. Shepard, 291 Mass. 513, 197 N. E. 460. So viewing the testimony, the facts from which an inference of who was the procuring cause must be drawn, are substantially as follows:

The plaintiff secured a customer (Mr. Young) from the state of Texas, in March 1945, and interested him as a prospective purchaser of the defendant's ranch. He took Mr. Young to the ranch headquarters. They had a general view of the ranch on the way out. Later Young went out alone and presumably looked over the ranch to his satisfaction. A second time the plaintiff attempted to sell to Young, but only secured an offer to lease with an option to buy, which defendant refused. After the plaintiff showed the ranch to Young the first time, he notified the defendant of his efforts and put Young in contact with him, which resulted in a proposition at a specific price from defendant to Young, the amount of which is not stated. Young did not turn this proposition down but insisted upon the defendant coming down from his home in Colorado Springs to Las Vegas to negotiate with him. This the defendant refused to do; but notified plaintiff of the circumstances, and suggested that he contact Young again, which plaintiff attempted to do but failed to find him. After Young's offer in June to lease with an option to buy, the plaintiff made no further effort to sell the property to Young for the reason, as stated by him, that the parties insisted upon negotiating themselves. The next we hear of Young, he was being

shown ranches in Colorado by Walling, the broker who had sent Young to plaintiff. He declined to buy any of the property shown him in Colorado by Walling, but stated to him that he was still interested in the Ojitos Frios Ranch in New Mexico, and that after he was through looking in Colorado he would go back to see that ranch again. He went to see the broker Haigler in Colorado Springs just after leaving Walling. Haigler showed Young five Colorado ranches; after which Young told Haigler he was not interested in Colorado ranches, that he was interested in "New Mexico ranches." There is nothing in the evidence to indicate that Young was interested in any other ranch than the Ojitos Frios. At any rate, when Haigler told him he had a New Mexico ranch listed, he immediately asked if it was the Ojitos Frios ranch, and was told that it was.

He became concerned over the fact that this ranch had been shown to him by plaintiff and asked what would be the plaintiff's status in the deal. Haigler's statement to him to the effect that he was dealing with an honorable man (referring to defendant) and that if plaintiff had any claim that he need have no concern, was undoubtedly meant to satisfy Young that if plaintiff was entitled to a commission it would be paid to him. It indicated that Young had in mind the fact that he had become interested in this property through the plaintiff and that his interest in it had continued to that time.

It was a reasonable inference that if Young had not contacted Haigler he would have gone back to Las Vegas and closed the trade with defendant, or through plaintiff. In other words, it was not the effort of Haigler that brought about the sale, but the chain of events set in motion by plaintiff in showing the land to Young, that continued without a break in continuity and interest that brought it about.

Some questions are raised as to whether the listing with plaintiff had not been cancelled, or whether all negotiations with Young had not been abandoned. These are questions of defense that were not pleaded, nor are they raised by assignment of error. We stated in Jackson v. Brower, 22 N.M. 615, 167 P. 6, 7:

"The law is well settled that the agent is the procuring cause when the sale is traced to his introduction of the purchaser to the owner or principal. Tested by this rule, we believe the above facts show that appellee was the procuring cause of the trade in question, for he introduced his principal to the agent of the owner of the lands in Texas with whom the trade was made. We can see no reason for a distinction between the introduction of

the principal to the owner or to the agent of the owner. Here McClure was a broker employed by Trigg and many other people to sell and trade lands for them. Jackson introduced appellant to McClure, and it was by virtue of this introduction, and the efforts of Jackson, that the trade was made. The fact that Jackson was not present and had nothing to do with the trade, further than bringing the parties together, is of no moment."

See Stout v. Bartlett, 52 N.M. 100, 192 P.2d 311; Schwabe v. Kemp & Coldwell, Tex.Civ.App., 20 S.W.2d 273.

It is a reasonable inference that the listing of the property was not cancelled by the letters between the parties regarding a new listing. While ten months was a long time in which to close the sale, we are not able to say that the trial court's conclusion is not supported by substantial evidence.

On this question we stated in Jackson v. Brower, supra:

"There was no error in refusing to give defendant's requested instruction No. 5, as the claimed revocation of the contract of employment by the elapse of time was not pleaded by the defendant and was not an issue. An affirmative defense, to be proved, must be pleaded (Kelly v. Stone, 94 Iowa 316, 62 N.W. 842; Scott v. Dillon, 58 Misc. 522, 109 N.Y.S. 877); and where a broker finds a purchaser at the seller's terms, while still employed, the reasonableness of the time which he has taken is immaterial (Moore v. Boehm, 45 Misc. 622, 91 N.Y.S. 125). Further, in an action for broker's commission, an alleged abandonment of the brokers' employment to sell is a matter of defense, which plaintiff is not bound to negative. Moore v. Boehm, supra. The case of Moore v. Boehm is very much in point on this question. It was a case where the employment was admitted and the issue was whether the employment had been terminated by notice. The defendant's request to submit to the jury the question whether plaintiff had procured a purchaser within a reasonable time was refused. The evidence showed that plaintiff had procured a purchaser at the terms fixed some six months after his employment. The appellate court held that there was no error in the ruling, announced the principles already set out * * *."

The following authorities bear upon the question: Williams v. Engler, 46 N.M. 454, 131 P.2d 267; Wilson v. Sewell, 50 N.M. 121, 171 P.2d 647; Millage v. Irwin, 68 Colo. 188, 187 P. 525; Grinnell Co. v. Simpson, 64 Wash. 564, 117 P. 391; Sessions v. Pacific Improvement Co., 57 Cal. App. 1, 206 P. 653; Owens v. Mountain States T. & T. Co., 50 Wyo. 331, 63 P.2d

1006; Arnett v. Scherer, 142 Or. 494, 20 P.2d 803.

The judgment of the district court should be, and is, affirmed.

It is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

194 P.2d 270

ALLEN v. ALLEN.

No. 5080.

Supreme Court of New Mexico.

May 17, 1948.

Rehearing Denied June 21, 1948.

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

George A. Shipley, of Alamogordo, for appellee.

LUJAN, Justice.

This is an appeal from a judgment granting a divorce to appellee from his wife, the appellant, and presents a question of jurisdiction.

The only point relied upon for reversal is the court's action in refusing to dismiss appellee's complaint for the reason that it was made to appear that the appellee was not in fact, and had not been, an actual bona fide resident of the State of New Mexico, for one year preceding the filing thereof.

Appellee, by his complaint, among other things alleged "that he is a resident of Otero County, New Mexico, and has been a bona fide resident of said county and state continuously for more than one year immediately preceding the filing of his complaint." By her answer, appellant denied this allegation and further alleged

that appellee is and has been a resident of the State of Illinois for more than one year prior to the filing of his complaint.

Following the hearing on June 14, 1947, on the motion to dismiss the complaint, the appellant and her Illinois attorney returned to Chicago, and on June 20, 1947, an order was entered denying the motion and giving the appellant until June 21, 1947, in which to answer. On said date the answer was filed and on June 23, 1947, appellee noticed the case for trial as of June 30, 1947. On that date the appellant filed a motion requesting additional time within which to take depositions of nonresident witnesses and to further enable her to contact other witnesses preparatory to taking their testimony in order to defend herself. At this time both the appellant and her counsel in chief were back in Chicago, and upon denial of her motion, her local counsel, announced in open court that he would not further participate in the hearing and withdrew from the court room, thereupon the trial proceeded ex parte to its determination.

Chief Justice Mills, speaking for the court in the case of De Baca v. Wilcox, reported in 11 N.M. 346, 68 P. 922, 923, which is analogous to the case in bar, said: "We will now consider the second point,—as to whether or not we are estopped from considering the points assigned as error, because plaintiffs in error suffered a judgment to go against them by default in the lower court, *and reserved no exceptions* on which to base a writ of error. It is a general rule that errors complained of must be objected to, and exceptions saved, or they will be disregarded in an appellate court. This principle has been frequently enunciated by this court. Neher v. Armijo [11 N.M. 67], 66 P. 517 and cases cited. But we have also recognized the exception to the general rule which authorizes us to notice without exception jurisdictional and other matters which may cause a case to be inherently and fatally defective. [Neher v. Armijo, 11 N.M. 67, 66 Pac. 517]. *The question of jurisdiction may be raised for the first time in the appellate court,* or the court may, of its own motion, take notice of such want of jurisdiction. 2 Cyc. 680." (Emphasis ours)

The appellee, at the time he was inducted into the United States Army and prior to his transfer to Alamogordo, New Mexico, was a legal resident of the State of Illinois.

The right to apply for or obtain a divorce is not a natural one, but is accorded only by reason of statute, and the state has the right to determine who are entitled to use its courts for that purpose and upon what conditions they may do so. 17 Am.Jur. section 8, page 151.

Section 25-704, 1941 Comp., reads as follows: "The plaintiff in action for the

dissolution of the bonds of matrimony must have been actual resident, *in good faith,* of the State for one (1) year next preceding the filing of his or her complaint; * * *" (Emphasis ours)

The appellant testified as follows regarding his claim of residence in New Mexico.

"* * * * * *

"Q. Where do you live, Mr. Allen? A. At 411 Thirteenth Street, Alamogordo, New Mexico.

"Q. That's in Otero County? A. That's right.

"Q. How long have you been a resident of Otero County, New Mexico? A. Since September 20, 1945.

"Q. Have you been a resident of the State of New Mexico continuously since that time? A. Yes, I have.

"Q. And resided here in Otero County? A. That is correct."

Duncan Campbell of Alamogordo, New Mexico, testified for the appellee as follows:

"* * * * * *

"Q. At any time soon after you first became acquainted with Captain Allen about Christmas, 1945, did he ever discuss with you his plans as to what he intended to do *when the war was over?* A. We used to have quite a few discussions and we talked quite a few times about his wanting to go into business here in Alamogordo.

"Q. From your conversation with him with reference to his *future plans,* did you understand that this was to be his future home? A. That's what I understood from his plans." (Emphasis ours.)

The trial court found as follows: "That the plaintiff, Byron D. Allen, is a bona fide resident of the State of New Mexico, and has been a resident of said State and of Otero County, New Mexico, continuously for more than one year immediately prior to the filing of his complaint herein on the 24th day of March. A.D. 1947."

There is apparently no question that the appellee actually lived, and continued to live in this state during the required period. The dispute is about whether such dwelling or living here constituted him a bona fide resident in the use of that term in the statute. We are of the opinion that it did not.

Article 7, Section 4, of the New Mexico Constitution provides: "No person shall be deemed to have acquired or lost his residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school."

However, this section of the constitution does not mean that a soldier stationed in this state may not acquire residence in

this state, but it does mean that he may not acquire a residence from the mere fact that he was stationed therein for whatever period of time he may be so stationed. Apart from that service he must establish a residence in the state with the intention of making it his permanent residence.

The only external manifestation appellee made as to his intention to make Alamogordo his permanent home was the renting of a dwelling house for himself and family. This, however, was an incident to his army life. Residence in New Mexico was not his object.

While ordinarily the domicile of a soldier is not changed or lost by his induction into military service, where he is under orders from his superiors and subject to transfer to different posts, as in the case in bar, yet, a new domicile may be acquired by a soldier as well as by any civilian if both the fact and the intent concur. Kankelborg v. Kankelborg, 199 Wash. 259, 90 P.2d 1018; Ex parte White, D.C., 228 F. 88; Trigg v. Trigg, 226 Mo.App. 284, 41 S.W.2d 583; Gallagher v. Gallagher, Tex.Civ.App., 214 S.W. 516; Harris v. Harris, 205 Ia. 108. 215 N.W. 661; Wilson v. Wilson, Tex.Civ. App., 189 S.W.2d 212; Pettaway v. Pettaway, Tex.Civ.App., 177 S.W.2d 285.

Appellee urges that we are bound by the substantial evidence rule. Ordinarily an appellate court will not disturb, but will adopt, the findings of the trial court where there is a conflict, in the evidence. The rule is otherwise where there is a substantial failure of the evidence to support the findings. In this case the appellee came to the State, not of his own volition, but by order of the United States Government, and was subject to be transferred whenever his superiors saw fit so to do. "Actual resident in good faith" as used in our statute is very much the same language as used in the statutes of other states concerning divorces, and we are therefore not without a construction of the expression by the highest courts of such states. In Hamill v. Talbott, 81 Mo.App. 210, 215, the court said: "The statutory terms 'resident or residence' as used in divorce statutes, contemplate, as we think, an actual residence with substantially the same attributes as are intended when the term 'domicile' is used. They do not mean the place where the defendant in fact resides for the time being. They mean a residence of a permanent and fixed character, a domicile."

In the case of Shilkret v. Helvering, 78 U.S.App.D.C. 178, 138 F.2d 925, 927, the court said: "The Commissioner argues that in deciding the case we are bound by the substantial evidence rule and that it is not our function to weigh the evidence or to choose between conflicting inferences. On the ground that there is substantial evidence to support the findings, he says our duty is to affirm without more. But we think that rule has not applicability here. Domicile, we re-

cently said, is a compound of fact and law, and where, upon admitted or undisputed facts, the decision turns on controverted legal principles, it is reviewable. Here there is no dispute as to the essential facts, the conflict relates only to their legal effect. The question must be determined by the application of certain rules long established by the courts, State and Federal, to find where a man's home really is, and there is no dearth of authority on the subject. In one of our most recent pronouncements in this respect, we said that to effect a change from an old and established domicile to a new one, there must be the absence of any present intention of not residing in the latter permanently or indefinitely. Or, stated differently, there must be a fixed purpose to remain in the new location permanently or indefinitely. For domicile once acquired is presumed to continue until it is shown to have been changed, and to show the change two things are indispensible,—'First, residence in the new locality; and, second, the intention to remain there. The change cannot be made except facto et animo. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. Until the new one is acquired, the old one remains. These principles are axiomatic in the law upon the subject.' "

Having held that the appellee was not a bona fide resident of the state of New Mexico as provided for by Section 25-704, 1941 Comp., it follows that the trial court did not have jurisdiction to entertain and enter judgment in the case, consequently the action of the trial court in entering such judgment was coram non judice. The court below having no jurisdiction to enter the judgment, we hold, that the same may be raised for the first time in this court, or that we can take notice of such want of jurisdiction, of our own motion, without any exception having been reserved in the lower court. See Sais v. City Electric Co., 26 N. M. 66, 188 P. 1110, and cases cited: 4 C.J. S., Appeal and Error, § 258(1), page 506.

The judgment is reversed with directions to the lower court to enter its judgment dismissing the complaint. And it is so ordered.

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

McGHEE, Justice (specially concurring).

I agree with the majority that the testimony of the plaintiff is not of the clear and convincing type that should be required in these divorce cases filed by soldiers sent here from other states. As Judge of the Fifth District during the war period, I had three army camps in the district and required a soldier plaintiff, who had been sent

into the state in military service, to make a strong showing on residence before granting a divorce. It may be that little more than a pro forma showing was required in Otero county and that by reason thereof the plaintiff may not have offered all proof on the point which he might have had available, and that on another trial he might be able to make a stronger showing. On the other hand, as I view the record, the defendant was not given a fair opportunity to procure and present her evidence in support of her claim that the plaintiff had not been a bona fide resident of New Mexico for one year next preceding the filing of the complaint.

Here are the material parts of the record proper:

1948—

March 24—Complaint filed.

April 21—Special appearance entered for the purpose of questioning the jurisdiction of the court.

April 23—Motion to dismiss filed by the defendant on the ground the plaintiff was a non resident of New Mexico, and therefore the court did not have jurisdiction of the cause.

April 23—Notice of pendency of suit with appearance day set for June 7, 1947. Affidavit of mailing filed this date.

May 13—Notice by plaintiff of hearing on motion to dismiss for May 17, 1947.

May 16—Motion filed by defendant's attorney for time to take depositions in Illinois to support the allegations of her motion that the plaintiff was in fact a resident of that state, and not a resident of New Mexico.

May 16—Affidavit and proof of publication.

May 17—Order continuing hearing on motion to dismiss until May 24, 1947.

1947—

June 14—The defendant filed a motion asking for $400.00 to cover her expenses of preparing her defense and of attending the hearing upon her motion to dismiss, and also for traveling expenses of her Chicago attorney, and for a reasonable sum as attorneys' fees. The motion recited that she was a resident of Chicago, had two children whose interests it was necessary to protect, etc.

June 14—Defendant entered her general appearance in the case.

June 20—Order dated June 19, 1947, denying motion to dismiss and giving the defendant until June 21, 1947, in which to answer, although she had asked for additional time.

June 23—Notice of final hearing filed by plaintiff for June 30, 1947.

June 30—Motion by defendant for an order granting her further time within which to take depositions of non resident witnes-

ses, stating that such time was necessary to enable her to get in touch with her witnesses and arrange for the taking of their testimony.

June 30—Order entered on motion of the defendant for suit money, expenses and attorney's fees, allowing $29.60 for expenses and $100.00 as attorney's fees, and it is recited that this was at the rate of 5 cents per mile from the state line (New Mexico-Texas near Tucumcari) and return, plus the sum of $100.00 as attorney's fees. (The defendant and her attorney had made the trip from Chicago to Alamogordo and return.)

June 30—Order entered denying an appeal from the order refusing to dismiss the case.

June 30—Final decree of divorce and order denying a continuance.

Following the submission of the motion to dismiss on June 14, the defendant and her Illinois attorney returned to Chicago. No action had then been taken on her motion for expenses, suit money and attorneys' fees, and I feel she and her counsel had the right to assume that in the event the motion to dismiss was denied she would be granted a reasonable time in which to take the depositions of her Illinois witnesses, and also that she would be granted a reasonable sum to cover expenses.

Instead of following this course the trial judge, by order dated June 19, 1947, gave her two days in which to answer and then put the case to trial on June 30, 1947, when she was in Chicago and without her having had time to take and return her depositions.

The matters shown by the record do not square with my ideas of administering justice. It should be remembered that a divorce action is really a triangular proceeding, to which the husband, the wife, and the state are parties. The state is not allowed to intervene and become an actual party as in such cases the court represents the state's interests. In these cases the courts are more ready than in other proceedings to grant continuances. See 17 Am.Jur. Sec. 13, Divorce and Separation, p. 155. Also it should be remembered that the welfare of two babies was involved in this case.

It is true that on June 30 her then local attorney (not the one appearing in this court) picked up his papers and went hence instanter following the allowance of the paltry sum allowed for expenses and the denial of his motions for an appeal and a continuance, but what could he do without a client, depositions or witnesses? It is true that sufficient time had been given for his client to return from Chicago to Alamogordo, if she was able to finance the trip, but she had lost one testifying bout with the plaintiff on the residence question when she went into the June 14 hearing without corroborating witnesses or depositions, and as she had not been allowed either the money

or time to take her depositions why should she come back and undertake what must have reasonably appeared to be a hopeless task? Her attorney might have stayed in the court room and have made a record that would have later been of some help, but it is more likely that opposing counsel would have only nailed his case tighter.

As above indicated, I would remand the case for a new trial, but with directions to grant the defendant sufficient time and suit money to obtain her depositions and attend the trial, together with a substantial increase in the attorneys' fees. However, as I am unable to obtain the concurrence of two of the other members of the court and thus dispose of the case, I will concur in the result announced in the majority opinion.

SADLER, Justice (dissenting).

The prevailing opinion reveals the anomalous situation where counsel for a litigant, disgruntled at the court's denial of motion for continuance interposed when the cause came on regularly for trial, by walking out on the court and abstaining from participation in the trial, has placed his client in a better position to challenge sufficiency of the evidence to support the findings made than if he had remained in the trial, although without reserving the question for review.

My unwillingness to concur in the majority opinion does not rest upon any disagreement between us over the right of this court to notice, without exception, jurisdictional matters, even though raised for the first time in this court. The opinion in the case they cite and quote, De Baca v. Wilcox, 11 N.M. 346, 68 P. 922, supports our right so to do as does the case of Davidson v. Enfield, 35 N.M. 580, 3 P.2d 979, and as do others which might be cited. It may be conceded, too, that an affirmative finding, either by the court or jury, of a jurisdictional fact essential to the court's right to enter judgment, wholly devoid of evidence to support it, although challenged here for the first time on such ground, falls within this class of cases. It should be pointed out, however, that there are statements in some of our opinions which create confusion on the right to do this very thing. See Woods v. Fambrough, 24 N.M. 488, 174 P. 996, and State v. McKenzie, 47 N.M. 449, 144 P.2d 161. Where we disagree is in making such a claim the basis of a review of the evidence to determine its substantiality, or otherwise examining it beyond the point of ascertaining whether there be *any* evidence which, with legitimate inferences therefrom, tends to support the finding.

In their opinion the majority state, as if of some significance, that the order entered June 20, 1947, denying the motion to dismiss gave defendant until June 21 to answer. This order was signed and dated June 19. Its background discloses that at a formal hearing on said motion, duly noticed for

May 17, the defendant defaulted, neither she nor her counsel appearing, after having filed a motion the day before seeking continuance of the hearing to secure the depositions of herself and unnamed, unlocated witnesses in Illinois and "other places". When neither defendant nor her counsel appeared on the day set for hearing on the motion on May 17, the trial court of its own motion entered an order setting the hearing over to May 24, 1947. For some reason not appearing of record, the hearing was not held on May 24, but instead was passed by stipulation to June 14, as recited in the order entered June 20 denying the motion. On June 14 the defendant appeared in person as well as by her two attorneys, the one from Chicago and the other from Alamogordo.

Before entry of the order of June 20, hearing on the motion to dismiss had been held in Alamogordo on June 14, 1947, as already stated, at which time evidence was taken and findings made in the order overruling the motion. It also gave defendant until June 21, 1947, to file an answer, if desired. Whether the trial court's action in ruling defendant to answer two days after signing the order on June 19, and one day following its entry, amounted to an abuse of discretion, we have no way of knowing. Certainly, it could have no bearing on the question of residence upon which the maority opinion is rested. The defendant had defaulted in appearance for the hearing on motion to dismiss set for May 17, notwithstanding the filing of a motion the day before seeking postponement thereof to take depositions of yet undiscovered witnesses. The cause had been pending since March 24, appearance day had come and gone by some two weeks, save as tolled by the special appearance on motion to dismiss, and general appearance had actually been entered the week before without answering. The trial court may very well have felt, although it can make no difference now, that dilatory tactics were being resorted to and that it was time to put the case at issue.

The cause was placed at issue by the filing of defendant's answer on June 21, 1947, as ordered. On June 23, plaintiff's counsel noticed the case for hearing on the merits on June 30, following. When the case came on regularly for trial on the date last mentioned, the defendant filed still another motion for time to take depositions of unnamed and unlocated non-resident witnesses. There was no allegation of diligence in seeking to identify, locate and take their depositions, notwithstanding pendency of the suit since late March, 1947, with the proceedings therein already mentioned and the special appearance of defendant on April 23 to challenge jurisdiction for claimed want of bona-fide residence on plaintiff's part. This was the first defense advanced in defendant's answer later filed. The trial court in the exercise of a sound discretion declined to grant the motion to postpone the trial, holding that "said motion was not

filed in apt time and does not state sufficient ground for a continuance of this cause." The language just quoted from the final decree is followed by the formal order overruling the motion and a recitation of abandoment of the trial by defendant's attorney. It reads: "Wherefore, it is Ordered, Adjudged and Decreed, that the Motion of the Defendant for a continuance be and the same is hereby denied. Whereupon, the said Attorney for the defendant announced in open Court that he would not participate further in the hearing and withdrew from the Court."

The majority do not rest their reversal on any claim that the denial of this motion was an abuse of discretion. Obviously, it was not. Instead, and contrary to the long established doctrine prevailing in this court that, absent a request for findings or exceptions to those made, the evidence will not be reviewed to determine whether they are supported by substantial evidence (Woods v. Fambrough, 24 N.M. 488, 174 P. 996; Murphy v. Hall, 26 N.M. 270, 191 P. 438; Williams v. Kemp, 33 N.M. 593, 273 P. 12, Santa Barbara Tie and Pole Co. v. Martinez, 34 N.M. 181, 279 P. 71; Alexander Hamilton Institute v. Smith, 35 N. M. 30, 289 P. 596; Damon v. Carmean, 44 N.M. 458, 104 P.2d 735; Veale v. Eavenson, N.M., 192 P.2d 312), the majority have proceeded to review the evidence and in so doing have disregarded another cardinal rule governing where a review is awarded upon a proper challenge to findings, namely, that they will not be disturbed if found to have substantial support in the evidence.

Even if the majority were entitled to review the evidence, as they are not on the record before us, they still are confronted by the substantial evidence rule. Under it the finding of residence made by the trial court is not to be overturned if it has substantial evidence to support it. It is difficult to understand how any one can say that finding lacks substantial support when the only evidence on the subject was that introduced by the plaintiff, all of which tends to support his claim of residence. The majority purport to quote all the testimony bearing on the issue of residence. Just why they omit that which is set out below, it is difficult to understand. Obviously the trial judge was entitled to consider it in making a finding on the vital issue of residence. Following by a few sentences the portion of plaintiff's testimony quoted by the majority, questions were asked him and replies made as follows:

"Q. *At the time you established your residence in Otero County, in September, 1945, state whether or not the defendant was a resident here with you.* A. *She was.*

* * * * * *

"Q. You say this particular quarrel lasted for some two or three days: What

did your wife do with reference to leaving? A. She informed me that she was leaving and I said, 'All right, if you want to go I can't force you to stay.' *And I told her that despite the fact that we had fallen out among ourselves, that I was still willing to maintain a home for her and the children here in Alamogordo.* During the next two or three days she would tell me that she was either staying or going; and she changed her mind a half dozen times. And regardless of her decision I told her she could go or stay *and if she wanted to stay I would maintain a home for her.* She finally made train reservations and called me and asked me to pick up her ticket; so, I went down and bought a train ticket. She never had unpacked her baggage.

"Q. Did you give your wife any reason to leave you early in March, as she did? A. No, I don't think so.

"Q. *Had you provided a home here?* A. *Yes, sir.*

"Q. And the necessities of life and such as were necessary for her comfort? A. *Yes, sir, Every convenience that could be, was in the home.*

* * * * * *

"Q. Have you been back to Illinois since you and your wife separated in March? A. No, sir." (Emphasis mine).

A witness, Duncan Campbell, called by the plaintiff, testified to several conversations with the plaintiff during which the latter expressed a desire to go into business in Alamogordo after the war was over. This portion of the testimony of the witness, Duncan, is quoted in the majority opinion. However, here as in the case of plaintiff as a witness, the majority fail to quote certain testimony bearing on the issue of residence and plaintiff's good faith in claiming it which, in my opinion, the trial judge was entitled to consider. It is as follows:

"Q. State your name, please. A. George Duncan Campbell.

"Q. Where do you reside? A. At 311 Fourteenth Street, Alamogordo, Otero County.

"Q. How long have you resided in Otero County, New Mexico? A. Approximately Two years—two years this month.

"Q. What business are you in? A. Men's Store.

"Q. And are you acquainted with Captain Byron D. Allen, the plaintiff in this case? A. I am.

"Q. How long have you known Captain Allen? A. He first started coming in the store about Christmas, 1945.

"Q. Were you acquainted with his wife at the time they were living here? A. Yes.

"Q. Where were they living? A. Along about Thirteenth Street—

"Q. *Since you have known Captain Allen—about Christmas of 1945—where has he been a resident?* A. *He lived here in town; his duties were at the Air Base—*

"Q. *Since 1945 continuously?* A. *Yes, sir, I know that for a fact.*" (Emphasis mine).

In my opinion, all of the testimony quoted herein, yet omitted by the majority and denied consideration in support of the trial court's finding of residence, is pertinent to that issue. Even if it be granted that portions thereof may not properly be so considered, how the following question and answer can be ignored in seeking support for the finding is inconceivable to me, to wit:

"Q. *At the time you established your residence in Otero County, in September, 1945, state whether or not the defendant was a resident here with you.* A. *She was.*" (Emphasis mine).

Can it be possible that the majority deny consideration because the question is leading? Surely not! And, yet, no other reason so obviously suggests itself. The majority offer no explanation of the reason for exclusion. If this be the reason, then, for the first time in its history, this court goes on record as saying it will sift from the bill of exceptions all evidence such as hearsay testimony, answers to leading questions and the like, which may have come into the record without objection through inadvertence or carelessness of counsel, yet might have been excluded upon proper objection, before testing the sufficiency of the evidence to support a finding. All reason for the alertness of counsel in keeping out objectionable evidence will disappear in the face of such a rule here for applying the substantial evidence test to findings.

Preliminary to a determination of the sufficiency of the evidence to support a finding of residence in plaintiff, the answer to a single question must be supplied. The question is: Can a person while on active duty in the United States Army change his residence? If he cannot, that ends the matter. Obviously, he can as the majority concede. But while professing to uphold the right of an army officer to change residence while a member of the armed services, the majority then proceed to apply a test for effecting the change which amounts to a denial of the right in practically every instance where the issue is raised. Of course, there is no legal impediment to such a change of residence. 19 C.J. 418; 28 C.J.S., Domicile, § 12, page 28; 17 Am.Jur. 634; Trigg v. Trigg, 226 Mo.App. 284, 41 S.W.2d 583. St. John v. St. John, 291 Ky. 363, 163 S.W.2d 820; see, also, annotation of subject in 106 A.L.R. 6(32), supplemented in 159 A.L.R. 496(507) and annotations in 148 A.L.R. 1413, as supplemented in 149 A.L.R. 1471, 150 A.L.R. 1468, 151

A.L.R. 1466, 152 A.L.R. 1471, 153 A.L.R. 1442, 153 A.L.R. 1466, 156 A.L.R. 1466.

The author of the text on the subject of Domicile in 17 Am.Jur. 634, concedes the right of a person in the armed services to effect a change of residence. He states: "A soldier residing at a government post on land ceded by a state to the government is not a resident of that state, although the grant by the state of the site of the post reserves the right to serve process from the courts of the state. On the other hand, if a person engaged in military service by animus and factum establishes a residence near but outside the military post, with the purpose of making such residence the home of himself and his wife, he may acquire a domicil in such place."

This Court in Klutts v. Jones, 21 N.M. 720, 158 P. 490, 492, L.R.A.1917A, 291, recognizes the question of whether a person is a resident of one place or another to be largely one of intention determinable by the trial court, stating: "* * * and, where the intention and the acts of the party are in accord with the fact of residence in a given place, there can be no doubt of the fact that such party is a bona fide resident of the place where he intends to and does reside." See, also, Fisher v. Terrell, 51 N.M. 427, 187 P.2d 387.

The facts in the case of St. John v. St. John, supra, decided by the Supreme Court of Kentucky are not unlike those in the case at bar. There an army officer, as here, was the plaintiff in a divorce suit. As an officer in the United States Army on active duty he first came into the state of Kentucky and was stationed at Fort Knox. Following marriage in November, 1940, he brought his wife to Kentucky and set up housekeeping at West Point, not far from Fort Knox. After dwelling at West Point for two months, the officer and his wife moved to the nearby town of Vine Grove where they resided until ordered to Fort Knox to reside on March 1, 1941. Having purchased furniture upon setting up housekeeping, the plaintiff stored same in Kentucky when ordered to Fort Knox.

In the St. John case, as here, the facts showed that the plaintiff claimed Kentucky as his home. Whereas, there the plaintiff and wife had maintained a household off the military reservation for only four months, here the plaintiff and wife had resided in a home provided by him off the military reservation for nearly two years. In the St. John case, where the facts are no stronger, if as strong as here, the court held [291 Ky. 363, 163 S.W.2d 823]: "The chancellor, in finding that appellant had not acquired a domicil in this state in effect ignored the direct and positive testimony as to intention and relied entirely on inferences at variance with this testimony. In the usual and ordinary case involving domicil, the one whose domicil is in question is not a witness and in-

ferences from proven facts and circumstances become all important but where, as here, the one whose domicillary status is in question gives positive uncontradicted testimony as to his intention and the proven facts and justifiable inferences therefrom do not render such testimony incredible, it should be given due consideration and weight. We think there was nothing in the evidence to discredit appellant's testimony and that of the witness referred to and render such testimony unworthy of belief. This being true, the evidence undoubtedly established that appellant had acquired a domicil in Kentucky which, concurring with actual residence, was sufficient to entitle him to maintain the action since, as above indicated, his domicil or legal residence here was not terminated by his moving into the military reservation under army orders."

In City of Roswell v. Hall, 45 N.M. 116, 112, P.2d 505, in an opinion by Chief Justice Brice the test to be applied in this court for determining sufficiency of the evidence to sustain findings of the trial court was stated as follows: "* * *. and in determining whether there is substantial evidence we will consider only that part of the evidence supporting the judgment, and reject the opposing or conflicting testimony." See, also, to the same effect, the cases of Dickerson v. Montoya, 44 N.M. 207, 100 P.2d 904; Williams v. Ertgler, 46 N.M. 454, 131 P.2d 267, and Sundt v. Tobin Quarries, 50 N.M. 254, 175 P.2d 684, 169 A.L.R. 586.

An application of the foregoing test can only result in sustaining the finding of residence. The majority, as has been pointed out, have applied this test in reverse, at least, as to some of plaintiff's supporting testimony, by excluding it from consideration altogether.

In St. Clair v. St. Clair, 175 S.C. 83, 178 S.E. 493, the holding of the court on the question now considered is epitomized in the second syllabus, as follows: "Finding of trial judge is conclusive on question of residence of party to action, unless there is a total failure of testimony to support it."

Unless there is absolutely *no* testimony to support the finding of residence, this court is without right to review the evidence for determining its substantive character in support of the questioned finding. This is so because the question of sufficiency of the evidence to support the finding was not reserved below. Faced with a claim that there is *no* evidence to support a jurisdictional finding, we may examine the record sufficiently to ascertain whether the claim be true. Once the court finds *some* evidence tending to support the finding, its inquiry ends, the record book is closed and the judgment must stand affirmed without debating its substantial character. Whether it were so was a question for the district court, not the Supreme

Court, to determine. If the defendant had desired to raise that question here, she should have been present or represented at the trial and reserved it for review.

How it can be said there is *no evidence* tending to support the questioned finding is simply incomprehensible to me. The isue was the plaintiff's bona fide residence in Otero County. He testified that Alamogordo was his residence and had been for two years. He had resided with his family, off the military base, in a house maintained by him in the town of Alamogordo throughout that period. On several different occasions, over the period of two years, he had discussed with a business man of Alamogordo the prospects of getting into some business there when his army tour ended. And, yes, too, if one please, unless excluded as in the prevailing opinion, apparently, because the question is "leading", but contrary to the test to be applied as declared by this court in the cases cited, supra, the plaintiff had "established" residence in Otero County, "in September, 1945."

If this Court can reverse a trial judge on findings made at a default trial, with the support the questioned finding here has, and where there is no challenge to a single ruling nor the slightest semblance of compliance with requirements for preserving error for review, then the litigant "who fights and runs away," indeed does "live to fight another day." As already said, such a litigant is placed in a better position to challenge error than the one whose counsel remains in the trial and merely overlooks preserving error for review.

The judgment of the trial court should be affirmed. The majority having determined otherwise, for the reasons heretofore stated, I dissent.

[redacted]

194 P.2d 678

STATE ex rel. PRINCE v. COORS et al.
No. 5121.

Supreme Court of New Mexico.
May 10, 1948.

[redacted]

Lewis R. Sutin, of Albuquerque, for petitioner.

M. Ralph Brown, and Harry D. Robins, both of Albuquerque, for respondents.

COMPTON, Justice.

This is an original proceeding for writ of prohibition by Lewis Prince against District Court of the Second Judicial District, Bernalillo County, and the Honorable Judges thereof, Henry G. Coors and R. F. Deacon Arledge.

Petitioner was charged by an information filed in the district court of Bernalillo county, with the crime of embezzlement. He claims that the District Court is about to put him to trial for the offense charged without first granting him a preliminary examination; that he has demanded such examination and that it has been denied him, in violation of Article 2, Sec. 14 of the Constitution. He now seeks prohibition to restrain the court from proceeding further.

To the petition, respondent has answered, admitting that relator was being put to trial upon the information. But respondent asserts (1) that relator was given a preliminary examination and (2) that he waived the same.

The single question for our determination is whether prohibition, under the circumstances, is available to relator. We must hold adversely to him.

Whether relator was granted a preliminary examination or waived the same is not an issue to be determined here. It is shown from the record that respondent has jurisdiction both of the subject matter and person. Thus having jurisdiction to determine the cause and render judgment, prohibition cannot be used to supply the ordinary functions of an appeal or writ of error, nor may it be used to restrain an inferior court from making an erroneous decision. State v. District Court Eighth Judicial District, 38 N.M. 451, 34 P.2d 1098; Peisker v. Chavez, 46 N.M. 159, 123 P.2d 726; Appelby v. District Court, 46 N.M. 376, 129 P.2d 338; Heron v. District Court, 46 N.M. 290, 128 P.2d 451; City of Roswell v. Richardson, 21 N.M. 104, 152 P. 1137.

Courts generally support the rule that prohibition, as a method of review, must be excluded where there are other efficient

and adequate remedies. Fels v. Justice's Court of City of Berkeley, 28 Cal.App.2d 739, 83 P.2d 721; C. S. Smith Metropolitan Market Co. v. Superior Court, 16 Cal.2d 226, 105 P.2d 587; Sullivan v. District Court of Milwaukee County, 145 Wis. 138, 130 N.W. 58; Ralph v. Police Court of City of El Cerrito, Cal.App., 190 P.2d 632. With us, however, as stated and as shown by the New Mexico cases cited above, it is solely a question of jurisdiction.

In Sullivan v. District Court of Milwaukee County, supra, the court, in considering a case in point, said [145 Wis. 138, 130 N.W. 59]: "It is further urged by the relator that his demand for a preliminary examination should have been granted, that he had never waived the same, and that he could not be lawfully tried until he had such preliminary examination. Even if such a contention be correct, the error of the court in refusing a preliminary examination can be reviewed only upon appeal or writ of error. It cannot be considered upon a motion for a writ of prohibition. Petition of Pierce-Arrow Motor Co., 143 Wis. 282, 127 N.W. 998. It was there held that a writ of prohibition cannot be used to perform the ordinary functions of an appeal or writ of error. * * *"

In support of his contention, relator calls to our attention, among other cases, Ralph v. Police Court, etc., supra. This case correctly states the law. There the petitioner had exhausted all available remedies open to him for a review of his case and the court was about to pronounce sentence upon a void judgment. It was at this stage of the proceeding that he applied for and was granted a writ of prohibition. It is seen that the court was without jurisdiction to render any judgment. It should be stated that prohibition will issue as a matter of right under such circumstances and it is upon this principle that prohibition was granted.

It is our conclusion that relator has been denied no right or privilege granted him under the Constitution and that the alternative writ of prohibition should be discharged as having been improvidently issued, and it is so ordered.

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

194 P.2d 679

FRYMIRE v. RICE.

No. 5102.

Supreme Court of New Mexico.

June 10, 1948.

Hubert O. Robertson, of Silver City, for appellant.

Clyde T. Bennett, of Silver City, for appellee.

McGHEE, Justice.

The appellant, defendant below, seeks the reversal of an adverse judgment in an ejectment action for the possession of an unpatented mining claim called Gold Bar No. 5 in the Wilcox Mining District of Catron County.

While there are numerous assignments of error relating to the findings of fact and conclusions of law made by the court, they are argued under the following points:

1. There was no valid location of the claim.

2. The required annual labor for the year 1940–1941 was not done on the claim.

The appellee is the successor in interest of the original locators who are now dead. Gold Bar No. 5 was located along with four other claims in 1929. We have examined the record relating to Point 1 and find that there is sufficient evidence to sustain the finding that the claim was validly located, the boundaries properly marked, proper notice of the location was filed in the office of the county clerk, that sufficient development work was done, and that mineral was discovered in place.

The trial court found that although no work was done in 1940 and 1941 on the Gold Bar No. 5 claim, the owner caused sufficient work to be done on the mother lode on other contiguous claims of the same group, which was of direct benefit to this claim, and that such work was for the benefit of all. It was also found that while the employees were doing this work they actually resided in a cabin on the No. 5 claim.

There is substantial evidence to support the finding.

Where several adjoining mining claims are held in common, work upon any one of them, in a given year, for the benefit of all, equal in amount to that required to

be done upon all, is a sufficient compliance with the mining laws of the United States. Eberle v. Carmichael, 8 N.M. 169, 174, 42 P. 95, and cases there cited.

[redacted] We have examined the record and find that the findings of fact necessary to support the judgment are supported by substantial evidence.

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

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

[redacted]

195 P.2d 86

FLOECK et al. v. HOOVER.

No. 5087.

Supreme Court of New Mexico.

April 27, 1948.

Rehearing Denied July 12, 1948.

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Williams & Beimfohr, of Tucumcari, for appellant.

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

COMPTON, Justice.

Plaintiff's intestate, Gerald M. Floeck, was killed as a result of a collision between a bucking horse he was riding, and an automobile driven by defendant, at a point on highway 66 near the Cory-Penn Filling Station, immediately west of Tucumcari, New Mexico. The case was submitted to a jury upon the issues of the negligence of the defendant and the contributory negligence of the deceased. The trial court refused to instruct the jury on the issue of last clear chance. The jury returned a verdict for the defendant and following the overruling of a motion for a new trial, judgment was entered in accordance with the verdict.

Three grounds are urged for a reversal of the judgment. First, the refusal of the court to instruct the jury on the doctrine of last clear chance; second, in refusing to submit to the jury the issue of whether the scene of the collision was a business or resident district; and third, in refusing to grant a new trial on the ground of newly discovered evidence.

Since we are called on to determine whether the trial court committed error in its refusal to give an instruction on the doctrine of last clear chance, it is well to announce those factual matters as will present such an issue. It must appear, (1) that plaintiff has been negligent, (2) that as a result of his negligence he is in a position of peril from which he cannot escape by the exercise of ordinary care, (3) that the defendant knows or should have known of plaintiff's peril, and (4) that defendant then had a clear chance, by the exercise of ordinary care, to avoid the injury, and that he failed to do so. Palmer v. Tschudy, 191 Cal. 696, 218 P. 36; Bence v. Teddy Taxi Co., 112 Cal.App. 636, 297 P. 128.

A review of the facts is necessary. The deceased was riding in a borrow pit on the south side of the highway, traveling in an easterly direction. The defendant also was driving in an easterly direction, at a speed of 30 to 35 miles per hour. About the time the defendant passed the filling station, and about 35 feet before he had overtaken the horse and its rider, the horse began to buck. It bucked out of the borrow pit onto the highway. The defendant, becoming aware of the deceased's perilous position, immediately applied his brakes, and at the same time swerved the automobile abruptly to the left, or north side of the highway. The horse continued bucking in the direction of the defendant's on-coming automobile, and bucked into the automobile at about the center of the black top, or the middle of the highway. The force of the impact dented

the right front fender, the right door, and broke the glass out of the right front door. Defendant's car came to a stop about 20 or 30 feet east of the impact on the north side and parallel to the highway, with both left wheels off the black top.

It is further shown in evidence that the widow of the deceased, an eyewitness to the accident, immediately thereafter stated that the defendant pulled to the left and tried very hard to get out of the way of the horse; that the defendant did everything he could to avoid being hit by the horse, and that she was afraid that the defendant was going to turn his car over or wreck it in trying to get out of the way of the horse.

From a consideration of this evidence, it clearly appears that an issue on the last clear chance doctrine is not presented. The law does not require a defendant to exercise a greater care than that required of plaintiff for his own safety. Nevertheless, the evidence shows that the defendant exercised more than ordinary care, yet failed to avoid the injury. Consequently, the fourth element, as a basis of the doctrine is absent.

In his brief, the plaintiff quotes what he says is the testimony of the defendant to support his claim that he was entitled to an instruction submitting the issue of the last clear chance doctrine to the jury, as follows: "A. I could have stopped my car within 50 feet.

"Q. As I understand it, you were approximately at the west edge of this driveway, proceeding east, at the time when you saw the horse start to buck and pitch onto the highway? A. Yes.

* * * * * *

"A. *Between the west edge of the east driveway and where this horse is located on the highway would be within 5% of 168 feet and 9 inches.*" (Our italics).

"Q. This horse appeared out of control, did it, Doctor? A. Yes, sir."

An examination of the record discloses that the answer underscored was not given by the defendant, but was a part of the testimony of Sterling Floeck, a brother of the deceased, given for the plaintiff in rebuttal, when he was testifying as an expert insurance adjuster. He was giving his opinion as to the location of the collision with relation to the filling station. He based his testimony on a posed photograph taken with the camera parallel with the road and a map drawn to scale which was not admitted in evidence. The defendant questioned the probative value of the testimony based on such a picture at the time. It is stated in Scott, "Photographic evidence", Sec. 87, p. 92: "When it is desired to show the distance between two objects in a scene, the ideal camera position is one on a line perpendicular to an imaginary line drawn between the important objects."

At 20 Am.Jur. "Evidence", Sec. 727, it is stated: "A photograph cannot be relied on as proof in itself of the dimensions of the depicted object or objects, and cannot be made properly available to establish the relative proportions of such object or objects except by evidence of the personal knowledge or scientific experience to demonstrate accurately the facts sought to be established."

But we do not need to resort to the books to learn of the unreliable nature of such testimony. We turn to his own testimony on the plaintiff's case in chief of his on-the-spot investigation made two days after the accident when the tire marks and blood stains were plainly visible. We quote therefrom as follows: "It was on the morning before the funeral about 9 or 10 o'clock. I have visited many such scenes in my occupation and as I went out there I took note of a great many things I guess the ordinary person wouldn't notice, * * * When I went out there, on arriving there, I saw a heavy spot of blood on the south side of the pavement. It was a very large spot. It was obvious that it was the blood of the horse. There was too much blood for a man. There was another spot up in the pavement near what would have been a center line of the pavement, had the pavement been lined, near the center of the pavement. Then just a few feet, 10 or possibly 12 feet to the west of that there were two black marks on the pavement. They started close together and as they cut across toward the north or northeast they became separated by about 28 or 30 inches and they came closer together as they went off the pavement on the north side of the road. Those marks could be less visibly traced off the shoulder of the road, which was about 32 to 36 inches wide there, and they then faded out after that. Do you want me to tell where those marks were located on the pavement?

"Q. Yes, if you know about it. A. They were near the Cory-Penn Station out there. They were just east of the east side coming out of the Cory-Penn Station. I measured them at the time. I will give you the measurements if you will give me a minute to think. Those marks were about thirty feet from the east of the Cory-Penn Station to the east, and the blood spot, as I said, was 10 or 12 feet beyond the skid marks and then there was another smaller spot some 8 or 10 feet east of this spot of blood, the large blood spot in the center of the pavement. * * *"

The other witnesses who viewed the scene of the accident placed the horse's body and place of collision approximately 15 to 40 feet from the east driveway.

It is, of course, the duty of the trial court to properly instruct the jury on questions of law raised by the evidence in the case, leaving the issues of fact for the jury, but in consideration of all the evidence, particularly the repeated statements of the

widow of the deceased, and in fact the principal plaintiff here, the only eyewitness to the accident who testified, that the collision was apparently unavoidable, the trial court properly refused to submit this issue to the jury. Thayer v. D. & R. G. R. R. Co., 21 N.M. 300, 154 P. 691; Citizen's Finance Co. v. Cole, 47 N.M. 73, 134 P.2d 550; Federal Land Bank of Wichita v. Beck, et ux., 46 N.M. 87, 61 P.2d 147.

The second assignment of error relates to the refusal of the trial court to give his requested instruction No. 15, as follows:

"You are instructed that the statute law of the State of New Mexico defines a "Business District" as follows: 'The territory contiguous to a highway when fifty (50) percent or more of the frontage thereon for a distance of three hundred (300) feet of (or) more is occupied by buildings in use for business.'

"And that the statute law of the State of New Mexico defines a 'Residence District' as follows: 'The territory contiguous to a highway not comprising a business district when the frontage on such highway for a distance of three hundred (300) feet or more is mainly occupied by dwellings or by dwellings and buildings in use for business.'

"If you find from the evidence that the area surrounding the Corypenn Station fits either of these definitions, then I instruct you that the legal speed limit under the laws of New Mexico is 20 miles per hour in the case of a business district, or 25 miles per hour in the case of a residence district, whether any speed limit sign is posted or not."

This instruction follows the language of the statute, Sec. 68-401, subsecs. (t) and (u), 1941 Comp. Certainly, the area was not a business district under our statutory definition. Was the proof, that the area was a residential district, sufficient to authorize the submission of the question to the jury?

Our statute defining a residence district is identical with the Wisconsin statute. The Supreme Court of that state in construing their statute in McGill v. Baumgart, 233 Wis. 86, 288 N.W. 799, and in Volland v. McGee, 238 Wis. 598, 300 N.W. 506, held that it is the frontage of the buildings within the 300 foot area that determines whether the scene of an accident is a residence district, and not the combined area of the buildings and yards. The Cory-Penn filling station is the only building shown to front directly on the highway and it has a width of 35 feet.

It is true that one witness testified that the frontage of the little group of buildings around the filling station was approximately 410 to 415 feet, but he did not give the dimensions of any of the buildings and the record is silent on this point except as to the filling station.

The proof shows that there are three residential houses behind the station from 250 to 900 feet back from the highway, with only one of them facing in the direction of the highway. The burden of proof was upon the plaintiff to show by actual measurements that the area occupied by the buildings, *to the exclusion of the vacant yard space,* was more than 50 per cent of the 300 feet area. He failed to meet such burden, and, following the reasoning of the Wisconsin courts, the court did not err in refusing to give the tendered instruction.

The third assignment of error relates to the refusal of the trial court to grant a new trial on the ground of newly discovered evidence. According to the motion, the plaintiff learned on Friday before the trial started the following Monday morning that a Mrs. Frances J. Fazekas was an eyewitness to the collision, but he did not know the nature of her testimony; that arrangements had been made with her to appear at the offie of the plaintiff's attorneys on Sunday and that a subpoena was immediately issued for her appearance as a witness on Monday, but it was not served; that she was injured in an automobile accident on Saturday night preceding the trial and immediately left for El Paso, Texas, and that her whereabouts were not discovered until after the jury had returned its verdict. Her affidavit was attached to the motion for a new trial, the material part of which reads: "On Sunday afternoon, May 26, 1946, I was out for a Sunday afternoon ride with a friend on the rural road around Tucumcari, Quay County, New Mexico. At approximately 5:30 P.M. we were proceeding in a westerly or southwesterly direction along the dirt road which runs parallel to the railroad tracks near the Tucumcari Memorial Cemetery west of Tucumcari, New Mexico, in Quay County. We were riding in a coupe model automobile and I was sitting half way turned on the seat facing toward the driver. This caused me to be looking south toward U. S. Highway 66. We were driving along talking and I was not paying any particular attention to what was going on on U. S. Highway 66, until I heard the screech of tires on the pavement followed by the sound of the impact, at which time I looked up. At that time our car was almost stopped at a point near the Southeastern corner of the Tucumcari Memorial Cemetery and approximaely 500 to 600 feet due north of the scene of the accident. When I looked up the horse and car were coming together, and the horse was hit and spun around into the right side of the car also. Immediately after the impact, Dr. Hoover's car (I believe it was Dr. Hoover's car, although at the time of the accident was not sure who it was) spun into the bar ditch along the North side of the road and came to rest facing West."

The plaintiff used due diligence in contacting the witness and in arranging for a conference to learn what her testimony would be, and also to insure her attendance, and through no fault on his part, she did not appear.

The requirements necessary to obtain a new trial are stated in State v. Luttrell, 28 N.M. 393, 212 P. 739 to be: (1) it must be such as will probably change the result if a new trial is granted; (2) it must have been discovered since the trial; (3) it must be such as could not have been discovered before the trial by the exercise of due diligence; (4) it must be material to the issue; (5) it must not be merely cumulative to the former evidence; (6) it must not be merely impeaching or contradictory to the former evidence.

While we seriously doubt whether such testimony would change the result of the trial, nevertheless, we feel that such testimony would run counter to the former evidence. Her attention was attracted to the scene of the noise of the collision. All of the evidence is to the effect that there were no marks of impact on the front of the defendant's automobile, but, on the contrary, they were on the side, and this is corroborated by the photographs of the automobile. The defendant himself testified that neither the horse nor the deceased struck the front of the car, but that the impact was on the side. Ground 6 furnishes an efficient bar to the claim of error in this regard.

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

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

[95 P.2d 621]

TAPIA et al. v. LUCERO.

No. 5082.

Supreme Court of New Mexico.

July 13, 1948.

Henry J. Hughes, of Santa Fe, for appellant.

William J. Truswell, of Albuquerque, amicus curiæ, for appellant.

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

McGHEE, Justice.

This is a class action brought by the appellant, a Rio Grande Pueblo Indian, on behalf of himself and the Indians of the Pueblos of Jemez, Acoma, San Juan, Picuris, San Felipe, Cochiti, Santo Domingo, Taos, Santa Clara, Tesuque, Pojoaque, San Ildefonso, Zia, Isleta Nambe, Sandia, Santa Ana and Laguna, seeking a declaratory judgment that he and the Indians of the Pueblos above named are qualified voters in New Mexico.

The case was submitted to the trial court upon the pleadings and a stipulation of facts.

The following findings of fact are challenged in whole or in part upon the ground that they are not sustained by the stipulation:

1. That plaintiff, Pete Tapia, is a member of the Pueblo Indian Tribe and lives in a tribal relationship with such Pueblo Indian Tribe.

2. That the plaintiff, Pete Tapia, is subject to and abides by the tribal laws and customs of the Pueblo Indian tribe.

3. That the plaintiff has paid no ad valorem taxes upon the personal property owned by him located upon the Indian reservation upon which he resides, and pays no ad valorem taxes upon the real estate upon which he resides on such Pueblo reservation.

It is stipulated that the only place of residence of the plaintiff and all other Pueblo Indians is upon their own Pueblo lands, but there is nothing to show that they live in tribal relationship and are subject to the tribal laws and customs. Neither is there anything to show what such laws and customs may be, or that the Indians have any personal property.

There is also another finding to which we desire to call attention reading as follows:

"That this plaintiff and all other members of the said Pueblos do pay some state and federal taxes."

This finding is evidently based upon that part of the stipulation reading:

"That the plaintiff herein and all members of the Pueblos hereinbefore mentioned, are subject to and pay the state sales tax, the state and federal gasoline tax, and perhaps other taxes."

What other taxes are perhaps paid by these Pueblo Indians? Are they excise or ad valorem taxes?

The State of New Mexico has based its refusal to allow Indians not taxed to vote upon the provisions of Art. 7, Sec. 1, excluding "Indians not taxed" from such right, so it is of the utmost importance that the record clearly disclose the kind of tax paid, if any. It is likewise important that the tribal relationship, laws and customs of these Pueblo Indians be fully shown.

These necessary facts were fully developed in the case of Lewis et al. v. Sabin, our No. 5083, which came to us from McKinley County and was later dismissed by the Indian appellants. Counsel will find the record in that case of assistance at another trial.

For error of the trial court in making its findings of fact Nos. 10, 11 and 12, without sufficient evidence to support them, deeming them material, the judgment will be reversed and the cause remanded to the District Court with directions to set aside its judgment and award a new trial. On the new trial, in view of what we have said, the unsatifactory state of the proof on the important issue whether the plaintiff and other members of the Pueblo Indian tribes pay ad valorem taxes, no doubt, will be clarified and settled by a specific finding. It is so ordered.

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

195 P.2d 622

STATE v. BORREGO.

No. 5066.

Supreme Court of New Mexico.
June 23, 1948.

Rehearing Denied Aug. 5, 1948.

H. A. Kiker and Charles C. Spann, both of Santa Fe, for appellant.

C. C. McCulloh, Atty. Gen., and William R. Federici, Asst. Atty. Gen., for appellee.

LUJAN, Justice.

The defendant, appellant here, was charged with the crime of involuntary

manslaughter, was found guilty by a jury, and from a judgment on the verdict has prosecuted this appeal.

A brief summary of the voluminous record discloses the following facts: On November 6, 1946, appellant, the driver, in company with Estevan Martinez and Lorenzo Romero, left the settlement of Vadito, in a pick-up truck belonging to Estevan Martinez. They drove in a westerly direction to the settlement of Penasco. Before their departure, they stopped at Cosme Roybal's bar, where appellant and Estevan Martinez each partook of two or three drinks of whiskey. The appellant and his companions all occupied the front seat of the truck. On this same evening Rogerio Duran and his wife left their home in Rodarte en route to Vadito and Penasco. While in the settlement of Penasco the deceased and his wife observed one of his trucks parked in front of Epifanio Chacon's premises. The deceased stopped his car on the highway next to this truck but found that the driver was not there, then noticed another truck owned by him parked some seventy-five yards below the highway in front of the Romero filling station. Thereupon he went to where it was and there engaged in conversation with its driver. This filling station is approximately fourteen feet down an incline from the highway. Upon his return trip to his car, and about fourteen feet in front of the second truck, which was parked about two feet from the pumps, he was struck by the pick-up truck driven by the appellant and died within an hour and a half thereafter. At the time the pick-up truck left the highway and went down the incline towards the filling station it was traveling at the rate of 40 to 50 miles per hour. The appellant after striking the deceased momentarily stopped his truck about 80 yards from the scene of the accident, but did not get out of the small truck or return thereto. He and his companions continued their journey in the direction of Rio Lucia and then stopped at Roybal's saloon, approximately three quarters of a mile south from the Romero filling station where they remained about fifteen minutes. Then appellant and his companions returned to the filling station, but he (appellant) did not go into the house. However, Estevan Martinez, did get out and go in but returned within five minutes and they then drove to appellant's home some thirty miles away, again returning to the scene of the accident with his father, mother and brother. There is testimony that the appellant was under the influence of intoxicating liquor at the time and place of the accident.

Appellant and his companions denied that either of them were drunk; denied that he was driving the small truck in a reckless and heedless manner, and stated he was traveling at the rate of 25 to 30 miles per hour at the time of the accident; denied having struck the deceased close to the

filling station, but admitted striking the deceased just beyond the center line on the highway, at a point where the highway curves.

The first eight assignments of error are based upon instructions given by the court and the refusal of others requested by appellant.

Along with the general instructions, the trial court gave the following on its own motion:

"No. 6. Our statutes further provide that 'Any person who drives any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, shall be guilty of reckless driving and upon conviction shall be punished, * * *. This is an unlawful offense not amounting to a felony.'

"No. 7. In this connection, the Court instructs you that while evidence of intoxication might bear upon the question of whether defendant was guilty of reckless driving, it does not necessarily prove it; but it is a circumstance to be considered by the jury in deciding the issue.

"No. 8. Our statutes further provide that 'It shall be unlawful * * * for any person whether licensed or not * * * who is under the influence of intoxicating liquor * * * to drive any vehicle upon a highway within this state.' A first conviction under this statute is an unlawful offense not amounting to a felony.

"No. 9. And in this connection the Court instructs you that a person who has taken a drink of intoxicating liquor is not necessarily under its influence; but if it affects him so that to the slightest degree he is less able, either mentally or physically or both, to exercise the clear judgment and steady hand necessary to handle an automobile with safety to himself and the public, he is under the influence of intoxicating liquor.

"No. 10. If you believe from the evidence beyond a reasonable doubt, that on the 6th day of November, A. D. 1946, at the County of Taos in the State of New Mexico, or at any other time within three years next prior to the 2d day of June, A.D. 1947, the date the information was filed in court, the defendant, Frank Borrego, did unlawfully kill Rogerio Duran, while in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act which might produce death in an unlawful manner, or without due caution and circumspection, then you will find the defendant guilty of involuntary manslaughter.

"No. 11. You are further instructed that if you find the defendant was under the influence of intoxicating liquor at the time and place when and where Rogerio Duran was struck by an automobile being

driven by the defendant, that is a circumstance to be considered by you in determining whether the defendant was then and there driving said automobile carelessly and heedlessly and in willful or wanton disregard of the safety of others; and unless you find beyond a reasonable doubt that he was then and there driving said automobile carelessly and heedlessly and in willful or wanton disregard of the safety of others, then your verdict must be for the acquittal of the defendant."

In addition to the above instructions the court gave the following instructions requested by the appellant:

"No. 1. Before you would be warranted in finding the defendant guilty in this case you must find beyond a reasonable doubt that at the time and place, when and where Rogerio Duran was struck by the automobile being driven by the defendant, the defendant carelessly and heedlessly, in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection, drove said automobile in such manner as to endanger any person.

"No. 2. You are instructed that the mere fact that one drives an automobile while under the influence of intoxicating liquor is not sufficient to convict him of the crime of involuntary manslaughter; and you are further instructed that in case you believe the defendant at the time and place when and where Rogerio Duran was struck by the automobile being driven by the defendant, was under the influence of intoxicating liquor, that would not be sufficient to justify you in convicting the defendant of the crime charged in the information, unless you further find and believe from the evidence beyond a reasonable doubt that the fact that defendant was under the influence of intoxicating liquor was the proximate cause of the death of the said Rogerio Duran."

"No. 4. You are instructed, Gentlemen of the Jury, that if you believe from the evidence in the case that the death of Rogerio Duran was the result of an unavoidable accident then your verdict must be for the defendant."

"No. 6. You are further instructed, Gentlemen of the Jury, that the expression previously used in these instructions in the words carelessly and heedlessly, in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection, mean such conduct as evidences utter disregard willfully exercised for the rights of others; that is to say that before one can be held to have acted carelessly and heedlessly, in willful or wanton disregard of the rights and safety of others in the driving of an automobile it must be found beyond a reasonable doubt that he so drove the vehicle as to manifest a total want of care whether others might suffer injury to their persons or the loss of lives

from said automobile; and in this case unless you find at the time and place, when and where Rogerio Duran was struck and injured the defendant was then and there driving said automobile in such manner as shows beyond a reasonable doubt that he had no interest in the safety of any other who might be in the highway, or against whom he might run, then and in that event you must find the defendant not guilty."

The court refused to give the following instructions requested by the defendant:

"No. 3. You are instructed, Gentlemen of the Jury, that unless you find and believe that at the time and place when and where Rogerio Duran was struck by the automobile then being driven by the defendant, that the defendant was driving said automobile carelessly and heedlessly and in wilfull or wanton disregard of the rights or safety of other people, then your verdict must be for the defendant."

"No. 5. You are instructed, Gentlemen of the Jury, that it is an offense against the laws of the State of New Mexico for any person to drive an automobile when under the influence of intoxicating liquor; but you are further instructed that the defendant is not on trial for this offense. The defendant is on trial upon a charge of involuntary manslaughter, based upon the fact that Rogerio Duran lost his life by being struck by an automobile driven by the defendant; and even though you find and believe that at the time and place when said Rogerio Duran was struck by the automobile being driven by the defendant, that defendant was under the influence of intoxicating liquors, that fact alone is not sufficient to justify you in convicting him of the crime charged against him, that is involuntary manslaughter. You are further instructed, however, that if you find the defendant was under the influence of intoxicating liquor at the time and place, when and where Rogerio Duran was struck by an automobile being driven by the defendant, that is a circumstance to be considered by you in determining whether defendant was then and there driving said automobile carelessly and heedlessly and in willful or wanton disregard of the safety of others; and unless you find beyond a reasonable doubt that he was then and there driving said automobile carelessly and heedlessly and in willful or wanton disregard of the safety of others, then your verdict must be for the acquittal of the defendant."

[redacted] We are of the opinion that requested instructions 3 and 5 were sufficiently covered by the instructions given by the court. Therefore, the refusal to give them was not error. Territory v. Pierce, 16 N. M. 10, 113 P. 591; Territory v. Baker, 4 N.M. 236, 13 P. 30; Cunningham v. Springer, 13 N.M. 259, 82 P. 232; State v. Bailey, 27 N.M. 145, 198 P. 529; State v. Turney, 41 N.M. 150, 65 P.2d 869.

The defendant complains that under instructions Nos. 6 to 11, inclusive, the jury might well have believed it was their duty to convict the defendant if he drove the car while under the influence of intoxicating liquor, or in a reckless and heedless manner although it did not find either of said acts was the proximate cause of the death of deceased. The defendant's requested instruction No. 2 which was given by the court took care of the drunken driving feature of the case. It is true that on the reckless driving question the court did not instruct the jury that defendant could not be convicted on this branch of the case unless it found such driving to be the proximate cause of the death of the deceased, but this omission is not available to the defendant here due to his failure to enter a proper exception or tender an instruction on this point. State v. Sisneros, 42 N.M. 500, 82 P.2d 274. The court gave the defendant's requested instructions Nos. 1 and 6, supra, on this branch of the case, and while they did not use the term "proximate cause," they were the ones desired by him at the time.

We have carefully considered the exceptions to the instructions given by the court as well as those refused and do not find that there is any error available to the defendant.

By assignment of error No. 9, appellant contends that the court erred in permitting the district attorney to inform the jury in his opening statement that the state would undertake to show the defendant, after the deceased was struck by his pick-up truck, drove away to a distance of seventy-five yards and stopped, then drove off without returning to the scene of the accident until forty minutes or an hour later, because the State attempted to show an offense committed subsequent to the death of the deceased, that is, the failure to stop at the place of the accident and render assistance, and that he likewise called attention of the jury to the length of time the defendant was away from locus in quo.

An opening statement is merely to inform the jury concerning questions of fact involved, so far as to prepare their minds for the evidence to be heard. The scope of the opening statement should be limited to getting before the jury a detail of the testimony expected to be offered. Evidence which tends to throw some light upon the guilt of defendant, and which has some logical connection with the crime charged, is not inadmissible because it may tend to show him guilty of some other crime. Appellant admitted on the stand that he had struck the deceased, but utterly failed to stop and render assistance, and on the contrary drove off and stopped at a saloon in a nearby settlement, tending to show a total disregard for the right and safety of others. State v. McDonald, 21 N.M. 110, 152 P. 1139; State v. Olivieri,

49 Nev. 75, 236, P. 1100; Rice v. People, 109 Colo. 8, 121 P.2d 658; State v. Ricks, 170 La. 507, 128 So. 293.

Assignments of error 10 to 16 inclusive, are predicated on the ground that the court erred in permitting the State to introduce evidence, over his (appellant's) objections, to show that he, instead of stopping his car, immediately after the accident, drove on some 80 yards, stopped a moment, and then drove on, because it was an attempt to show a separate and distinct offense, and therefore was inadmissible. We believe evidence which is competent, relevant and material cannot be excluded solely because it also tends to prove the person on trial guilty of some other crime. State v. Johnson, 37 N.M. 280, 21 P.2d 813, 89 A.L.R. 1368; State v. Bassett, 26 N.M. 476, 194 P. 867; and 20 Am.Jur. page 289, Section 310. Evidence otherwise competent, is not incompetent because it connects the defendant with an independent crime. The movements, conduct and admissions of the defendant for more than one and a half hours after the accident were clearly admissible as characterizing his attitude of mind at the time of the killing, and were so connected with the events as to be part of the whole transaction. State v. Graves, 21 N.M. 556, 157 P. 160; State v. Pino, 21 N.M. 660, 158 P. 131; State v. Lord, 42 N.M. 638, 84 P.2d 80; People v. Allen, 368 Ill. 368, 14 N.E.2d 397; and Opanchar v. State, 197 Wis. 454, 222 N. W. 245.

It is to be noted that the appellant first injected this testimony into the case himself, and we are of the opinion that he cannot now complain. State v. Stone, 41 N.M. 547, 72 P.2d 9; Krametbauer v. McDonald, 44 N.M. 473, 104 P.2d 900; State v. Stewart, 34 N.M. 65, 277 P. 22; and State v. Burrus, 38 N.M. 462, 35 P.2d 285.

It is further contended by the defendant that the court erred in permitting the district attorney to ask the witness Estevan Martinez the following questions on cross-examination over his objections:

"Q. Did you or Frank Borrego go into Cosme's saloon at any time before the accident that afternoon? A. Yes.

"Q. Did you drink any whiskey in the Cosme bar at the time you went in? A. Yes.

"Q. Did Frank Borrego drink any whiskey or anything else in there when he went with you? A. Yes.

"Q. Are you able to state approximately how many drinks of whiskey Frank Borrego had in there that evening? A. I cannot say how many.

"Q. Several drinks? A. Two or three."

Testimony was introduced by the State tending to show that the defendant,

at the time of the fatal accident, was under the influence of intoxicating liquor. We cannot say that the court's ruling was prejudicial, even though erroneous, because the same questions were asked the defendant on his direct examination and the same answers were given by him. In 4 C.J. page 968, Section 2951, 5 C.J.S., Appeal & Error, § 1724, the author states:

"Ruling upon questions asked a witness on cross-examination although erroneous, will not constitute ground for reversal for error where no substantial prejudice results therefrom."

On his direct examination the defendant testified as follows:

"Q. Did you tell Mr. Douglas you were drunk? A. I told him I had taken drinks.

"Q. How many drinks had you taken? A. I took two drinks at Cosme's.

"Q. Now is that what you had had to drink before this accident occurred? A. Yes.

* * * * * *

"Q. Were you sober at that time, or were you drunk? A. I was sober."

Under these circumstances, we think the error was harmless. State v. Talamante, 50 N.M. 6, 165 P.2d 812.

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

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

195 P.2d 1005

BOARD OF COUNTY COM'RS OF BERNALILLO COUNTY v. McCULLOH, Atty. Gen.

No. 5096.

Supreme Court of New Mexico.

June 21, 1948.

[redacted]

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[redacted]

[redacted]

M. Ralph Brown, Dist. Atty., and Harry D. Robins, Esq. Asst. Dist. Atty., both of Albuquerque, for relator.

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

A. T. Hannett and George Hannett, both of Albuquerque, amici curiae.

BRICE, Chief Justice.

This is an original action of mandamus brought in this court to compel the respondent, Clyde C. McCulloh, Attorney General of the State of New Mexico to approve bonds of the County of Bernalillo issued as authorized by Ch. 148, N.M.Laws of 1947, for the purpose of constructing a county hospital with isolation ward, equipping such hospital and isolation ward, and acquiring the land on which to construct the necessary buildings. An alternative writ was issued upon application of the relator, in which the Attorney General was commanded to forthwith approve the bonds or to show cause why he has not done so. The Attorney General has filed his return, in which he states:

"Respondent admits that the hospital bond election held and conducted by Relator was in full conformity with Chapter 148 of the New Mexico Laws of 1947, Chapter 7, Article 6, Chapter 15, New Mexico Statutes Annotated, 1941 Compilation, and Chapter 20 of the Laws of New Mexico of 1947, and that the results of same were properly canvassed and the results duly published as provided by law.

"Respondent, further answering and responding to said Alternative Writ of Mandamus, admits that it is a ministerial duty of his office to approve as to form all valid bond issues as a prerequisite to the purchase of same by the State of New Mexico.

"That the said Writ of Mandamus shows upon its face that bonds issued under the proceedings had herein are void for the reason that Chapter 148 of the New Mexico Laws of 1947 is unconstitutional insofar as it authorizes a county to issue general obligation bonds for the purpose of equipping a county hospital and isolation wards, and for the purchase of necessary land therefor, as same violates Article 9, Section 10 of the New Mexico Constitution which limits the purpose for which a county may borrow money to that of erecting necessary public buildings.

"Wherefore, it is respectfully submitted that the Alternative Writ of Mandamus should be dissolved for the reason aforesaid."

The treasurer of the State of New Mexico was the highest bidder for this issue of bonds, but he has refused to buy them unless and until they are approved by the Attorney General as required by law before the state may purchase them.

The provisions of Ch. 148, N.M.Laws 1947, which authorize the issuance of county bonds "to construct, purchase, own, maintain and operate hospitals, including isolation wards, and to purchase the necessary lands therefor; * * *." as stated in the title of the act, are as follows:

"Section 1. All counties shall have the power to construct, purchase, own, maintain and operate hospitals, including isolation wards, and to purchase the necessary land therefor.

"Section 2. All such counties may, for the purpose of maintaining and operating such hospitals and isolation wards, levy and collect taxes in the same manner as taxes for other general purposes are levied and collected in such counties.

"Section 3. All such counties shall have the power to issue bonds for the construction or purchase and equipping of such hospitals and isolation wards, and for the purchase of necessary land therefor.

"Section 4. Whenever a petition signed by not less than two hundred (200) qualified electors of any county in this state shall be presented to the board of county commissioners of the particular county, asking that a vote be taken on the question or proposition of constructing or purchasing a hospital and isolation ward and acquiring the land therefor, setting forth in general terms the object of such petition and the amount of bonds asked to be voted for, it shall be the duty of the board of county commissioners of such county to which said petition may be presented, within ten (10) days after the presentation, to call an election to be held within sixty (60) days thereafter in such county, and shall give notice of such election by publication once a week for at least three (3) consecutive weeks in any newspaper published in such county, which notices shall set forth the time and place of holding such election, the hospital and isolation ward proposed to be built or purchased, and the land to be acquired, and which bonds are to be voted for. * * * A bond election as above provided may also be called by the county commissioners, without any petition, after said commissioners have made a resolution calling such an election, which resolution shall set forth the object of the election and the amount of bonds to be issued.

* * *

"Section 9. All such counties are hereby authorized to do all acts and make all regulations which may be necessary or expedient for the promotion of this Act."

There is no question raised as to the constitutionality of Article 46 of Ch. 15, N.M. Sts.1941, as amended by Ch. 20, N.M.Laws 1947. The original law provided in great detail for the issuance of county bonds for the building of a courthouse, jail, and bridges; the conducting of an election for their approval by the qualified electors of the county, the form of the bond, the interest rate, and the term for which such bonds may be issued.

The amendment of 1947 added the words "and hospitals" after the words "courthouses, jails and bridges" in Sec. 15-4601, after which the section now reads:

"The boards of county commissioners in this state are hereby authorized and empowered to issue the bonds of such county, in any sum necessary, not greater that four (4) per cent, inclusive of all other bonded indebtedness, of the assessed value of the taxable property of said county, for the purpose of building courthouses, jails, bridges and hospitals."

Sec. 15-4604 was amended by adding the words "or hospital" in two places, so that the part of that section material here, now reads:

"Whenever a petition signed by not less than two hundred (200) qualified electors of any county in this state shall be presented to the board of county commissioners, asking that a vote be taken on the question or proposition of building a court house, jail, bridge or hospital, setting forth in general terms the object of such petition and the amount of bonds asked to be voted for, it shall be the duty of the board of county commissioners of such county to which said petition may be presented, within ten (10) days after the presentation, to call an election to be held within sixty (60) days thereafter in such county, and shall give notice of such election by publication once a week for at least three (3) consecutive weeks in any newspaper published in such county, which notices shall set forth the time and place of holding such election, the court house, jail, bridge or hospital proposed to be built and which bonds are to be voted for."

The original act is not otherwise amended, except to add some sections applicable only to hospitals. No question is raised as to the right of the county to erect a building to be used as a hospital if it is built and paid for as provided by this act.

All of the proceedings of the Board of County Commissioners of Bernalillo County provided for the issuance of bonds "for the construction of a county hospital with isolation wards, equipping such hospital and isolation ward, acquiring the land therefor" etc.

The ballot by which the question was submitted to the qualified electors was in form as follows:

"Bond Election for Bernalillo County
New Mexico

FOR the issuance of bonds of the County of Bernalillo, in the total sum of $1,000,000.00 for the construction of a County Hospital with Isolation Ward, equipping such Hospital and Isolation Ward, and acquiring the land therefor.

AGAINST the issuance of bonds of the County of Bernalillo in the total sum of $1,000,000.00 for the construction of a County Hospital with Isolation Ward, equipping such Hospital and Isolation Ward, and acquiring the land therefor."

appearing both in English and Spanish.

The vote was 1211 for the issuance of the bonds and 151 against it.

Sec. 10 of Article 9 of the State Constitution reads:

"No county shall borrow money except for the purpose of erecting necessary public buildings or constructing or repairing public roads and bridges, and in such cases only after the proposition to create such debt shall have been submitted to the qualified electors of the county who paid a property tax therein during the preceding year and approved by a majority of those voting thereon. No bonds issued for such purpose shall run for more than fifty years."

We are of the opinion that a county hospital building is "a necessary public building," as that phrase is used in Sec. 10 of Art. 9 of this state's Constitution. This was the legislature's construction, and we are satisfied that it is correct. Hutcheson v. Atherton, 44 N.M. 144, 99 P.2d 462.

The bonds have been issued for the purpose of "constructing and equipping a hospital and isolation ward, and for the purchase of necessary land therefor." Is this purpose (or purposes) within the prohibition of Sec. 10 of Art. 9 of the state Constitution, which provides "no county shall borrow money except for the purpose of erecting necessary public buildings * * *."?

The question then is whether the phrase "erecting necessary public buildings" as used in Sec. 10 of Art. 9 of the state Constitution, includes within its purview the "construction of a county hospital with isolation ward, equipping such hospital and isolation ward, and acquiring the land therefor."

We stated in State ex rel. Ward v. Romero, 17 N.M. 88, 125 P. 617, 621:

"It is the duty of this court to interpret the various provisions of the Constitution to carry out the spirit of that instrument. We should not permit legal technicalities and subtle niceties to control and thereby destroy what the framers of the Constitution intended.

"Where the spirit and intent of the instrument can be clearly ascertained, effect should be given to it, and the strict letter

should not control if the letter leads to incongruous results clearly not intended."

This is in harmony with the rules for construing constitutions as laid down by the Supreme Court of the United States, and courts of other states.

"The words 'concurrent power' occur in an amendment to a Constitution. In framing such instruments words naturally are employed in a comprehensive sense as expressive of general ideas rather than of finer shades of thought or of narrow distinctions. The simple and dignified diction of a Constitution does not readily lend itself to technical definition. There the terse statement of governmental principles in plain language may be looked for." Commonwealth v. Nickerson, 236 Mass. 281, 128 N.E. 273, 279, 10 A.L.R. 1568.

"A constitution, establishing a frame of government, declaring fundamental principles, and creating a national sovereignty, and intended to endure for ages, and to be adapted to the various crises of human affairs, is not to be interpreted with the strictness of a private contract. The constitution of the United States, by apt words of designation or general description, marks the outlines of the powers granted to the national legislature; but it does not undertake, with the precision and detail of a code of laws, to enumerate the subdivisions of those powers, or to specify all the means by which they may be carried into execution." Juilliard v. Greenman, 110 U.S. 421, 4 S.Ct. 122, 125, 28 L.Ed. 204.

"An act of the General Assembly should not be set aside by implication. A constitution should not receive a technical construction, as if it were an ordinary instrument or statute. It should be interpreted so as to carry out the general principles of the government and not defeat them." Jenkins v. State Board of Elections, 180 N.C. 169, 104 S.E. 346, 349, 14 A.L.R. 1247.

"The interpretation of constitutional principles must not be too literal. We must remember that the machinery of government would not work if it were not allowed a little play in its joints." Bain Peanut Co. v. Pinson, 282 U.S. 499, 51 S.Ct. 228, 75 L.Ed. 482.

The word "erection" as used in the Constitution is so used in a comprehensive sense. No specific power was given counties to build courthouses and jails; yet they are absolutely necessary to the functioning of the county as a political subdivision of the state. The power to erect these necessary buildings is futile unless land can be purchased on which to erect them; and a bare building is utterly useless unless equipped for its intended purpose.

In a comprehensive sense, then, the power to erect a necessary public building

includes the implied power to purchase the necessary land on which to erect it, and to equip it so that it can be used for the purpose for which it is built. It is immaterial that there may be other lawful means of securing funds for such a purpose. Public buildings may be built from tax levies, but this does not foreclose resort to the method here used to secure the funds.

The courts which have passed upon the question are unanimous in holding that the power to erect a public building implies the power to purchase the necessary land on which to erect it. Dewitt v. San Francisco, 2 Cal. 289; State ex rel. Post v. Board of Education, 71 W.Va. 52, 76 S.E. 127, Ann.Cas.1914B, 1238; Territory ex rel. Overholser v. Baxter, 16 Okl. 359, 83 P. 709; Shiedley v. Lynch, 95 Mo. 487, 8 S.W. 434; Moon v. Alred, Tex.Civ.App., 277 S.W. 787; Meyers v. Kansas City, 323 Mo. 200, 18 S.W.2d 900; State ex rel. Wahl v. Speer, 284 Mo. 45, 223 S.W. 655; Hudgins v. Mooresville Cons. School Dist., 312 Mo. 1, 278 S.W. 769. No case to the contrary has been cited by counsel and we have found none.

The courts are, with one exception, unanimous in holding that there is implied power to equip public buildings where power is given to erect them. Hudgins v. Mooresville Cons. School Dist., supra; Midland Special School Dist. v. Central Trust Co., 8 Cir., 1 F.2d 124; Territory ex rel. Overholser v. Baxter, supra; Moon v. Alred, supra; State ex rel. Davis v. Barber, 139 Fla. 706, 190 So. 809; Oklahoma County Excise Board v. Kurn, 189 Okl. 203, 115 P.2d 113; Board of Com'rs v. Malone & Co., 179 N.C. 110, 101 S.E. 552; Hendricks v. School Dist., 44 Wyo. 204, 10 P.2d 970; Jewett v. School Dist., 49 Wyo. 277, 54 P.2d 546.

The one decision which holds that the power to purchase sites and erect suitable buildings for school purposes does not include the implied power to equip such buildings, is Grabe v. Lamro, Etc. Dist., 53 S.D. 579, 221 N.W. 697.

There is a difference of opinion among the courts as to the character of equipment authorized. The Florida, Oklahoma, North Carolina and Wyoming courts affirm the power to equip such buildings, but limit the equipment to that which becomes a part of the building, such as desks in school buildings, which are fastened to the floor. The other cases cited hold that the power to erect a public building includes the implied power to furnish and equip it so that it can be used for the purpose for which it is erected.

The following authorities are cited by counsel as bearing upon the question here considered: State ex rel. Jay v. Marshall, 13 Mont. 136, 32 P. 648; Alexander v. Phillips, 31 Ariz. 503, 254 P. 1056, 52

A.L.R. 244; Judd v. School Dist. 227 Mo. App. 921, 58 S.W.2d 783; State ex rel. Bldg. Comm. v. Smith, 336 Mo. 810, 81 S.W.2d 613.

The Attorney General calls attention to Sec. 11 of Art. 9 of the state Constitution, which reads:

"No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds, and in such cases only when the proposition to create the debt shall have been submitted to a vote of such qualified electors of the district as are owners of real estate within such school district, and a majority of those voting on the question shall have voted in favor of creating such debt. No school district shall ever become indebted in an amount exceeding six per centum on the assessed valuation of the taxable property within such school district, as shown by the preceding general assessment."

He argues with reason that as the Constitution makers gave specific authority to school districts to buy a site upon which to erect school buildings and to equip them out of the proceeds of bond issues, that it is reasonable to conclude that it was not intended by Sec. 10 of Art. 9 to include the implied powers here claimed by relator. We are not unmindful of the force of this argument; but the cogent reasons stated for holding otherwise far outweigh it. The fact that a similar provision is more specific, does not necessarily establish an intent on the part of the makers of the Constitution to limit the use of the funds to the erection of a bare building without site or equipment.

If the contention has merit, then the authority granted would not include the power to purchase land upon which to erect the building; for that power is included in Sec. 11 of Art. 9, but is absent from Sec. 10 of Art. 9. They must stand or fall together, if the intent of the Constitution makers is to be measured by these differences. No member of this Court seems to doubt the power to purchase land on which to build the hospital; nor have we found any decision that is opposed.

Nothing said in Tom v. Board of County Com'rs., 43 N.M. 292, 92 P.2d 167, and Board of County Com'rs. v. State, 43 N.M. 409, 94 P.2d 515, is opposed to what we have stated herein.

We are of the opinion that the Relator has the implied authority to expend out of the proceeds of the bond issue in question the necessary funds to purchase a proper site on which to erect the hospital, and to purchase and install equipment reasonably necessary to the use of the building as a modern hospital.

It is our conclusion that the bond issue questioned is valid and that Respondent

should approve it, and to that end the writ will be made permanent.

It is so ordered.

LUJAN and COMPTON, JJ., concur.

SADLER and McGHEE, Justices (dissenting).

We need not go beyond previous decisions of our own court to settle the primary question presented for decision by the record on this appeal. Tom v. Board of County Commissioners, 43 N.M. 292, 92 P.2d 167, and Board of County Commissioners v. State, 43 N.M. 409, 94 P.2d 515.

The majority concede that the strongest argument raised against lending approval to the bond issue in question arises on a comparison of sections 10 and 11 of Article 9 of the state constitution. For convenience in contrasting them, we set them out side by side as follows:

Sec. 10. "No county shall borrow money except for the purpose of erecting necessary public buildings * * *."	Sec. 11. "No school district shall borrow money, except for the purpose of erecting and furnishing school buildings or purchasing school grounds."

It thus appears that when the framers of the constitution intended legislative authorization in school districts to borrow money for "furnishing" buildings erected, they made that intent clear by removing it from the field of inference. But as to counties, they made their intent equally clear by omitting the legislative authorization conferred in the case of school districts. We call to mind the cardinal rule of construction that the mention of one thing excludes another (expressio unius est exclusio alterius). Under its application power is withheld from the legislature to authorize payment by counties for equipment and furnishings from the proceeds of bonds issued to erect county buildings. We have applied this rule of construction frequently and in a variety of situations. Territory v. Ortiz, 1 N.M. 5; Thurman v. Grimes, 35 N.M. 498, 1 P.2d 972; In re Atchison, T. & S. F. Ry. Co., 37 N.M. 194, 20 P.2d 918; Atchison, T. & S. F. Ry. Co. v. State Corporation Commission, 43 N.M. 503, 95 P.2d 676.

But we are not confined to decisions dealing with cases by analogy. In Tom v. Board of County Commissioners, supra, and Board of County Commissioners v. State, supra, we were dealing with the very language of the constitution here relied upon as the source of authority for the expenditure involved. To repeat it, Art. 9, § 10, reads: "No county shall borrow money except for the purpose of erecting necessary public buildings." We held the bond issue void where the notice of bond election to provide funds for

"erecting" a courthouse and jail stated the issue was to be used for "erecting, remodeling and repairing" an existing courthouse. Why? Obviously, because the notice informed the electorate that some of the proceeds of the bond issue would be used for the unauthorized purpose of "remodeling and repairing." Speaking through the late Chief Justice Bickley, we said [43 N.M. 292, 92 P.2d 169]:

"The resolution and notice are defective and ambiguous, in that they indicate that the proceeds of the bonds will be used for erecting a court house and jail, an authorized use of the funds; and at the same time that they will be used for remodeling and repairing an existing court house and jail, an unauthorized use."

In other words, "erecting" the courthouse and jail were within constitutional authorization; "remodeling" and "repairing" were not. Expressio unius est exclusio alterius.

Again, in an opinion in another case dealing with the same language of the constitution, handed down at the same term, on the same day, and written by the same member of the court, viz., Board of County Commissioners v. State, supra, we rested the decision squarely on an application of the rule of construction that the mention of one thing excludes another. The case is not unlike the one just discussed and quoted from. Indeed, the opinion in the former case cites this one. The bond issue was held void as being outside constitutional authorization. The question was put, as follows [43 N.M. 409, 94 P.2d 516]:

"The sole question presented is whether or not under the provisions of Article IX, Sec. 10, of the Constitution and controlling statutes counties can issue bonds for the purpose of remodeling a court house."

And it was answered thus:

"The expression of the limitation on power to borrow money for the purpose of erecting buildings excludes the power to borrow money to remodel, alter or repair a building already existing, unless these processes amount in fact to erection of a building."

It is interesting to note that the present Chief Justice, author of the prevailing opinion in the case at bar, was a lone dissenter in each of the two cases mentioned.

Can it be said that "remodeling" and "repairing" an existing building is less germane or indigenous to the specific thing authorized, viz., "erecting" a building, than is "equipping" and "furnishing" a newly constructed one? We think not. Indeed, we are impressed that to "remodel" or "repair" an existing building in a way that does not amount to rebuilding and thus "erecting" it anew, more nearly approximates attainment of the latter end than does merely "equipping" and "fur-

nishing" a newly erected building. And, yet, as we have seen, by two separate decisions rendered on the same day, we held proceeds of bonds issued for erecting a building were not expendable to "remodel" and "repair" an existing one.

Through what logic or process of reasoning, then, are we to justify spending bond money for furnishing and equipping a newly erected building? How are we to say "to remodel" is not "to erect" but "to equip" is "to erect"? The prevailing opinion furnishes no satisfactory answer to this pertinent inquiry. It is not enough to say:

"We are not unmindful of the force of this argument; but the cogent reasons stated for holding otherwise far outweigh it. The fact that a similar provision is more specific, does not necessarily establish an intent on the part of the makers of the Constitution to limit the use of the funds to the erection of a bare building without site or equipment."

and to dispose of the two decisions of this court so strongly challenging the correctness of the majority conclusion in these cryptic lines:

"Nothing said in Tom v. Board of County Commissioners, 43 N.M. 292, 92 P.2d 167, and Board of County Commissioners v. State, 43 N.M. 409, 94 P.2d 515, is opposed to what we have stated herein."

"The courts are, with one exception," say the majority, "unanimous in holding that there is implied power to equip public buildings where power is given to erect them." The statement is followed by citation of a somewhat pretentious list of cases—nine in all. However, when classified according to jurisdictions they represent only six states and one federal case from the 8th Circuit, two decisions being included in the citations from each of the two states of Oklahoma and Wyoming to make up the aggregate of nine. The majority concede that the cases cited from Florida, Oklahoma, North Carolina and Wyoming—Oklahoma County Excise Board v. Kurn, 189 Okl. 203, 115 P.2d 113; State ex rel. Davis v. Barber, 139 Fla. 706, 190 So. 809; Board of County Commissioners v. Malone, 179 N.C. 110, 101 S.E. 552, and Jewett v. School District, 49 Wyo. 277, 54 P.2d 546—confine equipment purchasable with money borrowed to such as is of a permanent character and becomes a part of the building when incorporated therein. When we subtract from the cases relied on for support those from the states conceded by the majority as confining "equipment" purchasable to that of a permanent nature and which would classify as fixtures, there remain to them to support their position decisions from only three jurisdictions, represented by the cases of Hudgins v. Mooresville Cons. School District, 312 Mo. 1, 278 S.W. 769,

Moon v. Alred, Tex.Civ.App., 277 S.W. 787, and Midland Special School Dist. v. Central Trust Co., 8 Cir., 1 F.2d 124, 126. And from these three cases we withdraw the last mentioned federal case, believing it more nearly aligns itself along with the jurisdictions mentioned which confine "equipment" to such as becomes a part of the building. In the federal case mentioned, the court said:

"Now if the rigging of a ship is equipment, why not desks, rostrums, ventilating fans and devices, tubular fire escapes, and many other articles used in outfitting a schoolhouse be called equipment? In fact, it is common knowledge that all of these articles are called equipment, and yet when they are once installed they become parts of the building. They are all 'lienable articles' when being considered in connection with liens of mechanics and materialmen for the construction of buildings."

See, also, Grabe v. Lamro Independent Consolidated School District, 53 S.D. 579, 221 N.W. 697, cited approvingly by this court in Tom v. Board of County Commissioners, supra, and Pottawatomie County Excise Board v. Standish Pipe Line Co., 189 Okl. 202, 115 P.2d 119, as additional decisions denying the right here claimed to purchase furnishings at large from funds realized from the sale of the bonds.

So it is that when the state of the decisions on the subject is analyzed it is found the majority have the courts of but two states, Missouri, Hudgins v. School Dist., supra, and Texas, Moon v. Alred, supra, (the last mentioned decision being by an intermediate court of appeals) as against the decisions cited above from the states of Florida, Oklahoma, North Carolina, South Dakota, and Wyoming certainly, and the United States Circuit Court of Appeals for the 8th Circuit, seemingly, denying the right here claimed. Of course, to the cases from these jurisdictions may be added our own two heretofore cited, namely, Tom v. Board of County Commissioners, supra, and Board of County Commissioners v. State, supra, which we contend strongly support our position. The implication, then, arising upon a reading of the prevailing opinion that it has the support of the weight of authority in approving the purchase, from proceeds of the sale of bonds, of equipment of all kinds essential to the operation of a first class hospital, is so thoroughly repudiated by analyzing and weighing the authorities that we shall argue this phase of the case no further.

We are not unmindful that the courts which have passed on the question are unanimous, as stated by the majority, in holding that the power to erect a building implies the power to purchase the necessary land on which to erect it. They employ this fact arguendo to support their claim that the power to erect implies also the power to equip and furnish. But they

must make the argument in the face of this court's holding in Tom v. Board of County Commissioners and in Board of County Commissioners v. State, both cited above, that the power "to erect" does not include the implied power "to remodel" or "to repair", and in the face of the further fact that when the framers of the constitution intended that the purchase of "furnishings" from bond money should be permissible they made that intention clear by so stating. See Const. Art. 9, § 11, where the prohibition against borrowing by school districts excludes borrowing for "erecting" school buildings and for "furnishing" them as well. Then compare the language of this section with that of Const. Art. 9, § 10, relating to county buildings. The difference is obvious and significant.

It requires but a glance at the two companion sections of Const. Art. 9 to see that the effect of the majority opinion is to amend section 10 relating to county buildings to make it read as does section 11 relating to school buildings by supplying the word "furnishing" in the former section where omitted by the framers of the constitution. It would have been an easy matter for them to supply that word themselves if they had intended its presence, or, to have omitted it from section 11 if, as the majority contend as to section 10, the language means the same without it.

In writing the majority opinion for this court in Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003, 1011, the present Chief Justice who is author of the majority opinion herein challenged, said:

"One of the principles of our democracy for which our armed forces fight is the separation of powers. We, too, champion the principle that amendments to constitutions must be left to the people and not supplied by the courts."

We hereby renew our pledge of allegiance to the declaration of principle so forcefully stated by the then Mr. Justice Brice in Chase v. Lujan, supra, and seek its application to the question at issue in the case at bar.

A mere reading of the enabling act is convincing that the legislature authorized counties to purchase not only equipment of a permanent character which installed would become a part of the building but as well all types of furnishings and equipment, surgical and otherwise, used in the operation of a first class hospital. Proof of this is demonstrated by the fact that the levy authorized is merely for "maintaining and operating" such hospitals; not for the purchase of equipment. See L.1947, c. 148, § 2. But for this fact, it might be presumed that the county commissioners in authorizing the purchase of equipment from proceeds of the bond issue, and the people in voting favorably therefor, meant

to include only the kind of equipment that lawfully could be so purchased and installed. Jewett v. School District, supra.

In our opinion, the attorney general should not be compelled to lend blanket approval to the proposed bond issue since the purchase of equipment generally from the proceeds thereof is contemplated. For this reason, the alternative writ of mandamus should be discharged. The majority concluding otherwise, we dissent.

195 P.2d 1014

VIGIL et al. v. PENITENTIARY OF NEW MEXICO.

No. 5105.

Supreme Court of New Mexico.

July 19, 1948.

Bigbee & Kool and F. A. Catron, all of Santa Fe, for appellants.

C. C. McCulloh, Atty. Gen., William R. Federici and Robert V. Wollard, Asst. Attys. Gen., and Seth & Montgomery, of Santa Fe, for appellee.

McGHEE, Justice.

The first question raised by the appeal in this case is whether an individual may maintain an action in tort against The Penitentiary of New Mexico, a corporation, for damages.

Section 1, Article 14 of the New Mexico Constitution provides:

"The Penitentiary at Santa Fe, the Miners' Hospital of New Mexico at Raton, the New Mexico Insane Asylum at Las Vegas, and the New Mexico Reform School at Springer, are hereby confirmed as state institutions."

Chapter 55, Laws of 1939 (Sec. 45-101, N.M.Stats.1941 Ann.), makes the Penitentiary of New Mexico a corporate body with the right to sue and be sued, and reads:

"The general government and management of the penitentiary shall be vested in five [5] commissioners, who shall be appointed by the governor as in the constitution provided, and the governor shall have power at any time to remove any of said commissioners and appoint their successors. Said commissioners, and their successors in office, shall constitute a body corporate under the name and style of 'The Penitentiary of New Mexico,' and said corporation shall have the right as such to sue and be sued, to contract and be contracted with, to buy, own, hold, manage, lease, sell and otherwise handle and dispose of all such real, personal and mixed property as in the judgment of the commissioners may be necessary and proper for the operation and management of the penitentiary, including the right to acquire, maintain and operate any necessary farm, or farms, at such places in this state as the commissioners shall designate."

The trial court held that the action was one against the state and that it was immune from liability in an action of tort, absent specific consent for such action.

By the overwhelming weight of authority from other states such an action against a corporation like the defendant in this case is held to be an action against the state which cannot be maintained under the general power given such corporations to sue and be sued, absent specific legislative permission. Indeed, the cases hold that a cause of action for tort does not exist against the state or such a corporation as this defendant, in the absence of a specific statute authorizing it. 49 A.J. p. 288, Sec. 76; 59 C.J. p. 194, Sec. 337; Riddoch v. State, 68 Wash. 329, 123 P. 450, 42 L.R.A., N.S., 251, Ann.Cas.1913E, 1033; Clodfelter v. State, 86 N.C. 51, 41 Am.Rep. 440.

The appellants frankly concede these rules in other jurisdictions, but assert that under the holdings of this court in Locke v. Trustees of New Mexico Reform School, 23 N.M. 487, 169 P. 304; State v. Locke, 29 N.M. 148, 219 P. 790, 30 A.L.R. 407, and Dougherty v. Vidal et al., 37 N.M. 256, 21 P.2d 90, 93, to the effect that an action instituted against a corporation created to handle the state's institutions is not one against the state, allows them to maintain this action.

The first Locke case was an action in ejectment for the possession of real estate, which it was claimed the corporation withheld. As we now read that case the plaintiff was allowed to maintain it for the reason that it was the corporation that was in possession of the real estate, not the individual trustees. The opinion quotes numerous authorities to the effect that an action in ejectment may be maintained against an officer of the United States in possession of premises, and that such an action is not deemed one against the government in the constitutional sense.

Based on such statement it was held in the later case of State v. Locke, supra, which was a quiet title action by the state, that the judgment in the ejectment suit was not res judicata. Dougherty v. Vidal was an action against State Highway Commission and its individual members for damages claimed to have resulted from failure to carry out a promise to build a road on the old grade, in consideration of which Dougherty had donated a right of way. It was held that the commission had not been made a corporation, and that the legislature had not authorized actions against it. In the course of the opinion, although not necessary to a decision in the case, the statement in the Locke case that an action against such a public corporation is not an action against the state was repeated. It is well, however, to note that neither of these cases was a tort action. We quote from another part of the Dougherty case:

"Moreover, a question of jurisdiction arises. This court is the creature of the sovereign state. It can have no natural or presumptive jurisdiction over its creator. Such jurisdiction as we have over the state we must trace to the Constitution or to that branch of government which declares the state's public policy. In the absence of plain consent, to entertain a suit against the state is judicial usurpation.

"Furthermore, 'It is usually said that statutes authorizing suits against the state are to be strictly construed, since they are in derogation of the state's sovereignty.' 59 C.J. 303, 25 R.C.L. 416, Lewis' Sutherland, St.Const., 2d Ed., § 558."

Notwithstanding the language just quoted and the result reached in the Dougherty case, we find further evidence of the liberal policy of this court in allowing actions against the state by reference to the case of Board of Commissioners of Guadalupe County v. State et al., 43 N.M. 409, 94 P.2d 515, where not a voice was raised questioning the right of the commissioners to maintain an action against the State and the State Treasurer for a declaratory judgment on the validity of a bond issue, although we had previously 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 a state officer, except to compel the performance by him of a ministerial duty, is an action against the state. Apparently the fact that the suit was against the state went unnoticed in this court. See also State ex rel. Del Curto v. District Court Fourth Judicial Dist., 51 N.M. 297, 183 P.2d 607. It was evidently considered by counsel in the Guadalupe county case, supra, that the provision of the Declaratory Judgment Act, Sec. 25-603 of the 1941 Compilation, reading:

"For the purpose of this act, the state of New Mexico, or any official thereof, may be sued and declaratory judgment entered when the rights, status or other legal relations of the parties call for a construction of the constitution of the state of New Mexico, or any statute thereof."

was a grant of permission to sue the state.

Notwithstanding the language just quoted, this court in State v. Arnold, 48 N.M. 596, 154 P.2d 257, which involved the constitutionality of our descent and distribution statutes, held it not to be a general consent to sue the state, and that express consent of the legislature must be obtained before the state could be sued under the act. This decision evidenced a marked reversal of our former liberal policy in allowing actions to be maintained against the state, as in Locke v. Trustees of New Mexico Reform School and in some of the language in Dougherty v. Vidal, both supra; and placed us in line with the great majority of the courts in other states in holding that statutes authorizing suits against the state are to be strictly construed.

Is this suit against a governmental agency in fact a suit against the state, and, if so, does the language "right to sue and be sued" as used in the statute creating the penitentiary a corporation, open the door to an action in tort?

In 7 C.J.S., Asylums, § 9, pages 150, 151, the rule with reference to liability in tort of institutions, such as the state penitentiary, is set out as follows:

"* * * such an institution being a mere instrumentality of the state government, brought into being to aid in the performance of governmental duty, the rule of respondeat superior does not apply to it; and, therefore, it cannot be made to respond in damages for a personal injury inflicted on another by one of its inmates or employees, although such injury results from negligence or malicious acts on the part of such inmate or employee, and although the statute creating it provides that it may sue and be sued. The liability for such acts is on the individual personally guilty of the negligence or misconduct causing the injury. This has been held alike as to injuries sustained by an inmate through the negligence or wrongdoing of its employees as to injuries to

third persons by reason of negligent or wilful misconduct of employees or of inmates, and as to injuries done employees by inmates."

In an annotation on the subject under consideration in 49 A.L.R. p. 384, it is said:

"* * * the power conferred upon such public corporations as are under consideration, 'to sue and be sued,' is not a power to sue and be sued for any cause of action, whether in contract or tort, but to sue and be sued upon such matters only as are within the scope of the other corporate powers of such an institution, is held in Lyle v. National Home, 1909, C.C., 170 F. 842; White v. Alabama Insane Hospital, 1903, 138 Ala. 479, 35 So. 454; Leavell v. Western Kentucky Asylum, 1906, 122 Ky. 213, 91 S.W. 671, 4 L.R.A.,N.S., 269, 12 Ann.Cas. 827; and in Overholser v. National Home (1903) 68 Ohio St. 236, 67 N.E. 487, 62 L.R.A. 936, 96 Am.St.Rep. 658. This is upon the ground, as expressed in the last cited case, that 'the home not having been given the right to commit wrongs upon individuals, and it not having been contemplated that it would do so, the right to sue the home for tort was never contemplated or conferred.'"

In another annotation in 13 A.L.R., p. 1267, the following rule is stated:

"A general statute authorizing suits against the state does not permit a recovery for torts of its agents or servants."

The legislature has created many boards and commissions to transact the public business. Some have been made corporations, while others have been made mere governmental agencies, but their functions are substantially the same, whether incorporated or not, as pointed out by Mr. Justice Sadler in the Gibson case, 35 N.M. 550, 570, 571, 572, 4 P.2d 643, 653, from which we quote, in part:

"Perhaps more often than otherwise, the Legislature has created such boards without attempting to give them corporate character, instances of which are the creation of the state highway commission, section 64-301, Comp.1929, held in Looney v. Stryker, 31 N.M. 557, 249 P. 112, 50 A.L.R. 1404, a mere governmental agency; the state board of medical examiners, state board of education, and numerous others. The functions of these boards are substantially the same, whether incorporated or not. * * *"

As stated in Moody v. State's Prison of North Carolina, 128 N.C. 12, 38 S.E. 131, 53 L.R.A. 855, a tort action, where the defendant was a corporation as here:

"This is substantially a suit against the state. The defendant is a mere agent of the state in the administration of its government. The management and control of the state's prison is essentially a governmental function, being an indispensable part of the administration of the criminal laws

of the state. The matter is so fully and completely settled that nothing is left us, beyond the citation of authority. In Clodfelter v. State, 86 N.C. 51 [41 Am.Rep. 440], it was held that even an action instituted before this court under Const. art. 4, § 9, would not lie where a convict had lost his eyesight by the gross negligence of the supervising manager of the penitentiary, because, says Smith, Ch. J., 'the state, in administering the functions of government through its appointed agents and officers, is not legally liable to a claim in compensatory damages for an injury resulting from their misconduct or negligence. * * * If judgment upon such liability could be awarded against the defendant, it would be in effect a judgment against the state, to be enforced by execution against the state's property placed in the hands of its agency to be used for governmental purposes,—the operation of the state's prison."

In the present case, if the plaintiffs were held to have the right to maintain their action and recovered judgment, we would no doubt see the Sheriff of Santa Fe County levying an execution against the property of the penitentiary, an arm of the government, and just what he might be pleased to take into his possession and hold pending sale could not be forecast. We might be treated to the spectacle of seeing the superintendent, guards and convicts turned out upon the streets and highways pending a sale, at least, for it is stated in the Dougherty case the judgment creditor may have relief against the corporation in order to collect his judgment.

We think any language in Locke v. Trustees, supra, or Dougherty v. Vidal, supra, to the effect or tending to hold that mere corporate status of a state agency is determinative of the queustion of whether a suit against it is a suit against the state is erroneous and is hereby disapproved and overruled.

We also hold that the permission granted to such corporation to sue and be sued does not include the right to sue them in tort.

It is unnecessary to decide the questions relating to the sufficiency of the complaint raised by the cross appeal.

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

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

195 P.2d 1017

STATE v. JOHNSON et al.
No. 5101.

Supreme Court of New Mexico.
July 19, 1948.

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J. B. Newell, of Las Cruces, for appellants.

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

COMPTON, Justice.

The New Mexico State Police seized gambling paraphernalia, devices and equipment in the adjoining club rooms of the Central Cafe and Mint Cafe in Ruidoso, New Mexico, consisting of twenty-one slot machines, three roulette tables and wheels, one chuck-a-luck table, three dice tables, and three Black Jack tables, three poker tables and eight decks of cards, two boxes of poker chips and certain money found in the slot machines allegedly used as part of the gambling operations of said machines.

Proceedings were immediately instituted by the District Attorney against the proprietors of the premises, Ted Johnson and Tommy Hicks, in Cause No. 5371, and Buford Fisher in Cause No. 5372 of the District Court of Lincoln County under the provisions of Section 41-2206, New Mexico Statutes, 1941 Comp., to enjoin and restrain them from thereafter gambling upon the premises. Defendants consented to the entry of an order thus enjoining and restraining them from engaging in gambling on the premises.

Subsequently, the District Attorney instituted this proceeding summarily to abate a public nuisance and destroy the property thus seized. By permission of the court, the defendants in the prior proceedings intervened and urged as a defense, among others, (1) that Sec. 41-2209, New Mexico Statutes, 1941 Comp., provides the exclusive remedy for the abatement of nuisances and the destruction of gambling paraphernalia, devices, equipment, etc., and (2) that in any event, the proceedings in the prior causes constituted a bar to the claims urged here. Appellants also seek restoration of the equipment, devices and paraphernalia.

The trial court made the following findings of fact:

"1. That the gambling paraphernalia described in the complaint was seized by officers of the New Mexico State Police in the performance of their duty and in the enforcement of the laws of the State of New Mexico.

"2. That said gambling paraphernalia was by the New Mexico State police turned over to the Sheriff of Lincoln County for safe keeping and it is now in his possession.

"3. That at the time of the seizure of said gambling paraphernalia, said gambling paraphernalia was being used for gambling purposes.

"4. That the gambling paraphernalia listed in the complaint together with the

equipment therein listed are gambling devices."

Under the frequently announced rule, findings supported by substantial evidence will not be disturbed upon review. We have examined the record and conclude that the findings are amply supported by the evidence. Consequently the facts for our consideration are those found by the trial court.

The decisive questions for our determination are (1) whether Section 41-2209, supra, affords an exclusive remedy for the abatement of public nuisances and the destruction of gambling devices, equipment, etc., and (2) whether Causes 5371-5372 are a bar to this proceeding.

Under Section 41-2209, supra, where an injunction has issued, gambling paraphernalia, devices, equipment, etc., *may* be destroyed by order of the district court. From a consideration of this section it is obvious that the statute is merely permissive. It does not purport to modify or impair the common law powers of the courts, summarily to abate a public nuisance.

At 39 A. J. "Nuisances", the author expresses the rule in the following language:

Sec. 14. "* * * As a rule, statutes declaring certain things to be nuisances which were nuisances at common law are held to be merely declaratory of the common law and not to supersede the common law as to other acts which constitute a public nuisance at common law, nor, *as a rule, do statutory remedies for the abatement of nuisances supersede existing common law remedies.*"

Sec. 183. "The summary abatement of nuisances without judicial process or proceeding was well known to the common law long prior to the adoption of the Constitution, and hence, is not within the prohibition of the provisions of that instrument, and exists in the absence of statute. Subject to limitations hereafter stated, *the right may be exercised by public officers,* municipal corporations, and by private individuals. * * *"

Sec. 187. "* * * Things which are by the common or statutory law declared to be nuisances per se, or which are by their very nature palpably and indisputably such, may be abated or destroyed without notice or hearing. And *where a statute so specifically defines what shall constitute a nuisance as to leave no room for latitude on the question, officials are authorized and protected in abating such described nuisances,* and no notice of hearing is essential." (Emphasis ours.)

The former proceedings were directed at certain persons to enjoin and restrain them from gambling upon the premises; whereas, this proceeding is directed against the gambling paraphernalia itself, to abate and destroy it. The former proceedings were

in personam, the latter in rem. Separate causes of action are seen to exist.

Courts generally hold that where a single cause of action exists, a judgment between the same parties or their privies, operates as a bar to any subsequent action on what was or might have been litigated, but this rule does not exist where there are separate and distinct causes of action. And this general rule has been modified in this jurisdiction. In re: McMillan's Estate, 38 N.M. 347, 33 P.2d 369; Flint v. Kimbrough, 45 N.M. 342, 343, 115 P.2d 84; McCarthy v. Kay, 52 N.M. 5, 189 P.2d 450; Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636, 142 A.L.R. 1237.

In McCarthy v. Kay, supra, in discussing the doctrine res judicata, we said [52 N.M. 5, 189 P.2d 451]:

"The defendant quotes that part of the opinion in Floersheim v. Board of County Commissioners, 28 N.M. 330, 212 P. 451, to the effect that a judgment between the same parties or their privies operates as a bar to a subsequent action not only on what was litigated, *but what might have been litigated.* This court has whittled away at the rule stated in the italicized language for years, and finally in Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636, 142 A.L.R. 1237, assembled the authorities on the point, and held that the prior judgment between the same parties operated as an estoppel only as to questions of fact in issue in the prior case which were essential to a decision therein and upon the determination of which the prior judgment was rendered."

We conclude that the powers of the courts have neither been modified nor impaired by any statutory provision, nor is appellee barred from maintaining this action.

Appellants not only urged the restoration of the gambling paraphernalia and devices, but tersely pose the question: If the money is not to be restored what disposition will the court make of it? A sufficient answer is that when the money was placed in the slot machines and set aside as an inducement to play them, it became a component part of such gambling devices, contraband, and subject to seizure. The use of the money thus made by the appellants, resulted in a forfeiture of their dominion and ownership of it, and they cannot now make inquiry concerning its disposition.

That money, segregated as gambling paraphernalia, cannot be restored to the former owner is a recently announced doctrine. See Dorrell v. Clark, 1931, 90 Mont. 585, 4 P.2d 712, 79 A.L.R. 1000, where the authorities are assembled. Courts of other jurisdictions have followed in rapid succession the reasoning of the Montana court, and courts now generally hold, and we think properly so, that money, which has been ear-marked as an integral part of gambling equipment, may be

seized as a gambling device. Moore v. Brett, 193 Okl. 627, 137 P.2d 539; State v. McNichols, 63 Idaho 100, 117 P.2d 468; Fairmont Engine Company v. Montgomery County 35 Pa.Super. 367, 5 A.2d 419; People v. Krol, 304 Mich. 623, 8 N.W.2d 662; State v. Klozar, Ohio App., 46 N.E.2d 474; Kenny v. Wakenfeld, 14 N.J.Misc. 322, 184 A. 737.

We approve the doctrine. Appellants have forfeited their ownership of the money and having thus forfeited it, are in no position to assert a claim of ownership, nor can they enlist the aid of the court even for the purpose of an inquiry when they must, as a basis of their claim, show that the money was being used by them in an illegal manner.

Many assignments of error have been urged, all of which have been noticed and considered, and are found without merit.

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

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

195 P.2d 1020

STATE v. JONES.

No. 5110.

Supreme Court of New Mexico.

July 6, 1948.

See also, 51 N.M. 141, 179 P.2d 1001.

Caswell S. Neal, of Carlsbad, and O. O. Askren, of Roswell, for appellant.

C. C. McCulloh, Atty. Gen., and William R. Federici, Asst. Atty. Gen., for appellee.

COMPTON, Justice.

The defendant was convicted of murder in the second degree, and from the judgment and sentence he brings this appeal.

As an excuse or justification for the homicide, the defendant entered a plea of

self-defense and his first assignment of error is that the court by its instruction on the law of self-defense, merely instructed the jury on defendant's theory of the case without declaring the law of self-defense in reference to the facts relied on by him as establishing such defense.

The court instructed the jury as follows:

"A defense interposed by the defendant is that of self-defense. You are instructed that the rule of law on the subject of self-defense is this: Where a person in the lawful pursuit of his or her business, is assaulted, and when from the nature of the assault there is reasonable ground to believe that there is a design to take his or her life, or to do him or her great bodily harm, and the party attacked does so believe, then the killing of the assailant under such circumstances would be excusable or justifiable, although it should afterwards appear that no injury was intended and no reasonable danger existed. It is enough that there be an apparent danger; such an appearance as would induce a reasonable person in defendant's position to believe that he was in immediate danger of great bodily injury. Upon such appearance a party may act with safety, nor will he be held accountable though it should afterward appear that the indications were wholly fallacious, and that he was in no actual peril."

"The rule in such case is this: What would a reasonable person, a person of ordinary caution, judgment and observation, in the position of the defendant, seeing what he saw, and knowing what he knew, suppose from this situation and these surroundings. If such reasonable person so placed would have been justified in believing himself in imminent danger, then the defendant would be justified in believing himself in such peril, and in acting upon such appearances. And in considering whether the shooting was justifiable on the ground that the shooting was in self-defense, you should consider all the circumstances attending the shooting, the character of the wound and the conduct of the parties at the time and immediately prior thereto, and the degree and nature of force used by the defendant in making what is claimed to be self-defense, as bearing upon the question whether the shooting was actually done in self-defense, or whether it was done in carrying out an unlawful purpose.

"But the law of self-defense does not imply the right of attack, nor will it permit acts done in retaliation or for revenge. And if you believe from the evidence, beyond a reasonable doubt, that the defendant shot the deceased for the purpose of wreaking vengeance upon him for past injuries received, or for purposes of retaliation and revenge for such past injury,

then the defendant cannot avail himself of the law of self-defense, and you should not acquit on that ground. And it is for you to determine from all the evidence whether the claim of the defendant that he killed the deceased in self-defense is made in good faith or is a mere pretense."

The defendant requested the court to supplement its instruction by giving the following: "You are therefore instructed that in this case, if you find from the evidence, or have a reasonable doubt thereof, that at the time of the difficulty which resulted in the death of the deceased, the deceased seized a rock and assaulted, or attempted to assault the defendant therewith, or it so reasonably or apparently appeared to the defendant, as a reasonable man under the circumstances, and that the defendant as a reasonable man believed that he was about to receive great bodily harm or injury from the deceased, and that acting upon such belief, he shot and killed the deceased, you will find the defendant not guilty."

The tender was refused and exception taken.

It is well settled in this jurisdiction that a defendant not only is entitled to have his theory of the case submitted to the jury if supported by substantial evidence, but upon request, is entitled to have the law declared in reference to the facts of his case if there is evidence reasonably tending to substantiate it. State v. Martinez, 30 N.M. 178, 230 P. 379, 382; State v. Rogers, 31 N.M. 485, 247 P. 828; Salazar v. Garde, 35 N.M. 353, 298 P. 661; State v. Hughes, 43 N.M. 109, 86 P.2d 278.

In State v. Martinez, supra, we said [30 N.M. 178, 230 P. 382]: "The defendant is also entitled to have instructions given at his request upon his theory of the case, and to have the law declared in reference to the facts which he contends the evidence reasonably tends to show, and to an instruction defining the law as applicable to his defense, if there is any competent evidence reasonably tending to establish it."

And in homicide cases where self-defense is relied on and there is substantial evidence, though slight, it is sufficient. 13 R.C.L., Homicide, p. 935, Sec. 236. The evidence of the defendant alone may be sufficient. 30 C.J., Homicide, pp. 367, 368, Sec. 618; 41 C.J.S., Homicide, § 385.

Where there is substantial evidence we will not concern ourselves as to quantum. It is sufficiently shown by the answers of the defendant testifying in his own behalf:

"Q. Why did you fire that shot? A. Because Hays was coming at me with that rock.

"Q. Because of your physical condition did you feel you could compete with him fairly with that rock? A. No.

"Q. Why did you shoot him? A. Because I felt my own life was in danger.

"Q. Was that the only reason? A. Yes, sir."

Under proper instructions, it is the duty of the jury to view the facts and circumstances from the standpoint of the defendant, and upon request, it is the duty of the court to direct the jury's attention to the facts which the defendant contends constitute his defense. Glancing at the charge given, it is readily seen that the instruction was in the abstract. Nowhere did the court apply the law of self-defense to the evidence relied on by the defendant. It was the duty of the court to inform the jury of defendant's theory of the case wherein his evidence had a tendency to sustain it.

We conclude that the trial court erroneously refused defendant's tendered instruction.

It is next contended that the court erred by giving the following instruction on communicated threats: "You are instructed that evidence has been introduced in this case tending to show that prior to the difficulty which resulted in the death of the deceased, the deceased had made threats of a violent nature to the defendant in the presence and hearing of the defendant. You are instructed that if you believe from the evidence that threats of such a character were made by the deceased to the defendant, you may consider such evidence together with all the other facts and circumstances in evidence, in determining the *state of mind of the deceased* at the time of the difficulty and in determining who was the probable aggressor at such time." (Emphasis ours.)

The defendant excepted to this instruction as limiting the effect to be given communicated threats and requested the court to give the following: "You should also consider such evidence in determining the state of mind of the defendant, and whether or not, in view of such threats, the defendant in good faith armed himself, and whether or not the defendant, as a reasonable man under the circumstances, believed he was about to be assaulted by the deceased in such a manner as to result in great bodily harm or injury to him at the time of the difficulty resulting in the death of the deceased."

It is obvious that neither the instruction given nor the tendered instruction correctly tells the jury the purpose for which evidence of communicated threats was admissible. Communicated threats may well show the mental state of a deceased, but ordinarily are admissible to show the state of mind of the defendant as bearing upon his acts and conduct; but threats, unaccompanied by some overt act manifesting an intention, are not enough and the

jury should be so informed. At 41 C.J.S., Homicide, § 382, the rule is stated: "Where there is evidence tending to show that deceased has made threats of death or great bodily harm against accused, that such threats were communicated to accused and were followed by some overt act or demonstration on the part of the deceased indicating an impending purpose, real or apparent, to put them into operation, and not amounting to an actual attack, it is the duty of the court to instruct the jury fully and affirmatively with respect to the law of threats in connection with self-defense, although accused's testimony as the only evidence in support of the issue, and although the threats were made directly to accused."

To the same effect, see State v. Martinez, 30 N.M. 178, 230 P. 379; State v. Pruitt, 24 N.M. 68, 172 P. 1044; Macias v. State, 39 Ariz. 303, 6 P.2d 423; Pryor v. State, 120 Tex.Cr. 418, 48 S.W.2d 1003.

We therefore conclude that the instruction given, likewise the requested instruction, was erroneous. The cause will be reversed and remanded to the district court with directions to award defendant a new trial, and it is so ordered.

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

196 P.2d 734

STATE v. SLAYTON.

No. 5073.

Supreme Court of New Mexico.

Aug. 2, 1948.

[redacted]

Travis B. Dean and York & Schubert, all of Hobbs, for appellant.

C. C. McCulloh, Atty. Gen., William R. Federici, and Robert V. Wollard, Asst. Attys. Gen., for appellee.

SADLER, Justice.

The defendant (appellant) was found guilty by a jury in the district court of Lea County of the crime of assault with a deadly weapon and sentenced to serve a term of imprisonment in the county jail. He prosecutes this appeal from the judgment and sentence so rendered against and pronounced upon him.

The first claim of error is that the trial court erred in permitting the filing of an amended information at the opening of the trial. The jury had been duly impaneled and sworn and both sides had announced ready for trial, when the following proceedings took place, to-wit:

"Mr. Watts:—If the Court please, the State asks permission of the Court to file an amended information in this case.

"Mr. Dean:—We object to the filing of the amended Information because there is a difference between the original Information and the amended Information and it takes me quite by surprise and I am not ready to go to trial.

"Mr. Watts:—The original Information charged assault with intent to murder while the amended Information charges

just assault, so that the amended Information is for a lesser offense.

"The Court:—The objection will be overruled.

"Mr. Dean:—We except."

The record before us contains only the amended information, charging assault with a deadly weapon (1941 Comp. § 41-1704). The information it supersedes, however, is said to have been one charging assault with intent to murder (1941 Comp. § 41-606). At least, it was so stated by the district attorney in answering defendant's objection to the filing of the amended information. We shall so consider the matter.

The error claimed in allowing the filing of the amended information is argued under Points 1 and 2. First, it is claimed the court's ruling denied defendant the right to have copy of the information served on him twenty-four (24) hours before being called upon to plead thereto. 1941 Comp. § 42-646. This section of the Code of Criminal Procedure adds to the requirement for such service, the following:

"A failure to furnish such copy shall not affect the validity of any subsequent proceedings against the defendant if he pleads to the indictment or information."

The defendant made no claim to the right to have a copy of the amended information served on him. Indeed, entering his plea to the information, although objecting to the amendment on other grounds, would seem to bring him squarely within the language of the statute just quoted. Whether so or not, certainly, he is not to be permitted to claim the benefit of the statute for the first time in this court. In State v. Gennis, 41 N.M. 453, 70 P.2d 902, 906, we said:

"* * * a defendant may waive his right to be furnished with a copy of the information, and if he fails to demand the 24 hours' delay the validity of subsequent proceedings could not be questioned on that ground."

In carrying forward his argument under Point 2 in relation to filing of the amended information, counsel for defendant assert a claim of fundamental error. It is said to consist in the erroneous statement by the district attorney in the presence of the jury, upon asking leave to amend, that the original information charges "assault with intent to murder", while the amended information charges "assault", so that "the amended information is for a lesser offense." It is also claimed that fundamental error presents itself in the court's failure to direct a verdict of not guilty upon the ground that evidence of assault with a deadly weapon would not sustain a conviction under the original information charging assault with intent to murder.

The first claim of fundamental error, in effect, is but another way of seeking advantage of the trial court's failure to require service of a copy of the amended information on defendant at least twenty-four hours before calling upon him to plead thereto, notwithstanding he made no request for the service of such copy. Obviously, in presenting the objections made to an amendment of the information, counsel for defendant did not have in mind the statute in question. The confusion, if any, under which counsel labored by reason of the district attorney's inadvertent reference to the new charge as "assault", could have been quickly dispelled by examining the original on file. And if, by chance, counsel had called upon the district attorney for service of a copy of the amended information, that alone might have been sufficient to invoke the benefit of the statute, and support a claim of error, if the request were refused. But to sit by and merely claim "surprise" because of the reduction of the charge from assault with intent to murder to either "assault" or "assault with a deadly weapon", presents no error in this court for failure to apply the questioned statute, least of all a claim of fundamental error. The allowance of the amendment fails to meet the conditions under which alone the doctrine of fundamental error is applicable. State v. Garcia, 19 N.M. 414, 143 P. 1012; State v. Herrera, 28 N.M. 155, 207 P. 1085, 24 A.L.R. 1135, and Springer v. Duran, 37 N.M. 357, 23 P.2d 1083.

Nor does the claim of fundamental error based on the trial court's failure to direct a verdict of not guilty have better support than the one just disposed of. The defendant made no motion for directed verdict either at the close of the state's evidence or when both sides had rested and the case was ready to go to the jury. Under such circumstances the defendant is in no position to raise the question here. State v. Hunter, 37 N.M. 382, 24 P.2d 251. It is a sufficient answer to the argument that mere proof of assault with a deadly weapon will not support a conviction under the original information charging assault with intent to murder, to point out that defendant was not tried under the original information. The state was granted leave to file the amended information charging assault with a deadly weapon, the jury was instructed as to that charge and the evidence abundantly supports the verdict of guilty it returned into court.

It is argued under still another assignment of error that the court erred in refusing to permit defendant, testifying in his own behalf, to show specific acts of violence by the prosecuting witness, known by repute to him at the time of the assault. We have carefully examined the record on this claim of error. It fairly sustains the state's contention that defend-

ant's attorney, examining him as a witness, sought only to establish that the general reputation of the prosecuting witness for peace and quietude was bad. Not once during his examination was it made known by his attorney that he desired to show specific acts of violence. Accordingly, prompt acquiescence on the part of such attorney followed the trial court's ruling that evidence of specific acts or conduct was inadmissible to show general reputation or character, good or bad. 32 C.J. S., § 436, page 68, under topic Evidence; Stegall v. Commonwealth, 237 Ky. 694, 36 S.W.2d 338. State v. Sharpe, 170 La. 69, 127 So. 368.

[redacted] The cases of State v. Adroin, 28 N.M. 641, 216 P. 1048, and State v. Davis, 30 N.M. 395, 234 P. 311, are cited in support of the defendant's contention under this assignment of error. We have no quarrel with the doctrine announced in those cases. Unfortunately for the defendant, he fails to bring himself within them by disclosing a purpose to show specific acts of violence for any bearing they might have on the accused's apprehension of danger under his plea of self-defense. State v. Stewart, 30 N.M. 227, 231 P. 692. Furthermore, if it were granted that he did, he made no offer of proof and for this reason as well, the claimed error is not available here. State v. Stewart, supra.

Finding no error the judgment of the trial court should be affirmed.

It is so ordered.

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

[redacted]

196 P.2d 876

PORTALES NAT. BANK v. BEEMAN et al.

No. 5052.

Supreme Court of New Mexico.

July 22, 1948.

Rehearing Denied Sept. 7, 1948.

[redacted]

Reese & Reese, of Roswell, for appellants.

Mears & Mears, of Portales, for appellee.

BRICE, Chief Justice.

The plaintiff (appellee) sued the defendant on a promissory note. Constructive service was obtained by personal service of notice of suit on defendant in the state of California. Jurisdiction was obtained by attaching certain real estate and garnisheeing an indebtedness evidenced by three promissory notes made by J. D. Nuckols, garnishee in this proceeding, and alleged to be the property of defendant. The intervenors (appellants) among them claimed the property attached and garnisheed.

The trial court concluded that the property in question belonged to defendant Beeman and that the interveners had no interest therein; that it should be subjected to the payment of plaintiff's debt, which was in excess of $4,000.

Interveners Liddon W. Cowden and Olen R. Cowden each claimed ownership of 240 acres of the 480 acres of underlying minerals attached; and intervener Eileen D. Cowden claimed to be the owner of the three mortgage notes garnisheed, which aggregated the principal sum of $1,800.

The alleged titles of interveners Liddon W. Cowden and Olen R. Cowden are each

evidenced by a mineral deed, and that of Eileen Cowden by an assignment; all executed by W. H. Beeman, who at the time was the apparent owner of record.

On January 22, 1946, the defendant owed the plaintiff a promissory note in the principal sum of $4,191.63, no part of which had been paid. On that date this suit was filed, and the real estate in suit, claimed by interveners Liddon W. Cowden and Olen R. Cowden, was attached, allegedly as the property of the defendant; and the debt of $1,800 claimed by intervener Eileen D. Cowden, was garnisheed as a debt due defendant. On the 26th day of January, 1946, the district clerk issued a notice of this suit pending, directed to the defendant, a copy of which was served upon him personally in Los Angeles, California, on the 2nd day of February, 1946, but he did not answer, or otherwise appear in the case.

Each of the interveners claimed title to the property of record in his or her name by virtue of an executed oral trust, the details of which are in substance as follows:

Elizabeth R. Beeman was the great-aunt of interveners Olen R. and Liddon W. Cowden and had cared for them in her home from their infancy as if they had been her own children. The two young men were in the United States Army from late in 1942 to late in 1945. Intervener Eileen D. Cowden was the wife of intervener Olen R. Cowden. W. H. Beeman and Elizabeth R. Beeman were husband and wife and resided in California on April 19, 1944. Elizabeth R. Beeman owned the property in suit as her separate property. On the date last mentioned Mrs. Beeman entered into an oral agreement with her husband, in which it was agreed between them that she would transfer to him as trustee of an express trust the property in suit, and that as such trustee he would convey and assign the same to the respective interveners. To carry out the oral trust agreement on her part Mrs. Beeman then and there conveyed or assigned the property in suit to Beeman. She died January 17, 1945.

In executing the trust, as it is said, Beeman conveyed the real estate and assigned the mortgage notes and mortgage on May 14, 1945 to the respective interveners, as heretofore stated.

In answer to these claims of interveners the plaintiff in substance pleaded defenses as follows:

1. That no trust as alleged was created by the Beemans.

2. That the property in suit was the community property of Beeman and wife at the time Mrs. Beeman conveyed and assigned it to Beeman, and was subject to the payment of community debts.

3. That the mineral deeds and assignment from Mrs. Beeman to Beeman were

never executed, or if executed were never delivered to Beeman before Mrs. Beeman died, and never became effective.

4. That if the deeds and assignment made by Mrs. Beeman to defendant Beeman were made by her to effectuate an oral trust, then the trust agreement was void because not in writing.

5. That the mineral deeds and assignment were void because delivered after the property was attached and garnisheed, and after defendant had been served with process in this suit.

6. That the property in suit was the community property of Beeman and wife "and subject to the payment of their said indebtedness; and any attempted assignment or disposition thereof by W. H. Beeman was wholly fraudulent and void; and plaintiff states on information and belief that such was made for the purpose of cheating and defrauding his creditors, and particularly that due this plaintiff."

7. That plaintiff had no actual or constructive notice of any claim of interveners to the property in suit until the mineral property was attached and notes garnisheed; and it believed in good faith that all this property belonged to the defendant Beeman at that time. That the deeds and mortgage records of Roosevelt County "showed" nothing other than that W. H. Beeman was the absolute owner of such property.

The substance of the facts found by the Court material to a decision of the issues between the plaintiff and interveners, is as follows:

The defendant and Elizabeth R. Beeman were husband and wife. Mrs. Beeman died January 17, 1945 in the state of California, where they were living at that time. The interveners, Olen R. Cowden and Liddon W. Cowden, were grandnephews of Mrs. Beeman, and Eileen D. Cowden was the wife of Olen R. Cowden. The interveners grandnephews, were taken into the home of the defendant and wife at the ages of two and four years respectively, and lived with the Beemans as their children. They entered the armed service of the United States about 1942 and remained there for three years or more. They were cared for, educated and in every way treated as though they were the Beemans' own children.

On the 10th day of April, 1944, Elizabeth R. Beeman owned six notes of $500 each and one of $800, aggregating $3,800, executed by garnishee J. D. Nuckols and his wife Mildred Nuckols, secured by a mortgage on real estate. On that same date Elizabeth R. Beeman owned the minerals underlying 480 acres of land situated in Roosevelt County, New Mexico.

On the 19th day of April, 1944, Mrs. Beeman executed a written assignment of the unpaid notes and mortgage securing

them, to the defendant William H. Beeman; and on the same day she executed a mineral deed, purporting to transfer to the defendant Beeman "as his sole and separate property," the mineral interest in the 480 acres of land just mentioned, which were filed for record in the public records of Roosevelt County, New Mexico on February 16, 1945.

On the 4th day of February 1946 there was filed for record in the mortgage deed records of Roosevelt County, New Mexico an assignment of the notes and mortgage in suit, from William H. Beeman to intervener Eileen D. Cowden. At that time there were unpaid two $500 notes and one $800 note, a total of $1,800.

There was filed for record in the deed records of Roosevelt County, New Mexico, on the 14th day of February, 1946, two mineral deeds, each dated May 14, 1945, executed by defendant and acknowledged on the same day before Smead F. Kelly, a notary public of Los Angeles County, California. One of these deeds purported to convey 240 acres of the underlying minerals involved in this suit to intervener Olen R. Cowden; and the other the remaining 240 acres of the underlying minerals, to intervener Liddon W. Cowden.

The first information or knowledge that plaintiff had that interveners claimed the property in suit, or of the claim that it was conveyed to defendant as trustee for the use of interveners, was from their plea filed in this suit. It was not informed of any facts that put it on notice of any such claim or of any such trust as to the mineral rights, prior to the filing of the pleas of intervention. It was informed by a letter from defendant to it, dated September 22, 1945, that the notes garnished were "fixed" by Mrs. Beeman so that defendant would collect them and use the money to help the boys "get started in something when they are out of the army."

The plaintiff had no notice that defendant claimed to hold the property as trustee until after process was served on defendant on February 2, 1946; and at that time believed in good faith that defendant owned the property in suit.

None of the interveners had knowledge that defendant Beeman had made, executed and acknowledged the instrument conveying or assigning property to him, or her, until long thereafter; and none of them had knowledge that Beeman had any intent to defraud plaintiff by executing such instruments, if he ever had such purpose. That said instruments were made without consideration.

Among these findings of fact appear the following conclusions of law:

"8. * * * as a result of said conveyances (assignment of notes and mortgage and execution of mineral deeds to defendant by Mrs. Beeman) the said William H.

Beeman became the owner thereof as his separate estate. That said notes and mortgage deed remained the property of the said William H. Beeman at the time garnishment was made on J. D. Nuckols, the maker thereof, on January 22, 1946.

"13. That the evidence is insufficient to show that W. H. Beeman holds the title to said mineral interests in trust or as trustee.

"14. That the evidence is insufficient to show that W. H. Beeman held such notes and mortgage as trustee for Eileen Cowden, intervener.

"15. That the evidence shows that W. H. Beeman became the sole owner of all the property involved in this action upon the death of Elizabeth R. Beeman."

and a mixed finding of fact and conclusion of law, each as indicated by parenthetical notations, to wit: "16. That the purported conveyances of the minerals described herein to the said Olen R. Cowden and Liddon W. Cowden, and the purported assignment of said mortgage deed to the said Eileen D. Cowden, from the said William H. Beeman, were without consideration (a finding) and thereby became a nullity (a conclusion)."

Interveners' case is presented to us under thirty-six assignments of error, and argued under twenty-six points, many of which are immaterial to a decision of the main question, to wit, whether the defendant Beeman or interveners owned the property at the time it was attached or garnisheed.

The interveners assert that the court erred in making finding No. 16, to the effect that the mineral deeds and the assigned notes secured by mortgage, were made without consideration; and that the conclusion of law incorporated therein, to wit, "and thereby became a nullity," is error.

If the conveyances from Mrs. Beeman to Beeman conveyed property in trust, as testified to by Beeman, then Beeman never became the owner thereof and the court erred in his conclusion that these documents "became a nullity." On the other hand, if in fact the oral trust was never created we have a very different question.

Assuming for the present that no trust was created by agreement between the Beemans; then the question is whether the mineral deeds and the assignment of notes and mortgage were void because no consideration was paid therefor.

It has often been said that a debtor must be just before he can be generous; that he cannot give away his property and thus defeat the claims of creditors. While there are many exceptions, it is the general rule that a voluntary conveyance (one without consideration) is prima facie, or presumptively, fraudulent and void as to existing creditors without regard to the intent of either or both parties, even in the

absence of a finding that grantor is insolvent (Graham Grocery Co. v. Chase, 75 W.Va. 775, 84 S.E. 785, 17 A.L.R. 723) and this presumption is sufficient evidence to void the conveyance, unless rebutted by the grantee, who has the burden of proving the solvency of the grantor, First Nat'l Bank v. McClellan, 9 N.M. 636, 58 P. 347; Weathersbee v. Dekle, 107 Fla. 517, 145 So. 198.

"While some courts, as stated in the preceding section, consider voluntary conveyances as fraudulent per se, the majority take a less extreme view. They hold that a voluntary conveyance is not conclusively fraudulent as against existing creditors. According to some authorities, the Statutes of 13 and 27 Elizabeth do not apply to voluntary conveyances unless they are fraudulent. However, cases which hold that a voluntary conveyance is not per se fraudulent as to existing creditors generally hold that the transaction is prima facie or presumptively fraudulent as to them; and some of the cases hold that the presumption of fraud becomes absolute in the event of insolvency. On the other hand, the effect of the fact that the transfer was voluntary may be rebutted or overcome by proof that the transferrer had means of paying his debts apart from the subject matter of the disputed transfer * * *." 24 Am. Jur. "Fraudulent Conveyances", Sec. 25.

"The courts are practically unanimous in holding that if the rule of the particular jurisdiction as regards a showing of actual or constructive fraud on the part of the grantor or transferrer is satisfied, a voluntary conveyance or transfer is avoided as to creditors; and it is immaterial whether the grantee or transferee participated in, or knew of, the fraud of the grantor or transferrer, or knew of the facts and circumstances from which fraud is imputed to the latter * * *." 24 Am.Jur. "Fraudulent Conveyances," Sec. 27. And see 37 C.J.S., Fraudulent Conveyances, §§ 100c, 387.

[redacted] There was no finding on the question of defendant Beeman's solvency as of the time the transfers were made, or as of any other time. Under these circumstances the presumption must prevail and the deeds held to be void as to creditors, unless in fact these documents were made for the purpose of executing an oral trust as asserted by interveners.

The interveners cite Field v. Otero, 32 N.M. 338, 255 P. 785, and Chesher v. Shafter Lake Clay Co., 45 N.M. 419, 115 P.2d 636, to the effect that the burden of proof is upon plaintiff to prove defendant Beeman's insolvency. The deeds involved in those suits were not voluntary conveyances, but were made for substantial considerations. A different rule applies in such cases. Chesher v. Shafter Lake Clay Co., supra; 37 C.J.S., Fraudulent Conveyances, § 387.

The interveners have assigned as error the refusal of the trial court to adopt their requested findings numbers 7, 10, 12 and 14, to the effect that the oral trust alleged was in fact created, and that it was performed by the execution and delivery of the three transfers from defendant, one to each of the interveners.

The trial court did not necessarily err in refusing to adopt the interveners' several requested findings enumerated. The deeds from Mrs. Beeman to Beeman recited that the mineral interests were conveyed to Beeman as his sole and separate property, utterly inconsistent wtih the intention to create a trust. Also, at the time of all these transactions Mrs. Beeman was very ill, and it may be inferred that in contemplation of approaching death she conveyed title to all her property to her husband, who was an old man without means. The court might well have assumed that Mrs. Beeman would not have left him penniless by giving all her property to interveners. In view of the rule regarding the high degree or intensity of evidence required to establish an oral trust, to wit, that the evidence must be strong, cogent and convincing; (Lefkowitz v. Silver, 182 N. C. 339, 109 S.E. 56, 23 A.L.R. 1491, and annotations beginning at page 1500 of that volume), we are unable to say that the trial court erred in refusing to find that the oral trust asserted was actually created. Beeman alone testified to the facts which it is asserted created the trust pleaded.

The trial court might well have found that the alleged agreement, purported to have been made between the Beemans whereby it is said an oral trust was created, never occurred. It is assumed and argued by interveners that the trial court had made an adverse finding on the question, and they ought to be bound thereby.

The judgment of the district court should be affirmed, and it is so ordered.

LUJAN, SADLER and McGHEE, JJ., and FOWLER, District Judge, concur.

197 P.2d 228

LEA COUNTY FAIR ASS'N v. ELKAN.

No. 5075.

Supreme Court of New Mexico.

Sept. 3, 1948.

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[redacted]

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

G. T. Hanners, of Lovington, for appellee.

PER CURIAM.

The original opinion in this case has been withdrawn and the following substituted therefor:

LUJAN, Justice.

The question is whether the district court erred in entering a decree providing that a permanent injunction should issue against the defendant (appellant) enjoining him from trespassing on certain described land.

We are met on the threshold of this case by questions of practice and procedure, which we will first dispose of.

The argument in the appellant's brief-in-chief is presented in eight divisions, each one preceded by a number followed by the word "point." However, no point was made in any instance as a basis for argument, as required by Section 14 of Supreme Court Rule 15. The rule contemplates that a proposition of law called a "point" shall be made as a basis for argument in presenting cases in this court. We stated in Robinson v. Mittry Bros., 43 N.M. 357, 94 P.2d 99, 101:

"The appellants have entirely ignored Sec. 14(5) of Supreme Court Rule XV, which required them to present points, or legal propositions as a basis for their arguments. The argument is in three divisions, none of which is preceded by a point or proposition of law as a basis for its support. * * *

"It is true that more than one error assigned may be presented under one point; but only in case they are all germane to

it, and a decision of the question presented will dispose of all of them. * * *

"What we have here is one continuous argument without a point or legal proposition as a basis, largely to the effect that there is no substantial evidence to support the verdict of the jury. For the convenience of this court and opposing counsel, the rule requiring the presentation of points or propositions of law as a basis for argument, should not be ignored." Brown v. Mitchell, 45 N.M. 71, 109 P.2d 788.

Under the first division, without point, we find the following:

"The court erred in refusing to adopt requested findings of fact submitted by defendant, Nos. 4, 5, 7, 8, 9, 10, 11, 12, 14 and 15."

This is the identical language of assignment of error No. 2.

We find the same defect in assignment of error No. 4, as follows:

"The court erred in adopting its findings of fact Nos. 2, 3, 10, 11, 12, 13, 14, 15, 16, 17 and 18."

We will not consider an assignment directed against all the findings of fact or conclusions of law made by the trial court, or the failure to adopt all of the findings requested. Such procedure is too general. United States v. Rio Grande Dam & Irrigation Co., 10 N.M. 617, 56 P. 276. Each error relied upon must be separately assigned (First Nat'l Bank v. Haverkampf, 16 N.M. 497, 121 P. 31; Kershner v. Trinidad Mill & Min. Co., 26 N.M. 73, 189 P. 658), and the findings, or requested findings, must be copied into the assignment, not referred to merely by number.

Aside from these defects, many of the requested findings are calls for findings of evidentiary facts. This is true of numbers 4, 5, 7, 8, 9 (requested findings 10 and 11 are not copied in the brief), 12 and 15 (so-called finding number 14 is a request for a conclusion of law). The trial court is required to make findings of ultimate facts only. Paulos v. Janetakos, 46 N.M. 390, 129 P.2d 636, 142 A.L.R. 1237, and Annotation p. 1243.

The trial court did not err in refusing to adopt these requests, and the findings made are not properly attacked.

We find the same defective briefing under the division marked "Point II." The third assignment of error is copied, as follows:

"The court erred in refusing to adopt conclusions of law 1, 2, 3, 4, 5 and 6 requested by the defendant."

Not one of these requested conclusions of law appears in the brief; aside from the fact that all six alleged errors are presented as one. We will not search the record for the purpose of determining just what conclusions of law were requested.

It is argued that the trial court's finding of fact No. 10 is "without any support or proof." That finding is not copied in the brief, and the substance of the evidence thereon is not set out as required by Sec. 6 of Supreme Court Rule 15. It is stated:

"We have heretofore set out the evidence and proof in support of defendant's requested finding of fact No. 4 to show that it was supported by competent proof and the court's own finding of fact No. 10 is without any support or proof."

The substance of all the evidence should have been set out as provided by the rule. We will not search the record to find it.

It is not sufficient to point to the evidence presented under another point. The objections to a finding, together with the substance of the evidence touching it, must be set out under the point in which it is attacked.

Findings of fact numbers 2, 11, 12, 13, 14, 15, 16, 17 and 18 are attacked by number. They are not set out in the brief. No evidence is substantially set out from which we can determine whether the objections to these findings are well taken, and we will not search the whole record for this information.

Division No. 6 seems to be based upon the following assignment of error:

"The court erred in its analysis and conclusions in arriving at its decision."

A memorandum of the trial court is not a part of the record on appeal, and this assignment of error will not be considered. Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740.

Assignment of error No. 1, argued under Point 7, is as follows:

"The court erred in overruling defendant's motion to dismiss both at the conclusion of plaintiff's case in chief, and at the close of the case."

We are of the opinion that there was evidence sufficient to support a decree against the defendant. The trial court did not err in overruling the motion to dismiss.

The facts necessary to a decision, as found by the trial court, are as follows:

"1. The plaintiff is the owner in fee simple of the SE¼ of Section 3, T. 16 S., R. 36 E., containing 160 acres, more or less, except a tract containing two acres which is now owned by the defendant, and which is hereinafter described.

"2. The plaintiff owns and maintains upon said quarter section a large livestock building, large livestock sales ring, corrals and loading chute, all used for livestock purposes, and also three small buildings used for storage and juvenile recreational purposes; said livestock building is 56 feet

in width from north to south, and 145 feet in length from west to east, and the northeast corner of said livestock building is approximately 1120 feet south of the northern boundary line of said quarter section and approximately 505 feet east of the western boundary line of said quarter section; the three small buildings are located directly south of the west end of said livestock building, with approximately equal distances between each of said buildings and the south line of said livestock building; and the southwest corner of the southermost of the three small buildings is 220 feet south of the northwest corner of said livestock building, and approximately 360 feet east of the western boundary line of said quarter section.

"3. By an instrument in writing the plaintiff leased to the defendant, for use as an airport and landing field, the said quarter section of land except a portion thereof lying in the western and northwestern part of the quarter section. The exception is first mentioned in the lease as being of 'that portion of said lands now used for livestock purposes, as hereinafter provided,' but later in the lease the excepted portion is more definitely described as being the buildings and corrals of plaintiff 'now located near the northwest corner * * * together with all the land lying between the buildings and the north and west boundaries of said quarter section.'

"4. At the time the lease was made the lands of the plaintiff, in their then existing condition, had been designated as an approved airfield by the Civil Aeronautics Authority.

"5. The lease required the defendant to maintain, repair and improve the runways which then existed on the leased lands, and to erect an operational office approximately 200 yards north of the livestock building.

"6. The lease contract sued on by the plaintiff was framed, prepared and submitted by the plaintiff.

* * * * * *

"12. In said airport lease permission was granted to the defendant to construct his hangar and operational office at a point approximately 200 yards due north of said livestock building within the eastern portion and along the eastern edge of the lands which had been excepted from the lease, and that although permission was given to him by said lease to construct his hangar and operational office at said point, the defendant has failed and refused to do so.

"13. Subsequent to the making of said airport lease and on or about June 13, 1946, the defendant learned that there was a two acre tract of land in the northwest portion of said quarter section which was not owned by the plaintiff; and that such two acre tract was located within the exterior limits of the larger tract which had

been excepted from said airport lease; and on or about June 13, 1946, the defendant acquired a quitclaim deed from the First Baptist Church covering said two acre tract, which is described as follows:

"Beginning at a point 1100 feet south of the northwest corner of said quarter section, thence east 300 feet; thence north 300 feet; thence west 300 feet; thence south 300 feet to the point of beginning, containing 2.06 acres.

"14. The defendant constructed upon such two acre tract an airplane hangar and operational office and airplane servicing equipment; and that the defendant scraped off and graded two airplane taxistrips leading into said hangar and upon and across the lands which had been excepted from said airport lease as described in Finding No. 11 above and in Finding No. 18, post.

"15. The defendant has been operating and conducting his airplane business from the hangar upon his two acre tract, has been causing his airplanes to use the taxistrips leading into said hangar and upon and across the excepted lands of the plaintiff, and has been causing said airplanes to taxi back and forth upon and across said excepted lands, and that all airplanes using the defendant's hangar and facilities, whether said planes belonged to the defendant or other persons, have been going upon and across the excepted lands of the plaintiff in getting to said hangar and in *taxiiing* to and from said hangar.

* * * * * *

"18. Measurements have been made and shown herein of the boundary lines of the excepted lands as above outlined in Finding No. 11, for more particular description, and it appears and is hereby found that in the airport lease entered into between the plaintiff and defendant on April 30, 1946, there was excepted from said lease all of the lands in the northwest portion of said quarter section which are described as follows: Beginning at the northeast corner of the livestock building, which point is approximately 1120 feet south of the northern boundary line of said quarter section and approximately 505 feet east of the western boundary line of said quarter section; thence north approximately 1120 feet to the northern boundary line of said quarter section; thence west along said boundary line to the northwest corner of said quarter section; thence south along the western boundary line of said quarter section approximately 1340 feet to a point directly west of the south side of the southernmost of the three small buildings; thence east 360 feet to the southwest corner of the southernmost of the three small buildings; thence north 220 feet to the northwest corner of the livestock building; thence east 145 feet to the point of beginning; and that there was also excepted from said airport lease the livestock corrals and the live-

stock building and three small buildings hereinabove described, and that the remainder of said quarter section (except the buildings and excepted lands as hereinabove described) was leased to the defendant for airport and aeronautical purposes."

The trial court concluded (some of its conclusions are intermingled with the facts) as follows:

That the lease description of the reserved lands is ambiguous and a literal interpretation would lead to absurd results. That a proper construction, in view of the evidence on the question of the ambiguous description of the reserved lands, shows it to be as described in finding No. 18.

"1. There was excepted from said airport lease all of that portion in the western part and the northwest corner of said quarter section which is indicated in the above Finding No. 11 and is more particularly described in the above Finding No. 18, and the defendant did not acquire by virtue of said lease any right to the use of any of said excepted lands, other than the permission granted to him by said lease to construct his hangar and operational office along the eastern edge of said excepted lands and at a point approximately 200 yards due north of said livestock building.

"2. The acts of the defendant in using said excepted lands constitute repeated and continuous trespass upon the same.

"3. The plaintiff is entitled to a permanent injunction against the defendant."

A perpetual injunction was granted against trespass on all the reserved land, as well as the two acre tract belonging to appellant. This might prevent the appellant from exercising his license or limited easement to erect his operational building as provided by the terms of the lease, and to use such portions of the reserved property as may be reasonably necessary to utilize the operational building in connection with the appellant's business, which the lease contract authorizes him to conduct on the premises, if and when he erects such building.

The injunction should be modified so as to exclude the two acre tract from its operation, and to permit the erection of the operational building at the place designated in the lease, if appellant so elects, and the use of that portion of the reserved land necessary for egress and ingress by motor propelled or horse drawn ground operated vehicles to said building if erected. The injunction is otherwise approved.

The cause is reversed and remanded with instructions to the district court to reform its decree as suggested herein.

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

McGHEE, J., did not participate.

197 P.2d 421

TRUJILLO v. TRUJILLO.

No. 5089.

Supreme Court of New Mexico.

Sept. 7, 1948.

Frank Andrews and Samuel Z. Montoya, both of Santa Fe, for appellant.

Bigbee & Kool, of Santa Fe, for appellee.

SADLER, Justice.

The appellant, who was contestee below, and the appellee, the contestant, were rival candidates for the office of County Clerk of Rio Arriba County at the general election held on November 5, 1946. They will be here referred to as contestant and contestee, respectively. The contestee, as the candidate on the democratic ticket for County Clerk was certified to have received a majority of sixteen votes and received the certificate of election at the hands of the County Canvassing Board. In due season he was contested for the office by Mrs. Cruz Trujillo, candidate for the same office on the republican ticket. Judgment went for the contestant below and this appeal followed. Since the case was decided on the pleadings, no evidence having been taken, the form of the notice of contest filed and of the answer in certain particulars becomes important. The notice of contest reads:

"Comes Now the Contestant, Mrs. Cruz Trujillo, and for her grounds of contest states:

"I That she was the Republican candidate for County Clerk of Rio Arriba County; and the Contestee, Edward Trujillo, was the Democratic candidate for County Clerk of Rio Arriba County.

"II That On November 27, 1946, following a recount requested by Edward Trujillo, the Contestee herein, the County Commissioners of Rio Arriba County met as the County Canvassing Board and issued a Certificate of Election to Edward Trujillo, based on the canvass and recount of the returns of Rio Arriba County, which purported to show on their face that Edward Trujillo received a majority of sixteen (16) votes.

"III That according to the County Canvass of Rio Arriba County, Edward Trujillo received one hundred seventy-four (174) votes, and the Contestant herein received one hundred forty-three votes in Precinct 1-A. In Precinct 2, Edward Trujillo received one hundred seventy-two votes, and the Contestant herein is shown to have received one hundred sixty-seven (167) votes. In Precinct 8, the County Canvass shows that Edward Trujillo received one hundred twelve (112) votes, and the Contestant herein, eighty-three (83)

votes. In Precinct 14, the returns show that Edward Trujillo received ninety-eight (98) votes, and that the Contestant herein received seventy-four (74) votes. In Precinct 15, the returns show that Edward Trujillo received thirty-eight (38) votes, and the Contestant herein thirteen (13) votes. In Precinct 17-B, the returns show that Edward Trujillo received one hundred one (101) votes, and the Contestant herein, eleven (11) votes. In Precinct 18, the returns show that Edward Trujillo received one hundred seventy-eight (178) votes, and the Contestant herein, eighty-seven (87) votes. In Precinct 19, the returns show that Edward Trujillo received one hundred-fifty (150) votes, and the Contestant herein one hundred thirty-seven (137) votes. In Precinct 20, the returns show that Edward Trujillo received ninety-seven (97) votes, and the Contestant herein ninety-one (91) votes. In Precinct 21, the returns show that Edward Trujillo received eighty-seven (87) votes, and the Contestant herein sixty-seven (67) votes. In Precinct 25, the returns show that Edward Trujillo received one hundred eighty-four (184) votes, and the Contestant herein, one hundred fifty-seven (157) votes. In Precinct 28, the returns show that Edward Trujillo received two hundred sixty-seven (267) votes, and the Contestant herein two hundred thirty-five (235) votes. In Precinct 29, the returns show that Edward Trujillo received twelve (12) votes, and the Contestant herein received six (6) votes. In Precinct 44, the returns show that Edward Trujillo received one hundred thirty-one (131) votes, and the Contestant herein, eighty (80) votes; and in Precinct 46, the returns show that Edward Trujillo received twenty (20) votes, and the Contestant herein received five (5) votes.

"IV That the returns, as indicated in Paragraph Number III of this Notice of Suit, as certified to by the County Commissioners Rio Arriba County, sitting as a County Canvassing Board of Rio Arriba County, show that in the group of Precincts listed in Paragraph Number III of this Notice of Contest, that Edward Trujillo carried such Precincts by a majority of four hundred sixty-six (466) votes.

"V That in all of the Precincts listed in Paragraph Number III of this Notice of Contest, the election officials failed to substantially comply with the provisions of the election code of the State of New Mexico, designed to protect the secrecy and sanctity of the ballot and the correct recording of the names and ballot numbers in the poll books and the entering of the ballot number on the book of bound original Affidavits of Registration, as provided by the laws of the State of New Mexico; and the Contestant herein alleges on information and belief that the election officials failed in the following particulars to com-

ply with the provisions of the election code of the State of New Mexico in all of the Precincts listed in Paragraph III of this Notice of Contest, as follows, to-wit:

"(A.) In that they failed to include the ballot number for each voter, as required by the Statutes of the State of New Mexico, in both the poll books and the book of bound original Affidavits of Registration.

"(B.) In that they failed to ascertain whether each person who presented himself at the polls to vote was properly registered, and failed to insert the ballot numbers of the registered voters on the bound original Affidavits of Registration.

"(C.) In that the poll clerks and election officials failed to enter the name of each voter as it appears on the registration book in the poll book with the street address of the voter where possible, and failed to list the correct number of the voter and the correct number of the ballot voted by such voter on the poll books and on the original Affidavits of Registration, as required by the Statutes of the State of New Mexico.

"(D.) In that they failed to list the names of married women whose names appear in the Registration Book by their given names instead of under the name of their husbands, and failed to enter such name upon each poll book as the married name, as required by the Statutes of the State of New Mexico.

"(E) In that the election officials failed to require, or in any way comply with the provisions of the election code of the State of New Mexico that require the making of Affidavits for Assistance before any voter is given assistance at the polls, and that the election officials in all of the Precincts listed in Paragraph III of this Notice of Contest allowed numerous voters to receive assistance in violation of the laws of the State of New Mexico, without having the voters sign Affidavits for Assistant, or without complying with any of the mandatory statutes of the State of New Mexico pertaining to assistance of voters.

"(F) In that the election officials failed to prohibit electioneering within fifty (50) feet of the polling places in each of the Precincts listed in Paragraph III hereof, and violated said section by permitting and allowing electioneering within fifty (50) feet of the polling places in such a manner that the secrecy of the ballot was not protected, as required by the laws of the State of New Mexico, and in such a manner that voters were intimidated and were not in many cases able to exercise their free choice of candidates.

"(G) In that the election officials of all of the Precincts listed in Paragraph III of this Notice of Contest failed and refused to comply with the Statutes of the State of New Mexico pertaining to the manner

of counting and tallying the ballots and pertaining to the signing of certificates, as required by the Statutes of the State of New Mexico.

"(H) In that the election officials of all of the Precincts listed in Paragraph III of this Notice of Contest failed and refused to certify the name of the last person who voted and the last ballot cast at the election prior to the termination of the voting at the time provided by law.

"(I) In that the election officials of all of the Precincts listed in Paragraph III of this Notice of Contest failed and refused, at the close of the polls at six o'clock in the evening on November 5, 1946, the day of election, to immediately place all unused ballots bearing the names of candidates in the ballot boxes, wrapped in packages separate from those in which the ballots cast by voters are wrapped.

"(J) In that the election officials allowed persons in the places where voting was taking place in addition to the judges and clerks of election, one accredited challenger appointed in writing by the County Chairman or Precinct Chairman from each political party represented on the ballot, State Police and other peace officers performing official duty, and electors engaged in voting and also counting judges and clerks in cases where appointed, and that the additional persons were allowed in the voting places of all of the Precincts listed in Paragraph III hereof in addition to those enumerated in this paragraph.

"(K) In that the election officials had in their possession intoxicating liquor while performing official acts under the provisions of the election code of the State of New Mexico, on November 5, 1946, and in addition, allowed other persons to have liquor within their possession within two hundred (200) feet of the polling places of each of the above-listed Precincts.

"VI That, as a result of the failure of the election officials to place the names of all voters on the poll books in the manner in which they appear on the Affidavits of Registration, it is impossible to ascertain with certainty whether many of the persons whose names appear on the poll books are in fact registered or unregistered; and therefore Contestant alleges on information and belief that the election officials of all the Precincts listed in Paragraph III hereof fraudulently allowed unregistered voters to vote in the election held on November 5, 1946, and counted, tallied, and certified the votes of each of such unregistered persons for the office of County Clerk of Rio Arriba County.

"VII. That as a result of the failure of the election officials in all of the Precincts listed in Paragraph III above to properly insert the ballot number of each voter on the registration affidavits, as required by the Statutes of the State of New

Mexico, and in addition the failure of the election officials to properly place the names of the voters in the poll books as they are listed in the Registration Affidavits, it is impossible to ascertain whether or not large numbers of unregistered voters voted; and this Contestant alleges on information and belief that unregistered voters voted in large numbers in each of the Precincts listed in Paragraph III, and that the election officials fraudulently allowed such illegal voting in order to record and elect all candidates on the Democratic ticket, including the Contestee herein.

"VIII That the Democratic candidates, including the Contestee herein, had majority representation upon the Board of Election Officials for each Precinct or election division listed in Paragraph III herein, and that the majority of all the election officials of the Precincts listed in Paragraph III herein were Democrats.

"IX Contestant alleges on information and belief that the election officials of each of the Precincts or election divisions listed in Paragraph III hereof were guilty of allowing fraud, intimidation, coercion and undue influence; and all of said election officials asserted fraud, intimidation, coercion and undue influence in that the secrecy and the purity of the ballot was not safeguarded and that the failure and neglect to comply with substantial requirements of the election law, as more specifically alleged elsewhere in this Notice of Contest was intentional on the part of the election officials.

"X That in Precinct 17-C, two persons voted marking their ballot with an "X" for the straight Republican ticket and then placed an "X" in the square immediately below the name of Edward Trujillo, the Democratic candidate, and that the election officials of such Precinct erroneously counted and tallied such two votes for Edward Trujillo, when in fact they were cast for no one.

"XI That in Precinct 37, two persons voted marking their ballot with an "X" for the straight Republican ticket and then placed an "X" in the square immediately below the name of Edward Trujillo, the Democratic candidate, and that the election officials of such Precinct erroneously counted and tallied such two votes for Edward Trujillo, when in fact they were cast for no one.

"XII The election officials were unable to ascertain when voters had voted more than once by their failure to comply with the provisions of the election code, as set forth above; and, as a result, fraudulently allowed the same person to vote more than once in many instances in all of the Precincts and election divisions set forth in Paragraph III above.

"XIII That the election officials in Precinct 17-B, La Puente, all left the place where the election was being held during or around the noonhour to go to lunch and left the polling place without any election official, except a polling clerk, present. This polling clerk was Fermin Manzanares, a Democrat, and he was the only person present during this entire period of time.

"XIV That the election officials of Precinct 14 did not comply with the requirements of the Statute for delivering the ballot box, together with all election equipment, to the County Clerk's office, but permitted and allowed Albert Amador, the Democratic candidate for County School Superintendent, to take the ballot box, together with both keys to the ballot box, to the County Clerk's office in Tierra Amarilla.

"Wherefore, Contestant respectfully prays that all of the votes of the entire election divisions and Precincts set forth and enumerated in Paragraph III of this Notice of Contest be refused and that the Contestant is entitled to have the returns from Rio Arriba County recomputed correctly showing her majority of over four hundred fifty (450) votes.

"It Is Further Prayed that two (2) votes be stricken from the total of those received by Edward Trujillo in Precinct 17-C, and that two (2) votes be stricken from the votes shown to have been received by Edward Trujillo in Precinct 37.

"Contestant further prays that judgment be entered adjudging Contestant to be entitled to the office of County Clerk of Rio Arriba County with all the privileges, powers and emoluments attending thereto and for her costs herein, and

"Further that the Contestant have judgment placing her in possession of said office of County Clerk of Rio Arriba County and for the emoluments therein from the beginning of the term for which she was elected with all her costs."

The answer filed in response to the foregoing notice of contest need not be set out in extenso. Suffice it to say that it consists of three parts denominated as "first", "second" and "third" defenses. The "First Defense" was in the nature of a demurrer, consisting of legal objections to the notice of contest as a whole and to the several paragraphs thereof. The "Second Defense" consists of admissions of the allegations of certain paragraphs of the notice of contest, or parts thereof, and denials of the allegations of certain others, or certain parts thereof. The "Third Defense" puts forward affirmative matter pleaded by way of defense.

It will be noted from a reading of paragraph V of the notice of contest that the primary grounds of contest are set forth therein. The basic objection to the state-

ment of grounds raised by contestee in his answer is the generality and lack of particularity employed. Illustrative of the character of contestee's challenge, paragraphs (a), (b) and (c) of section III of the answer, aimed at section V of the notice of contest and repeated in substance as to each and every succeeding paragraph V thereof, are set out herein as follows:

"Without waiving any other defense herein set forth, contestee states that the Notice of Contest fails to state facts sufficient to constitute grounds of contest or upon which relief may be granted to the contestant for the following reasons:

"(a). That paragraph V, thereof, fails to set forth any facts showing a violation of any part of the election code, designed to protect the secrecy or sanctity of the ballot, or that the secrecy or sanctity of the ballot was violated; that said paragraph fails to set forth facts showing that the said election officials failed to substantially comply with the statutory provisions of the election code; that the allegations of paragraph V are merely general allegations of error without pointing out any specific mistake or fraud or facts showing that the results of the election were, in any way, affected thereby, or the substance of the facts upon which contestant's belief is founded, and that such general allegations of error, believed to exist, are not sufficient grounds upon which to base a contest proceeding, and further, that said allegations are redundant and immaterial and should be, by this Court, stricken or dismissed.

"(b). That the allegations contained in paragraph V (A) fail to state facts constituting a cause of action in ordinary and concise language in that said allegations fail to allege in what specific particulars, in each contested Precinct, the election officials failed in their duty and, therefore, do not give to the contestee sufficient notice to enable him to prepare a defense; that said paragraph is merely a general and uncertain allegation of error which does not set forth facts showing a failure on the part of the election officials to substantially comply with the provisions of the election code and fails to specifically set forth the names of the voters whose ballot numbers were not placed in the poll books and in the book of bound, original Affidavits of Registration and, by reason of the above, said allegations are redundant and immaterial and should be, by this Court, stricken or dismissed.

"(c) That the first part of paragraph V (B), thereof, alleges that the election officials failed to ascertain whether each person, who presented himself at the polls to vote, was properly registered; that said allegation is merely a general allegation of error without pointing out any specific

mistake or fraud or the facts upon which contestant's belief is founded and that the names of the voter, allegedly not ascertained to be registered, were not set forth as required by statute and that such a general allegation of error, believed to exist, is not sufficient ground upon which to base a contest proceeding; that the objections, hereinbefore, made in paragraph (b), are hereby adopted as though set forth in full herein as to the remaining allegations of paragraph V (B)."

In a reply filed to contestee's answer, the contestant after entering a general denial to all allegations in paragraphs I, II and III of contestee's First Defense, then moved that the court accept as true all facts alleged in her notice of contest for failure on defendant's part specifically to deny them. She prayed the court to render judgment placing her in possession of the office in question and all emoluments thereof from the beginning of the term for which she was elected. A like reply and prayer were interposed to the contestee's Second Defense and after interposing a general denial to paragraphs I and II of contestee's Third Defense, certain specific admissions and denials were made as to the remainder thereof.

The contest having thus been put at issue, the matter came on for hearing on the various motions contained in contestee's answer and contestant's reply. As a result the court struck from the notice of contest paragraphs VI, VII, X, XI and XII and ordered all other allegations of the notice of contest to be considered admitted because not specifically denied, the language of the order reading as follows:

"Wherefore, It Is Ordered, that paragraphs VI, VII, X, XI and XII of the Notice of Contest be and the same are hereby ordered stricken.

"It Is Further Ordered that any and all other issues raised by contestee in his first defense to the Notice of Contest be and the same hereby are overruled.

"It Is Further Ordered that the second defense of Contestee's answer is hereby ordered stricken and the allegations of the Notice of Contest are declared to be true for the reason that they are not specifically denied and are therefore admitted.

"And, It Is Further Ordered And Found, that the issues raised in the third defense of contestee's answer are moot under this ruling.

"And, It Is Further Ordered, that the respective parties submit their requested Findings of Fact and Conclusions of Law, and that Judgment be entered in this cause for the contestant as prayed in the Notice of Contest."

The contestee's principal claim of error is that the court erred in overruling his motion to dismiss the notice of contest as

a whole for failure to state grounds of contest upon which relief could be granted; or, in the alternative and for consideration only in the event the motion to dismiss the entire notice of contest should be overruled, that it was error to deny the motion to strike specified and separate paragraphs thereof. After careful consideration, we have come to the conclusion that the trial court properly denied the motion in so far as it asked dismissal of the notice of contest outright but that it erred in declining to strike all of paragraph V of the notice of contest and each and every sub-paragraph thereof. We sustain the claim of contestee, so persuasively argued by his counsel, that each and every ground of contest set up in this paragraph of the notice of contest is so vague, general and lacking in particularity as to amount to nothing more than generalities, constituting mere conclusions of the pleader and imposing upon the contestee no duty to make answer thereto.

Counsel for the contestant have sought, in paragraph V of their notice of contest, to take advantage of 1941 Comp. § 56-347, which, so far as material, reads:

"In any election contest a prima facie showing that the election officials of any election division have failed to substantially comply with the provisions of the Election Code, designed for protecting the secrecy and sanctity of the ballot and the correct recording of the names and ballot numbers in the poll books, and the entering of the ballot numbers in the book of bound original affidavits of registration as herein provided, shall cast upon the candidates of the political party which had majority representation upon the board of election officials for such election division the burden of proving that no fraud, intimidation, coercion or undue influence was exerted by said election officials, and that the secrecy and purity of the ballot were safeguarded and no intentional evasion of the substantial requirements of the law was made. Upon failure to make a showing upon which the trial court shall so find, the votes of such entire election division shall be rejected. Provided that no such rejection shall be so made where it appears to the trial court that the election officials ignored the statutory requirements with the probable intent of procuring the rejection of the vote of such election division."

It is to be observed that this language of the Election Code, added as an amendment thereto by L. 1935, c. 147, § 42, transposes the conventional position of the parties as to the duty of going forward with the evidence by creating a prima facie case in favor of a contestant running on the ticket of the minority political party upon a prima facie showing that the election officials of an election division have failed to comply substantially with the provisions of the Election Code in specified particu-

lars, among such provisions being those "designed for protecting the secrecy and sanctity of the ballot." When this prima facie showing is made, under the condition named, it then becomes the duty of the contestee as a candidate of the dominant political party having majority representation upon the board of election officials, to prove "that no fraud, intimidation, coercion or undue influence was exerted by said election officials, and that the secrecy and purity of the ballot were safeguarded and no intentional evasion of the substantial requirements of the law was made."

It should be obvious to all, however, that before this favored position is to be achieved by a contestant, he must make the prima facie showing prerequisite to its enjoyment, first, by alleging the specific facts which alone entitle him to it and, then, furnishing proof thereof where such facts are properly denied. Certainly, the first condition is not to be fulfilled by opening the Election Code on the portion thereof entitled "Instructions to Election Officers" (1941 Comp. § 56-319) and copying, slavishly, almost paragraph by paragraph in the form of allegations, the language of the statute, without alleging a single specific fact constituting the noncompliance charged against the election officials in the form of conclusions of the pleader.

The Election Code provides for a notice of contest specifying the "grounds" upon which the claim of the contestant is based, and in the event it is charged that illegal votes have been cast or counted for the contestee, the name of each person whose vote is said to have been illegally cast or counted, the precinct or election district involved, and the facts showing such illegality, all must be specified with particularity. 1941 Comp. § 56-604. Although the foregoing statute relates to contest of *elections,* District Court Rule No. 87, promulgated by the Supreme Court, effective June 1, 1946, makes the same applicable to the contest of a *nomination* in primary elections.

We construed the foregoing statute in Ferran v. Trujillo, 50 N.M. 266, 175 P.2d 998, where the grounds of contest were alleged with no greater particularity than in paragraph V of the notice of contest in the case at bar and held them insufficient to call upon contestee to answer. See, also, the earlier cases of Wood v. Beals, 29 N.M. 88, 218 P. 354, and Bryan v. Barnett, 35 N.M. 207, 292 P. 611.

In Ferran v. Trujillo, supra [50 N.M. 266, 175 P.2d 1000], we said:

"For an instance of the words 'grounds' and 'facts' having been used interchangeably in our decisions, relating to this statute, see Rogers v. Scott, 35 N.M. 446, 300 P. 441, 442, where the court said:

" 'It necessarily follows that the contestant may set up in his notice any *facts*

showing that he is legally entitled to the office * * *.' (Emphasis supplied.)

"Further in support of the view that the use of the word 'grounds' in Sec. 56-604 does not dispense with allegations of specific facts upon which the grounds are based, see Sec. 56-606 of 1941 Comp., which provides:

"'* * * any material fact alleged in the notice of contest not specifically denied by the answer within the time aforesaid shall be taken and considered as true.'"

Following the foregoing statement we reviewed and quoted at length from the opinion in the important case of Otjen v. Kerr, 191 Okl. 628, 136 P.2d 411, winding up our consideration of same with a further quotation therefrom and our comment, as follows:

"It would unduly lengthen this opinion to copy here the reasoning and quotations of judicial expression and from text books upon which the court reached the conclusion that the notice of contest did not contain any allegations of fact to be tried at a hearing. The court summed up as follows:

"'From the decisions and texts cited certain rules are apparent. The contestant must have some knowledge or means of information as to facts that would change the election result or as to facts that show fraud; and he must allege or state such facts with sufficient certainty to show what facts he will seek to prove at the hearing, thus warning his opponent as to what alleged facts he should there prepare to meet by counter proof. General statements and all embracing statements which demonstrate lack of factual foundation and in themselves exclude probability of information or knowledge thereof in entirety may fall far short of the simple requirements, no matter in how forceful or extravagant language the statement is written.'

"We think that the foregoing summary is applicable to our election contest statute.

"The counsel for contestant-appellant has cited decisions of courts announcing a contrary view. These we have considered but find not persuasive."

The conclusion reached as to the claimed grounds of contest set up in paragraph V of the notice of contest would prove decisive of the case but for the fact that in paragraphs XIII and XIV of the notice of contest specific facts are alleged showing failure to comply substantially with the provisions of the Election Code, designed to protect the secrecy and sanctity of the ballot, in that, to-wit, (1) as alleged in paragraph XIII, the election officials in Precinct 17-B (La Puente) left the polls unattended during the noon hour to go to lunch, save for the presence of a

democratic polling clerk, one Fermin Manzanares, and (2) as alleged in paragraph XIV, the election officials in Precinct 14, in disregard of the statutory requirements in such behalf, permitted one Albert Amador, the democratic candidate for county school superintendent, to deliver the ballot boxes and both keys thereto, along with all election equipment, to the office of the county clerk in Tierra Amarilla, following the official count and recording of the vote in said precinct. The democratic party had majority representation on these two election boards.

The foregoing grounds of contest are met in contestant's answer, in each instance, with a general denial only. Consequently, under the express language of 1941 Comp. § 56-606, these grounds of contest are to "be taken and considered as true." They were so treated by the trial court in a formal order entered in the cause the pertinent language of which has been set out hereinabove. The vote in either of these precincts, independently of that in the other, when disregarded, gives the contestant a majority sufficient within itself to overcome the contestee's majority of sixteen (16) as shown by the official canvass for the county as a whole. Considered together and deducted, they overcome contestee's majority in the county and leave the contestant a majority of one hundred fourteen (114) in the race for the office of county clerk.

But it is argued by counsel for the contestee (appellant) that the adoption by this court of the Rules of Civil Procedure for the District Courts of the state has wrought a change in the statutes treated as rules of pleading theretofore applicable to election contests. They call attention to 1941 Comp. § 56-722, which so far as material reads:

"Every petition, case, cause, action or proceeding, whether civil or criminal, which may be brought or filed in any district court under any provision of the Election Code shall be deemed a proceeding within the provisions of chapter 84, Session Laws of 1933 (§§ 19-301, 19-302), and the provisions of said act shall be applicable thereto."

and argue therefrom that the strictness of the statutes governing election contests has been lifted, especially in relation to what constitutes a specific denial. They refer to 1941 Comp. § 19-101, rule 8(b), reading: "* * * Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, *he may make his denials as specific denials of designated averments or paragraphs* * * *." (Emphasis supplied by contestee's [appellant's] counsel.)

With this predicate, contestee's counsel conclude:

"Thus we believe it is obvious that the old common law definition of a specific de-

nial has been changed by our new rules, and the denial set forth in paragraph III of the Second Defense is exactly as required under 19-101, 8(b), i. e. a specific denial *of designated* paragraphs. (Emphasis by contestee's counsel.)

The argument advanced is ingeneous but we are not prepared to accept it. 1941 Comp., § 19-101, Rule 1, provides:

"These rules govern the procedure in the district courts of New Mexico in all suits of a civil nature whether cognizable as cases at law or in equity, *except in special statutory * * * proceedings* where existing rules are inconsistent herewith." (Emphasis ours.)

It is thus seen that under express language of the foregoing Rule 1, 1941 Comp. § 19-101, declaring the scope of Rules of Civil Procedure for District Courts, that special statutory proceedings, where inconsistent, are not governed thereby. This has been the uniform holding of the Supreme Court from the beginning to date. Bull v. Southwick, 2 N.M. 321; Bryan v. Barnett, 35 N.M. 207, 292 P. 611; Ferran v. Trujillo, 50 N.M. 266, 175 P.2d 998. The trial court did not err in treating as admitted, because not specifically denied, the allegations of paragraphs XIII and XIV of the notice of contest.

It is argued with much earnestness by contestee's counsel that the defaults charged are mere irregularities which, absent a showing of fraud, should not be held decisive. Cases such as Carabajal v. Lucero, 22 N.M. 30, 158 P. 1088; Montoya v. Ortiz, 24 N.M. 616, 617, 175 P. 335; Gallegos v. Miera, 28 N.M. 565, 215 P. 968, and Wright v. Closson, 29 N.M. 546, 224 P. 483, are cited in support of this contention. But in some of these very cases as, for instance, Gallegos v. Miera; Montoya v. Ortiz and Wright v. Closson, the court qualifies the holding by stating that in the absence of a statute *so providing,* mere irregularities will not warrant disregarding the vote of an entire precinct or voting district where there is no fraud.

The fault in this argument lies in the fact that here we have exactly such a statute, 1941 Comp. § 56-347. It casts the burden on the candidate of the dominant political party to show there was no fraud, if a prima facie showing be made that the provisions of the Election Code designed to protect the secrecy and sanctity of the ballot have not been substantially complied with. The penalty for failure is rejection of the entire vote of the election district involved. The power of the legislature so to provide cannot be questioned. Orchard v. Board of County Commissioners, 42 N.M. 172, 76 P.2d 41.

The conclusions reached render unnecessary the consideration and decision of other questions raised and argued by counsel for contestee (appellant). It is

perhaps worth mentioning that the allegations of the Third Defense in contestee's answer are subject to the same objections and criticism for vagueness and generality as are the allegations of paragraph V in contestant's notice of contest. Indeed, this section of contestee's answer seems little more than a rescript of certain sub-sections of paragraph V of the notice of contest, but related only to the precincts or voting districts carried by contestant, as her allegations are related only to precincts carried by the contestee.

It follows from what has been said that the judgment of the trial court is correct and should be affirmed.

It is so ordered.

LUJAN, McGHEE, and COMPTON, JJ., concur.

BRICE, Chief Justice (specially concurring).

I concur in the opinion of Mr. Justice Sadler; but I have long been impressed by the fact that the contest procedure should be amended. The provision for specific denials of facts charged by a contestant has caused much injustice and the loss of offices by citizens who have been elected thereto. It should be amended so that the pleadings in ordinary suits would apply. This would not cause any more delay than the contest statutes and would be in accord with justice. Without reference to this case, it is too easy to secure an unjust advantage of the unwary, by charges of alleged facts which, to say the least, are not known to be true.

197 P.2d 430

DAVIS v. CAMPBELL.

No. 5103.

Supreme Court of New Mexico.

Sept. 8, 1948.

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Rueckhaus & Watkins, of Albuquerque, for appellant.

F. Ernest Ayers, of Estancia, for appellee.

LUJAN, Justice.

On September 14, 1944, plaintiff, who was in the business of publishing biographical sketches of the lives of New Mexico citizens in a book called the Historical Encyclopedia of New Mexico, through his agent and representative, R. D. Ross, secured a subscription from D. B. Campbell, Sr., the defendant, for a copy of this book, for the sum of $38.50. This subscription or note reads as follows:

"I hereby authorize the New Mexico Historical Association to prepare and insert in the Historical Encyclopedia of New Mexico, and I hereby subscribe for one (1) set of said encyclopedia for which I promise to pay Thirty eight Dollars and fifty cents ($38.50) to New Mexico Historical Association or order, at Albuquerque, New Mexico, one-half of said amount payable on this date and balance payable on submission of biographical sketch."

On the same day the defendant entered into an agreement whereby he agreed to furnish the plaintiff with a photograph of himself and the plaintiff was to prepare a portrait engraving therefrom to be inserted in the encyclopedia for the sum of $275.00, upon submission of proof of the engraving. Accordingly, the defendant furnished the plaintiff with data from which he was to write a biographical sketch of his life, together with a kodak snapshot of himself, as well as a kodak picture of his wife.

On March 11, 1945, the plaintiff personally called upon the defendant and submitted to him a biographical sketch which was typewritten, but on account of his poor eyesight, plaintiff read it to him, likewise the engraving of his picture. However, no printer's sketch was either presented nor read to him. At the request of plaintiff, the defendant gave him a check in the sum of $313.50, and then the plaintiff procured the following instrument from him:

"I hereby authorize New Mexico Historical Association to have prepared a portrait engraving from photograph to be inserted in the Historical Encyclopedia of New Mexico, for which I promise to pay the sum of Two Hundred Seventy-five and no/100 Dollars to said Company order at Albuquerque, New Mexico, payable on submission of proof of said engraving. I al-

so agree to furnish them my photograph within thirty days from this date, failure of which will render the above amount payable on demand."

It is to be noted that nothing is said in this instrument as to the defendant's wife. Subsequently the encyclopedia was published containing an erroneous biographical sketch of the defendant's life together with his and his wife's pictures.

On September 7, 1946, the encyclopedia was delivered to the defendant, whereupon he signed and delivered to the plaintiff, the following receipt:

"Received from the New Mexico Historical Association one copy of the Historical Encyclopedia of New Mexico in which biographical sketch and portrait appears as per agreement."

This suit was filed by the plaintiff on the alleged contract or note of March 11, 1945, alleging that the defendant was indebted to him thereon in the sum of Two Hundred and Seventy-five Dollars; and that he had performed all conditions precedent in said contract. A copy of the subscription and note were made a part of the complaint and marked exhibit "A".

The defendant denied the allegations of the complaint and further alleged that the plaintiff did not submit a proof of the engraving of the photograph of his wife; that he did not approve any proof of the engraving for publication in the encyclopedia; and that the photograph of his wife as inserted by the plaintiff in the encyclopedia was of poor quality and inferior to the photograph submitted to him.

By way of an affirmative defense, the defendant alleged that the contract was procured by fraudulent misrepresentations of the agent and representative of the plaintiff, in that the plaintiff agreed to publish a biographical sketch and portrait of the defendant and to insert a portrait of his wife in the encyclopedia; that in order to secure the consent of the defendant to the publication of the biographical sketch and the insertion of the two photographs, the plaintiff represented to him that if he would insert and pay for the insertion of his picture, the plaintiff would include his wife's picture free of charge; that plaintiff's agent misrepresented the amount of said payment; that the signing of the note was only to authorize the insertion of his wife's picture and that it would not cost him anything more than the cost of his biographical sketch and photograph; that he has paid for it and does not owe the plaintiff anything. He further alleged that the representations made by plaintiff's agent were known to be untrue at the time, and were recklessly made with the intent to deceive the defendant and for the purpose of inducing him to act upon them; that defendant relied upon these misrepresentations,

and in reliance of same signed the papers required to be signed by the plaintiff or his agent; that he was injured by ridicule, unfavorable publicity and additional expense thereby. He also alleged that the biographical sketch of his life as published by the plaintiff in the encyclopedia was not correct in certain instances; and that the plaintiff did not submit the biographical sketch to him for his approval before it was published, although he had agreed to do so.

By his cross-complaint, the defendant adopted the allegations contained in his affirmative defense and prayed for damages as a result thereof.

It is to be noted that the note upon which this suit is founded, marked plaintiff's exhibit No. 1, and introduced in evidence differs materially from plaintiff's exhibit "A" which was made a part of his complaint. The plaintiff in his exhibit "A" after the word "from" inserted the words "Mrs. D. B. Campbell's photograph", which do not appear in his exhibit No. 1.

Plaintiff urges four assignments of error in support of his contention that the judgment should be reversed, as follows:

1. That there is no evidence that the subscription sued on by the plaintiff was secured from the defendant by fraud.

2. That the parole evidence rule excludes evidence of prior or contemporaneous oral agreements which would vary the written contract.

3. That the plaintiff did not violate his agreement to submit proof of the biographical sketch of the defendant for his approval before publishing same in the Historical Encyclopedia of New Mexico.

4. That the defendant has not shown that he sustained any damage as a result of the errors in his biographical sketch.

After hearing all the evidence on the issues raised by the pleadings thereto, the trial court made the following findings of fact, to-wit:

"1. That the note sued on by plaintiff was secured from defendant by fraudulent representations to the effect that there was no charge in addition to what defendant had already paid to plaintiff.

"2. That the note designated as 'Plaintiff's Exhibit 2' was secured by plaintiff by a fraudulent representation that the amount was two seventy-five, when in fact it was a note for two hundred seventy five dollars.

"3. That the salesmanship used by the plaintiff and his agent, R. B. Ross, in securing Plaintiff's Exhibits 1, 2 and 3 was slick salesmanship of a type intended to defraud defendant, and did result in defrauding defendant through his reliance on the representations made by plaintiff and his agent, R. B. Ross.

"4. That the defendant relied upon the representations made by the plaintiff and his agent, R. B. Ross, and that it was proper for defendant to rely upon the representations made by the plaintiff and his agents, because of defendant's poor eyesight, his age and his lack of education.

"5. That the biographical sketch of defendant, as published by plaintiff in the Historical Encyclopedia of New Mexico, was not correct as to the time defendant had lived in Torrance County, New Mexico, and was not correct as to the time when defendant left Blue County, Oklahoma, and the resulting inference as to the age of defendant, resulting from these misrepresentations together with the stated age of defendant when he came to Torrance County, caused defendant embarrassment and ridicule and resultant damage.

"6. That plaintiff did not submit a proof of the biographical sketch of defendant to defendant for his approval before publishing said sketch in the Historical Encyclopedia of New Mexico, and plaintiff thereby violated his agreement as shown by plaintiff's Exhibit 1. That the failure of plaintiff to submit a proof of the biographical sketch as agreed, subjected defendant to embarrassment and ridicule, and resulted in giving him an inferior biographical sketch, to his damage.

"7. That plaintiff's agent, R. B. Ross, represented that the insertion of the biographical sketch would not cost anything in addition to the cost of the picture of defendant in the Historical Encyclopedia of New Mexico. Said representation was known to be false by said agent when it was made and it was made to help secure Plaintiff's Exhibits 1, 2 and 3 in this suit. Defendant relied on said representation, to his damage.

"8. That defendant was damaged by the fraudulent representations of plaintiff and his agent, R. B. Ross, and by the incorrect publication of the biographical sketch, in the amount of $200.00.

"9. That 'Plaintiff's Exhibit 4' the check to plaintiff by defendant, was paid only after protest to plaintiff about the representations that had been falsely made by plaintiff's agent, R. B. Ross.

"10. That when the agent of plaintiff delivered the set of the Historical Encyclopedia of New Mexico to defendant, defendant was told that it was merely a receipt for the two books, and defendant was not told that the receipt stated that the biographical sketch and portrait appeared therein as per agreement; that defendant was not able to examine and read the receipt at that time, and had to rely on the representations of plaintiff's agent, because of the eyesight of defendant being poor."

From the foregoing findings of fact the court concluded as a matter of law:

"2. That plaintiff's Exhibits 1, 2 and 3 were secured by fraudulent misrepresenta-

tions to defendant; said representations having been made knowing their falsity, and with intent that defendant should rely on them, and defendant having relied on them to his injury, plaintiff is not now entitled to collect anything on them, because of his and his agent's fraud in the inducement of said contract. A plaintiff may not recover on a contract induced by his own or his agent's fraudulent representations, made in the regular course of plaintiff's business.

"3. That a contract in writing may be varied by oral proof of fraud in the inducement.

"4. That plaintiff having by his own evidence, on direct examination, admitted making an oral agreement with defendant as to the time for payment of 'Plaintiff's Exhibit 3', on which plaintiff based this suit, which oral agreement was at variance with the printed 'Plaintiff's Exhibit 3', thereby opened the door for further oral proof by defendant, at variance with the written contract.

"5. That defendant having already paid under protest, more than he agreed to pay plaintiff, is under no obligation to pay any more.

"6. That 'Plaintiff's Exhibit 1', in any event, must be interpreted as an agreement by plaintiff to furnish a correct biographical sketch. It cannot be said as a matter of law that a contract to furnish a biographical sketch would be a contract to furnish anything other than a correct biographical sketch. Failure to furnish a correct biographical sketch in this case was a breach of the contract by plaintiff, for which defendant is entitled to damages."

Under his point one, plaintiff urges that there is no evidence that the subscription sued on by him was secured from the defendant by fraud, and that the lower court reached into the empty air to find facts with which to establish a fraudulent conduct on his part as well as that of his salesman, but, by his brief, plaintiff fails to give us the substance of all of the evidence touching upon the transaction involved in this litigation, and hence does not show a compliance with section six of Rule 15 of the Supreme Court. Sands v. Sands, 48 N.M. 458, 152 P.2d 399; Ritter-Walker Company v. Bell, 46 N.M. 125, 123 P.2d 381; Alamogordo Improvement Co. v. Pendergast, 45 N.M. 40, 109 P.2d 254. Nevertheless, we have carefully examined the entire testimony and are of the opinion that there was substantial evidence to support each of the findings attacked. This court resolves all disputed facts in favor of appellee and views the evidence in the aspect most favorable to him. Sands v. Sands, supra; and McDonald v. Polansky, 48 N.M. 518, 153 P.2d 670.

It is next contended by the plaintiff, that the parol evidence rule excludes evidence of prior or contemporaneous oral agreements which would vary the written

contract. We agree with this contention. However, the rule that oral representations and inducements preceding or contemporaneous with the agreement are merged in the writing is subject to the exception that, if the representations amount to fraud which avoids the written contract, they are not merged therein, and parol evidence is admissible to show the fraud. People v. Orekar, 22 N.M. 307, 161 P. 1110; and Morstad v. Atchinson T. & S. F. Ry. Co., 23 N.M. 663, 170 P. 886. Therefore, if a signature is procured by fraud, the party so defrauded is not barred from relief by the fact that he failed to read or have read the contract to him before signing it, and he may plead such facts constituting fraud in defense to a recovery upon such writing. Vermont Farm Machinery Co. v. Ash, 23 N.M. 647, 170 P. 741. The answer in this case sufficiently alleged the fraud perpetrated upon him by the plaintiff.

As to point three, it is sufficient to say that the court's specific finding of fact No. 6, is supported by substantial evidence, and is therefore, for the purpose of review, the fact in the case. This finding of fact is a sufficient basis for the conclusion of law and the resulting judgment. We have carefully examined the testimony, concluding as above stated.

Finally it is urged that the defendant has not shown that he sustained any damage as a result of the errors in his biographical sketch. We are of the opinion that the defendant's proof in this respect was sufficient to support the court's finding that he had suffered damages. The defendant furnished the plaintiff with data from which he was to prepare a biographical sketch and submit a printed proof to the defendant for his approval. Plaintiff prepared a typewritten biographical sketch of defendant's life which he read to him, but did not submit a printed proof thereof, and after the biographical sketch was published in the Historical Encyclopedia of New Mexico and delivered to the defendant, he discovered that the biographical sketch of himself as published in the aforesaid encyclopedia was not correct in many instances and specially as to the time he had lived in Torrance County, New Mexico, nor as to the time he left Blue County, Oklahoma, and the resulting inference as to his age. There is no doubt that the plaintiff violated his contract in failing to submit a printed proof of defendant's biographical sketch for his approval before it was finally published in the encyclopedia, and there is no question but that defendant is entitled to damages on his cross-complaint, although his proof was weak establishing the amount. The trial court allowed $200.00, and considering all the facts and circumstances we believe that it was justified in allowing this amount.

Absolute certainty as to damages sustained is, of course, in many cases impossible; all that the law requires is that

such damages be allowed as directly and naturally result from the injury. Damages may be recovered notwithstanding that they cannot be calculated with absolute exactness. In cases of this kind, or in such cases as damages for personal injuries, pain or mental anguish, where the damages cannot possibly be exact, the findings of the court will not be disturbed unless clearly wrong. Nichols v. Anderson, 43 N.M. 296, 92 P.2d 781.

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

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

197 P.2d 435

EDWARDS v. ERWIN.

No. 5086.

Supreme Court of New Mexico.

Sept. 11, 1948.

W. C. Whatley and T. K. Campbell, both of Las Cruces, for appellant.

R. R. Posey, of Las Cruces, for appellee.

SADLER, Justice.

The plaintiff below, who is appellee and cross-appellant here, sued to foreclose a mechanic's lien on a house and lot in Las Cruces, Dona Ana County, New Mexico. Judgment went for plaintiff, although the amount adjudged due was less than that claimed. Accordingly, the defendant appealed and the plaintiff took a cross-appeal. Both feel aggrieved at the amount for which the lien was foreclosed, the defendant asserting it is too much—the plaintiff, too little. We are asked to resolve their controversy.

The plaintiff sued on a verbal contract for construction of the house to be used for residence purposes on a lot owned by the defendant. According to the complaint, which he supported by his testimony, the house was to be built by the plaintiff and the defendant was to pay at the cost price for the materials and labor going into the construction, plus the customary ten (10) per cent. of total cost of the materials and labor, the latter to serve as plaintiff's compensation. In other words, it was what is commonly called by the craft a "cost plus" job. Payment was to be made from time to time as the work progressed, and was so paid according to the complaint, leaving a balance unpaid upon completion of the building in the sum of $1479.47, for which recovery and foreclosure were prayed.

The defendant, for his defense, pleaded that the plaintiff had agreed to construct the house for a fixed price of $2900 and furnish all the materials, later asserting inability to furnish bathroom and plumbing fixtures, which the defendant claimed he supplied and paid for along with many other items, at a total cost of $1036.46. Notwithstanding all this the defendant, so he alleged, had offered to pay the plaintiff $1049 in addition to the sum of $2450, already paid him. In answering, the defendant expressed a willingness to pay this amount into court in full satisfaction of the plaintiff's demands.

After trial upon the issues made up as aforesaid, the court announced it would render judgment for plaintiff for the full amount claimed less a plumbing bill of $230.55, which it was agreed the defendant should have credit for. Thereafter, yet before any findings had been made or conclusions announced, the court called in the parties and dictated the following statement into the record, to-wit:

"The Court: The Court withdraws its opinion heretofore given, before any findings of fact are made or decree entered, and now holds as follows: That according to plaintiff's Complaint herein the work was to be done by him for the defendant, have the materials and supplies furnished and have the labor performed at the cost price plus ten percent of the total cost price of materials, supplies and labor on the part of the defendant. In his Answer and also in the proof the plaintiff was to do the work

according to specifications and to furnish all labor and materials required in the construction and completion of said building for between $2800.00 and $2900.00. According to changes made by the parties in their pleadings and also by their evidence there was no meeting of the minds of the parties as to the cost price of the labor, materials, etc. On that account the plaintiff's remedy should be on the basis of quantum meruit and if sufficient testimony has not already been submitted the case will be held open until further testimony is submitted to the Court."

The parties, deeming that evidence appropriate to an award on the basis of a quantum meruit had not been introduced, came again before the court a month later for an adjourned hearing. Both sides introduced testimony and examined and cross-examined witnesses touching the reasonable value of services, labor and material going into the construction of the building. There was no objection from any source, or from either party, on the ground that such testimony was not within the issues or was inadmissible upon the pleadings as they stood.

When the parties had finished introducing testimony, the trial court filed its formal decision in the case consisting of findings of fact and conclusions of law. Briefly summarized they were to the effect that, due to misunderstanding of the parties, there had never been any meeting of the minds upon the terms under which the building should be constructed; that, nevertheless, the plaintiff having proceeded to construct the same with the defendant's knowledge and consent, was entitled to recover on the basis of a quantum meruit. Aside from what has been said of the findings and conclusions, the court found and concluded as follows:

"6. The Court further finds that the labor and materials furnished by plaintiff and used in the construction of the said building amounted to the sum of $3499.50 and that the defendant has paid the sum of $2450.00, as well as the cost of the plumbing, amounting to $230.55, leaving a balance due from defendant to plaintiff of $818.95, together with interest at six percent per annum from date of completion of the building.

"Conclusions of Law

"1. That as there was no meeting of minds of plaintiff and defendant as to the charges for labor and materials to be furnished in the construction of the building, plaintiff is entitled to recover on the basis of the value of such materials and labor so furnished by him, and deducting the said payments so made by the defendant leaves a balance due of $818.95, together with interest of six percent per annum from date of completion of the building.

"2. In addition the plaintiff is entitled to $25.00 for making and filing claim of lien dated the 27th of August, 1946, and also

$100.00 attorney's fee for services of plaintiff's attorney in this cause, including what may be required for foreclosure of the lien.

"3. The Court further finds that the said balance due with interest is a valid and subsisting lien against the property of the defendant described in the complaint and also in the builder's lien."

The judgment entered followed the findings and conclusions, both as to amount adjudged due and the establishment and foreclosure of the mechanic's lien set up in the complaint. Both parties complain of the judgment and by appeal and cross-appeal seek to reverse it.

Two errors are assigned by the defendant as appellant, (1) that the court erred in holding there had been no meeting of the minds on terms of an express contract and (2) that even if the trial court properly held there was no meeting of the minds, there was no substantial evidence to support the trial court's finding on a quantum meruit basis. Although the two errors assigned are as just stated, the two points argued are as follows:

"Point I. Where an action was brought on an expressed contract, the burden was on the plaintiff to establish and prove the contract and on failing to do so he could not recover on a quantum meruit.

"Point II. The Court erred in holding that the plaintiff was entitled to recover anything from the defendant, because, after deciding that that was no meeting of the minds of the parties, there was no evidence to support the finding that plaintiff was entitled to anything above what he had been paid."

Counsel for defendant introduces his argument under this point in the following vein, to-wit:

"Defendant's first point is based upon the proposition that where a cause of action has been brought on an expressed contract there can be no recovery on quantum meruit. The proposition is one of first impression in this jurisdiction as far as counsel have been able to determine."

It is a complete answer to this argument to point out, assuming it to be correct there can be no recovery on an implied contract where the action is laid on an express contract (and there is ample authority to support the proposition, 17 C.J.S., *Contracts* § 569, p. 1203), nevertheless, where the parties litigate without objection on the basis of a quantum meruit, here the complaint will be deemed amended accordingly, as though originally so framed. Canavan v. Canavan, 17 N.M. 503, 131 P. 493, Ann.Cas.1915B, 1064. That is exactly what happened below. Following the trial judge's holding that there was no meeting of the minds, he announced he would take evidence on the reasonable value of the services rendered and the materials supplied. Both sides acquiesced in this ruling and proceeded to introduce evi-

dence, examine witnesses and otherwise conduct the case as though such had been the theory originally advanced. It is too late now to contend otherwise. Sandoval v. Unknown Heirs, 25 N.M. 536, 185 P. 282, and Springer v. Wasson, 25 N.M. 379, 183 P. 398.

It is next argued under Point II that in the event the court should hold, as we have, recovery permissible upon a quantum meruit, the evidence was insufficient to support the trial court's findings on that theory. We have carefully reviewed the somewhat extensive testimony taken on reasonable value of services, labor and materials supplied. Without attempting any recapitulation of it, we must hold it affords substantial support for the court's findings in this behalf. Indeed, the defendant complaining of the findings, is fortunate not to have been subjected to a larger recovery than he was.

We have not discussed one error assigned but not covered by any point in the argument, namely, that the court erred in finding and concluding that there was no meeting of the minds on an express contract for construction of the building. Frankly, this claim of error seems not to have been reserved below; even if it had been, when the trial court transformed the suit into one for recovery on a quantum meruit, all parties acquiesced without remonstrance or objection of any kind. It is now too late to advert to error claimed to have been committed in relation to the abandoned theory of express contract. Cf. Horton v. Atchison, T. & S. F. Ry. Co., 34 N.M. 594, 288 P. 1065. What is said disposes of cross-appeal.

Finding no error the judgment under review will be affirmed.

It is so ordered.

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

197 P.2d 618

DUNNE v. PETTERMAN.

No. 5093.

Supreme Court of New Mexico.

July 24, 1948.

Rehearing Denied Oct. 2, 1948.

Lorenzo A. Chavez, of Albuquerque, for appellant.

Rueckhaus & Watkins, Melvin D. Rueckhaus, and Ped S. Watkins, all of Albuquerque, for appellee.

LUJAN, Justice.

This action was commenced by the plaintiff, E. A. Dunne, against the defendants, J. D. Clark, L. E. Petterman, d/b/a Trans-American Trailer Sales Co., and Southwest Finance, Inc., for the sum of $2050.00, or the possession of the house trailer claimed by him. Clark and the Southwest Finance Company having disclaimed any right to the title, interest or a lien thereon,

the trial proceeded only against the defendant Petterman. Judgment was awarded against him from which he prosecutes this appeal.

The parties will be referred to herein as they appeared in the district court. The plaintiff was engaged in the trailer business in the city of El Paso, Texas. On December 17, 1946, one Lon Milner entered into an oral agreement with the plaintiff whereby he agreed to buy and the plaintiff agreed to sell an Alma Silver Moon house trailer, serial number 80106. On the same day Milner deposited $500.00 with plaintiff, it then and there being understood by and between the parties that the title to the house trailer would not be delivered until the balance of the $2050.00 was paid in full, on or before February 1, 1947. Possession of the house trailer was then delivered to Milner with the understanding that it would not be removed from El Paso, but be used by him, his wife and baby in said city. This was done because Milner was desperately in need of living quarters and none could be found in El Paso at that time. When plaintiff delivered possession of the house trailer to Milner, no bill of sale was delivered to him nor was there a chattel mortgage executed by Milner. However, there was a note given and signed by Milner for the balance of the money due on the transaction. Though this note recites "this note is secured by a chattel mortgage of even date herewith, * * *" none was given, and the plaintiff considered the same as a debt memorandum of the amount still due him by Milner.

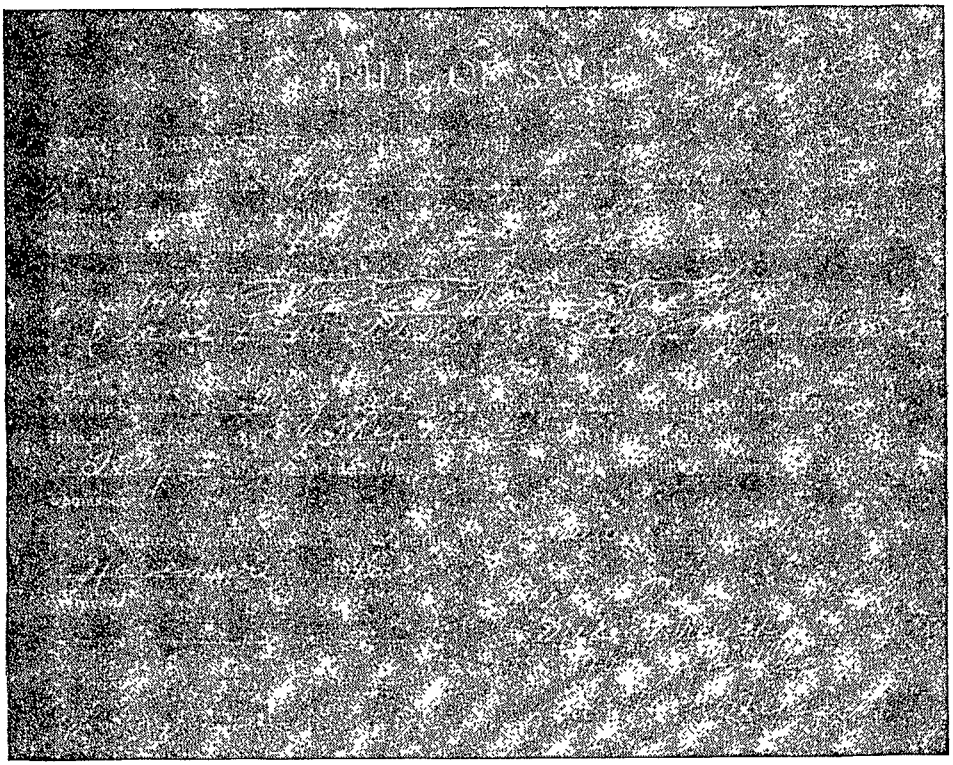
Shortly after possession of the house trailer had been delivered to Milner, he, without the consent of the plaintiff, removed it from the State of Texas into the State of New Mexico, where he later sold it to the defendant at Albuquerque, on January 14, 1947, less than one month after he obtained possession of it.

Several assignments of error are presented on this appeal only one of which need be determined, itself being decisive, namely:

"That the court erred in holding that the defendant was not a bona fide purchaser for reasonable value without actual or constructive notice of plaintiff's rights."

Under this assignment appellant urges that he is a bona fide purchaser of the trailer for a reasonable value and without notice of the infirmities in the transaction between Mike's Trailer Sales Company and Harold Carlson, and that Carlson having furnished him with a bill of sale, the plaintiff should not be permitted to recover it. With this contention we do not agree. The defendant had actual notice that the purported bill of sale from Mike's Trailer Sales Company to Carlson was fraudulent in that on its very face it plainly showed erasures as well as insertions written in

different colored ink and different hand writing. The following is a photostatic reproduction of the original bill of sale.



From an examination of the above bill of sale which was executed by the Mike's Trailer Sales of El Paso, Texas, to one Harold A. Carlson, for a 1944 Continental House Trailer, Serial No. 2252838, it will be seen that at the time Milner alias Carlson delivered it to the defendant the following notations, insertions and erasures appeared on its very face: At the top right hand side the words "Alma Silver Moon #80106 on door plate" noted; after the figures "1944" the words "Continental House Trailer" were erased and the words "Alma House Trailer" inserted in lieu thereof; and after the figures 2252838 the following words and figures were added "Body #80106 on door plate." All of which appeared in different hand writing and different ink.

[redacted] A person cannot be a bona fide purchaser who has brought to his attention

facts which should have put him to an inquiry, which if pursued with due diligence, would have led to a knowledge of the infirmities appearing upon the face of the instrument involved in the transaction. To constitute that good faith which will protect a vendee in a transaction of the nature of the one before us, there must not only be an absence of actual knowledge of the vendor's fraud, but an absence of that which, in law, amounts to notice. If the vendee has knowledge of such facts as would lead an ordinarily prudent man, using ordinary caution, to make further inquiries, which if made, would have disclosed the vendor's fraudulent act, he will be deemed to have notice of such fraud. We think it sufficiently appears, from the testimony of appellant's own agent and from the bill of sale, that he was not a bona fide purchaser for value without notice. Kitchen v. Schuster, 14 N.M. 164, 89 P. 261; and Taylor v. Hanchett Oil Co., 37 N.M. 606, 27 P.2d 59.

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

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

On Motion for Rehearing.

LUJAN, Justice.

The defendant, appellant in this court, has moved for rehearing. This motion is unsupported by brief, Supreme Court Rule 18, Sec. 3, 1941 Comp. § 19-201, and, therefore, is not entitled to consideration as of right. Supreme Court Rule 16, Sec. 2. Nevertheless, the filing of such motion affords us the occasion for an additional observation on the opinion filed. It should have been mentioned therein, but was not, that in sustaining the plaintiff's oral conditional sales contract as against the defendant, who was unable to qualify as a bona fide purchaser for value from plaintiff's vendee, we were applying the law of Texas, where the contract was entered into, making such contracts chattel mortgages, rather than the law of New Mexico, where the defendant's purchase took place. Cf. Allison v. Niehaus, 44 N.M. 342, 102 P.2d 659.

Under Vernon's Texas Civil Statutes, Sec. 5489, a conditional sales contract is deemed to be a chattel mortgage and, when possession is delivered to the vendee, is void as to creditors and bona fide purchasers, unless the reservation of title be in writing and registered as required of chattel mortgages. This Section reads:

"All reservation of the title to or property in chattels, as security for the purchase money thereof, shall be held to be chattel mortgages, and shall, when possession is delivered to the vendee, be void as to creditors and bona fide purchasers, unless such reservation be in writing and registered as required of chattel mortgages. * * *"

See Crews v. Harlan, 99 Tex. 93, 87 S.W. 656, 13 Ann.Cas. 863; Crews v. Harlan, Tex.Civ.App., 88 S.W. 411; and Runnels Chevrolet Co. v. Travis, Tex.Civ.App., 62 S.W.2d 225.

The motion for rehearing will be denied. And it is so ordered.

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

197 P.2d 875

FAIRCHILD v. UNITED SERVICE CORPORATION et al.

No. 5099.

Supreme Court of New Mexico.

Sept. 24, 1948.

Irwin S. Moise and Lewis R. Sutin, both of Albuquerque, and H. A. Kiker, of Santa Fe, for appellant.

Adams & Chase, of Albuquerque, for appellees.

BRICE, Chief Justice.

Plaintiff (appellant), as administrator of the estate of Kendrick Ivan Fairchild, deceased, instituted this action to recover damages alleged to have been sustained because of the wrongful death of his decedent, caused by defendants' (appellees') negligence.

After answering defendants moved for a summary judgment, alleging that at the time deceased was struck and killed by defendant corporation's truck the defendant was hauling and disposing of garbage in the City of Albuquerque, and "said truck at the time of said accident was a public conveyance and was being operated in connection with said corporation's business as a common carrier," for which reason this action could not be maintained.

The plaintiff filed counter affidavits tending to prove that the defendant corporation was not a common carrier.

Thereafter, on the 2nd day of October, 1947, a summary judgment was entered, in which the defendant was authorized to amend its answer by inserting the words "for hire" in the second paragraph thereof, so that it thereafter alleged that the defendant "was engaged in its business of collecting, hauling, and disposing of garbage for hire for the general public within and in the vicinity of the City of Albuquerque." It was then adjudged that "plaintiff take nothing by reason of the matters and things alleged in the complaint, and that said complaint be and the same is, hereby dismissed."

On the 15th day of October, 1947 a motion for appeal was filed by plaintiff, and on the same day an order allowing an appeal to the Supreme Court of New Mexico was entered.

On the 20th day of October, 1947, plaintiff filed a request for permission to move to vacate the order of appeal without prejudice to its right to renew the motion. This motion was sustained and an order entered on the same day, which provided that the order "entered on October 15, 1947 (order granting appeal) be, and the same hereby is set aside and vacated without prejudice, however, to plaintiff's renewing its motion to appeal."

Thereafter, on the 20th day of October, 1947, the plaintiff moved the court to vacate its judgment for reasons stated; and on the 28th day of October, 1947, the plaintiff filed a supplementary motion for the same purpose, each of which was overruled, on October 20, 1947, and October 28, 1947, respectively. Thereafter on the 20th day of November, 1947, plaintiff moved for an appeal which was granted by order duly entered on that date.

The several motions and orders entered subsequently to the granting of the first appeal are as follows:

Motion:

"Comes now the plaintiff and respectfully shows the Court that there has heretofore been entered an order allowing an appeal in this Court from a summary judgment entered by the Court on October 2, 1947; that in order that the Court may consider whether or not the summary judgment order heretofore entered should be

vacated and to permit the plaintiff to file a motion requesting the vacating of said order, the plaintiff respectfully moves the Court that the order allowing an appeal in this cause be vacated and set aside by the Court, without prejudice to renewing the motion for an appeal."

"Order. This cause coming on for hearing on the motion of the plaintiff to vacate the order allowing an appeal to the Supreme Court, and the Court being duly advised in the premises;

Now, Therefore, It Is By The Court Ordered, Adjudged And Decreed: That the order allowing an appeal to the Supreme Court of the State of New Mexico, entered on October 15, 1947, be and the same hereby is set aside and vacated, without prejudice however to the plaintiff's renewing its motion to appeal."

"Motion. Comes now the plaintiff and moves the Court for an order vacating the summary judgment entered in this cause on October 2, 1947, and as grounds for said motion respectfully shows the Court:

"1. That Chapter 125 of the 1947 Session Laws of the State of New Mexico permits the bringing of this cause in the name of the personal representative of the deceased if any other person entitled to do so has not brought suit within nine (9) months after the death; that more than nine (9) months had passed without suit being brought at the time that the summary judgment was entered in this cause, and that the plaintiff was a proper party plaintiff to bring this suit; that there is attached hereto a certificate of the Clerk of the Court setting forth that no action had been commenced within nine (9) months after the death by any other person entitled to sue, which said certificate is marked 'Exhibit A', hereby referred to and made a part hereof."

"Supplementary Motion: Comes now the plaintiff and in supplement of his motion for an order vacating the summary judgment entered in this cause would respectfully show to the Court:

"1. That this cause of action was brought in the name of the personal representative of the deceased, whereas Section 21-104 of New Mexico Statutes 1941 Compilation provided that where the death was occasioned by reason of the negligence of a common carrier, the action should be brought by the wife. Under the law, the plaintiff has the right to file a petition substituting the wife as plaintiff, and the date of the substitution dates back to the time of the filing of the complaint.

"II. If the Court will vacate the summary judgment, the plaintiff will file its motion and petition for substitution of parties plaintiff, and this cause may then proceed to trial."

"Order. It Is Ordered that the motion filed herein on October 20, 1947, by plain-

tiff asking that summary judgment entered herein on October 2, 1947 be vacated, be and the same hereby is denied and overruled. To all of which the plaintiff excepts."

"Order: This Cause came on for hearing upon plaintiff's supplementary motion for an order vacating the summary judgment entered herein, and the Court having heard argument of counsel and considered trial briefs submitted by counsel raising among other things, the question of the Court's jurisdiction to hear and determine said motion, and the Court being of the opinion that, in view of this order denying said motion, it is unnecessary to decide the question of jurisdiction, and now being fully advised in the premises, It Is Ordered that said supplementary motion be, and the same is, hereby denied, to all of which the plaintiff is duly allowed an exception."

Thereafter the appellant moved for an appeal to the Supreme Court, and the following order allowing appeal was entered:

"Order Allowing Appeal. This cause coming on for hearing on motion of the plaintiff for an appeal from the summary judgment entered in this cause against him, and also from that certain order overruling supplemental motion to vacate summary judgment, and it appearing to the Court that said plaintiff has been aggrieved by said judgment.

"Now, Therefore, It Is By The Court Ordered that the plaintiff be and he hereby is allowed an appeal to the Supreme Court of the State of New Mexico from that said judgment entered in this cause on October 2, 1947, and also from that certain order overruling motion to vacate summary judgment entered on the 20th day of November 1947, and from that certain order overruling supplemental motion to vacate summary judgment entered on the 28th day of November 1947."

In moving to set aside the first order of appeal appellant's purpose was to remove this obstacle so that he might take advantage of the thirty day statute, hereinafter set out, for moving against the judgment.

A question of jurisdiction raised by the appellees will be first disposed of. It is asserted that after the order granting the first appeal was entered the district court was without jurisdiction to vacate or cancel it for the reason, as it is asserted, that the case was then pending in this court.

It is a general rule of law, applying where courts have terms, that the judgments, decrees, or other orders of courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and may, during that term, be set aside, vacated, modified or annulled by that court. Bronson, Executrix, v. Schulten, 104 U.S.

410, 26 L.Ed. 797; Zimmern v. United States, 298 U.S. 167, 56 S.Ct. 706, 80 L.Ed. 1118; Goddard v. Ordway, 101 U.S. 745, 25 L.Ed. 1040; 49 C.J.S., Judgments, § 229, page 436.

But in this state the district court has no terms, except for the trial of jury cases, Coulter v. Board of Com'rs, 22 N.M. 24, 158 P. 1086.

It was held in Crichton v. Storz, 20 N.M. 195, 147 P. 916; Fullen v. Fullen, 22 N.M. 122, 159 P. 952, and Coulter v. Board of Com'rs, supra, that because there were no terms of court for the trial of civil cases to the court, a final judgment rendered passed immediately from the further control of the court, except in two instances provided by statute, to wit, that of a default judgment and that of a judgment irregularly entered.

Subsequent to the decisions in the Crichton, Coulter and Fullen cases, Sec. 19-901, Sts.1941, Ch. 15, N.M.L.1917, was enacted, a part of which is as follows: "* * * Final judgments and decrees, entered by district courts in all cases tried pursuant to the provisions of this section shall remain under the control of such courts for a period of thirty (30) days after the entry thereof, and for such further time as may be necessary to enable the court to pass upon and dispose of any motion which may have been filed within such period, directed against such judgment * * *."

It was stated by this court in Kerr v. Southwest Fluorite Co., 35 N.M. 232, 294 P. 324, 325, that this statute "Restored to district courts, during the period of thirty days, the control which they formerly had over their judgments during term time; which control had been held destroyed as the effect of abolishing terms of court except for jury cases."

And we said in Gilbert v. New Mexico Const. Co., 35 N.M. 262, 295 P. 291, 292: "What we have here to determine is the legislative intent. We recently suggested in Kerr v. Southwest Fluorite Company [35 N.M. 232], 294 P. 324, that the purpose was to restore to the district courts that control over their judgments during term time which they had been held to have lost when the same section in its original form did away with terms, except for jury cases. Pursuing that suggestion to determine the extent of the control restored, we find that in Fullen v. Fullen, 21 N.M. 212, 153 P. 294, 300, it was said to be 'plenary' and to include vacating, setting aside, modifying and annulling judgments, 'upon the theory that until the term closed the whole matter of the determination of the rights of litigants rested in the breast of the court and, theoretically at least, all judgments became final as of the last day of the term.' See

also, Henderson v. Dreyfus, 26 N.M. 262, 191 P. 455; Id., 26 N.M. 541, 191 P. 442."

It is held by the great weight of authority that an order granting an appeal may be vacated by a subsequent order of the same court, if made within the time that judgments, orders and decrees are under the control of the court that entered them. Goddard v. Ordway, 101 U.S. 745, 25 L.Ed. 1040; Brewster v. Springer, 79 Or. 88, 154 P. 418; Miller v. Prout, 32 Ida. 728, 187 P. 948; Doullut v. Rush, 142 La. 460, 77 So. 116; Hydraulic Press Brick Co. v. Bambrick Bros. Const. Co., Mo.App., 211 S.W. 93; Bronson v. Schulten, 104 U.S. 410, 26 L.Ed. 797; McCanless v. State, ex rel. Hamm, 181 Tenn. 308, 181 S.W.2d 154, 153 A.L.R. 832; Shaw v. Addison, 236 Iowa 720, 18 N.W.2d 796; Cook v. Smith, 58 Iowa 607, 12 N.W. 617; Lee v. Fowler, 263 Mass. 440, 161 N.E. 910; Blackburn v. Knight, 81 Tex. 326, 16 S.W. 1075; Thompson v. Towle, 98 Conn. 738, 120 A. 503; Niedringhaus v. Niedringhaus Inv. Co., Mo.App., 54 S.W.2d 79. The Missouri court in the Niedringhaus case cites many authorities to the effect that the district court may set aside its judgment or order of appeal after the appeal is taken.

In Goddard v. Ordway, the Supreme Court said: "The allowance of the appeal to Ordway was a judicial act of the court in term time. The order was entered on the minutes as part of what was done in the cause by the court while in session. In Ex Parte Lange, 18 Wall. 163, 21 L.Ed. 872, we said that 'The general power of the court over its own judgments, orders and decrees, in both civil and criminal cases, during the existence of the term at which they are first made is undeniable * * *.' As part of the 'roll of that term,' they are deemed to be 'in the breast of the court during the whole term.' * * * Under this rule, we think it clear that the court had the power during the term, at the request of Ordway, to set aside the order of allowance and thus vacate the appeal which had been granted in his favor. This was done before any adverse rights had intervened. We are unable to see how the allowance of an appeal differs in this respect from any other judicial order made in the cause. If the one is subject to revocation or amendment while the term continues, so, as it seems to us, must be the other.

"There is nothing in this which interferes with the rule that, where an appeal is allowed, all jurisdiction of the suit appealed is transferred to this court. Here the question is, whether an appeal was, in legal effect allowed. It is true an order of allowance was granted and entered on the minutes of the court. So long as this order continued in operation it bound the parties; but as it remained subject to the judicial power of the court during the term at which it was entered, its revocation va-

cated what had been done, and left the decree standing with no appeal allowed * * *. Neither one of the parties was finally discharged from the court until the term ended, and each was bound to take notice of whatever was done affecting his interests in the suit until a final adjournment actually took place."

To the same effect are the following cases:

"* * * An appeal from a judgment does not divest the jurisdiction of the trial court to pass upon or to grant a motion for a new trial, which operates to vacate the judgment. * * *

"The proceeding under this staute is an independent proceeding and exists concurrently with the right of appeal from the judgment. Any order made pursuant to such a proceeding does not operate to extend the time for appeal from the judgment. The proper course is to appeal from the judgment if it is desired to have the judgment reviewed and to apply to the trial court for relief under this section, notwithstanding such appeal." Miller v. Prout, 32 Idaho 728, 187 P. 948, 949.

"It is well settled that the circuit court has jurisdiction of a cause, and power to control and set aside its judgments and orders, during the term at which the judgment was rendered or the orders made, and the effect of the action of the trial court, in setting aside the judgment at the same term at which it was rendered, had the effect of vacating the appeal from that judgment, and when it entered up a new judgment at the same term during which the first was entered, as appears by the certificate of the clerk, and as learned counsel for appellant practically admits was done, the appeal from this first judgment fell, and could be taken only from the final judgment, and it is from a final judgment alone that an appeal lies, save in some exceptional cases, as on interlocutory judgments and the like, to which classes this did not belong." Hydraulic Press Brick Co. v. Bambrick Bros. Const. Co., Mo.App., 211 S.W. 93, 94.

"* * * a trial court may, within the time limited therefor, set aside a judgment and amend the final determination by making and filing findings of fact and of law and render judgment thereon, and that it is not only within the power of that court to make the correction, notwithstanding an appeal may have been taken and not heard, but that the duty devolves upon it to do so, in order to save the expense of an appeal, which without such amendment must necessarily result in a reversal of the judgment." Brewster v. Springer, 79 Or. 88, 154 P. 418, 419.

"* * * We regard the proposition as established by our decisions that the district court has such power and control over

its judgments as that during the term at which any judgment may be rendered it may lawfully set aside, reform, amend, or correct it, and this, though an appeal or a writ of error bond has been filed by the party supposing himself aggrieved by the judgment. * * * If a court has the power to set aside and reform its judgment, we see no reason why it should not have the power to set it aside and render it for the opposing party, during the term, as was done in this case." Blackburn v. Knight, 81 Tex. 326, 16 S.W. 1075, 1078.

But it is argued that the question was decided in Abeytia v. Spiegelberg, 20 N.M. 614, 151 P. 696, 697. In that case appellee moved in the district court for a dismissal of the appeal seventy days after it was granted. We said:

"* * * If it be conceded that the district court, by the allowance of the appeal, lost jurisdiction of the cause, except for certain specified purposes, such, for instance, as the settling and signing of the bill of exceptions, statutory provisions governing which exist, it must necessarily follow that the trial court could not entertain a motion to dismiss the appeal, and that the clerk of that court, by accepting and filing an unauthorized motion, could not make such motion a part of the record on appeal, for such motion would not be a paper 'regularly filed in a cause with the clerk of the district court,' under section 4491, Code 1915.

"Section 4471, Code 1915, provides for the allowance of appeals by the district courts. No condition precedent is attached, except an application to the court and the suing out and serving of a citation, where the appeal is not taken in open court. Upon the allowance of the appeal, the case is in contemplation of law pending in this court. In the case of Canavan v. Canavan, supra [18 N.M. 468, 138 P. 200], we said: 'Under our statute, however, the filing of the bond within the specified time is not necessary to our jurisdiction. It attaches upon the allowance of the appeal or the issuance of the writ of error.'

"This statement of the law is amply supported by the adjudicated cases. While under many of the cases the giving of an appeal bond is jurisdictional, and must precede the allowance of an appeal, the courts hold that where the requisite steps are taken, and the appeal is allowed the jurisdiction is transferred, or, as in some cases the filing of the bond follows the allowance of the appeal; but such bond is essential to the jurisdiction of the appellate court."

We stated in Veale v. Eavenson, 52 N.M. 102, 192 P.2d 312, 314: "Upon the entry of the order allowing an appeal and the giving of the supersedeas bond the trial court lost jurisdiction of the case except for the

purpose of perfecting the appeal to this court. In contemplation of law it was pending here."

The question here posed was not presented or discussed in the Abeytia case, nor could it have been. At the time of that decision Sec. 19-901, N.M.Sts.1941 had not been enacted. In Veale v. Eavenson, supra, the question was whether the court erred in refusing to consider requested findings of fact and conclusions of law filed eighty-six days after an appeal had been allowed and supersedeas bond filed. Obviously the trial court ruled correctly. The case was pending in this court by virtue of the order of appeal. The trial court had lost jurisdiction except for the purpose of appeal to this court; and the jurisdiction over it, with the exception stated, remained in this court from the entry of the order allowing appeal and filing supersedeas as this court stated.

The statute, 19-901, remained in force as a rule of court by virtue of the following statutes:

"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. * * *" Sec. 19-301, N.M.Sts.1941.

"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." Sec. 19-302, N.M.Sts.1941.

The following two rules are to be construed with rule 19-901, to wit:

"Within three months from the entry of any final judgment in any civil action, any party aggrieved may appeal therefrom to the Supreme Court. * * *" Supreme Court Rule V, 1941 Comp. § 19-201.

"An appellant or plaintiff in error, not having superseded the judgment, such appeal not having been docketed in the Supreme Court, may abandon his appeal or writ of error by filing notice thereof in the court allowing such appeal or issuing such writ of error, and an order shall be thereupon entered vacating the allowance of such appeal or writ of error. The clerk of the Supreme Court shall forthwith transmit to the clerk of the district court a certified copy of any order vacating the allowance of a writ of error.

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

Supreme Court Rule XI, 1941 Comp. § 19-201.

By promulgating Supreme Court Rule XI (which it seems is a rule of practice and procedure for district court in cases of appeal), district courts are authorized to vacate orders granting appeal, this court's jurisdiction notwithstanding.

We have the exact situation here. The district court, with no exception, is given control by rule of court over its orders, judgments, and decrees for thirty days after entry. It was never contemplated that this authority should be nullified by an appeal to this court. Frequently both parties are dissatisfied with a judgment. One may desire to appeal, the other move against the judgment. Could the latter be deprived of his statutory right to move against the judgment by the former's hasty appeal? No such injustice was contemplated. The rule authorizing appeals must be construed with rule 19-901, supra, under which district courts may vacate any order, judgment or decree, including an order allowing an appeal, if it interferes with the district court's authority granted by rule 19-901, supra.

We stated in Pankey v. Hot Springs Nat. Bank, 42 N.M. 674, 84 P.2d 649, 653: "There has been a constant endeavor of this court with the assistance of advisory committees selected by the court from the Bar of the state, to liberalize our rules of appellate procedure to the end that causes brought here for review may be heard upon their merits if possible."

Our rules will be liberally construed to effectuate that end.

We are of the opinion that the trial court had jurisdiction to vacate the first order granting an appeal to this court for the purposes stated, if not generally; a question not decided.

This action was brought under the following statutes:

"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." § 24-101, N.M.Sts.1941.

"Every action instituted by virtue of the provisions of this and the preceding section must be brought within one (1) year after the cause of action shall have accrued." § 24-102, N.M.Sts.1941.

"Every such action as mentioned in section 1821 (§ 24-101) shall be brought by

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

"First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; * * *." § 24-103, N. M.Sts.1941.

The appellee asserts that it is a common carrier and that if it is liable in damages for the death of deceased, the suit should have been brought under Sec. 24-104, N.M. Sts.1941, which is as follows: "Whenever any person shall die from any injury resulting from, or occasioned by the negligence, unskillfulness or criminal intent of any officer, agent, servant or employee, whilst running, conducting or managing any locomotive, car, or train of cars, or of any driver of any stage coach or other public conveyance, while in charge of the same as driver; and when any passenger shall die from injury resulting from, or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stage coach, or other public conveyance, the corporation, individual or individuals, in whose employ any such officer, agent, servant, employee, engineer or driver, shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stage coach, or other public conveyance, at the time any injury is received, resulting from, or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying, the sum of seven thousand five hundred dollars ($7,500) which may be sued and recovered; first, by the husband or wife of the deceased; or second, if there be no husband or wife, or if he or she fails to sue within six (6) months after such death, then by the minor child or children of the deceased; * * *."

As the deceased had a wife the remainder of the statute is immaterial to a decision.

In Sanchez v. Contract Trucking Co., 45 N.M. 506, 117 P.2d 815, we had under consideration the construction of this section, 24-104, and held that the words "public conveyance" were therein used in the sense of "common carrier." We quoted with approval from Drakesmith v. Ryan, Mo.App., 57 S.W.2d 727, 729, as follows: "* * * Rather, we think it was the purpose of the Legislature to use the term 'public conveyance' in the sense of 'common carrier,' and to make the statute cover carriers by rail, water, and land. In this instance the trucks of defendant were properly classed as automobiles or motorcars; and, inasmuch as they were also public conveyances, in that they were used in defendant's regular business to transport freight for hire, the application of the statute seems established."

It is manifest that if the appellee is not a common carrier in the sense this phrase is used in the Sanchez case then the suit was correctly brought by the deceased's administrator. White v. Montoya, 46 N.M. 241, 126 P.2d 471.

A common carrier under the New Mexico statute as it existed in 1941, at the time we handed down our opinion in Sanchez v. Contract Trucking Company, supra, was defined as follows: "The term 'common motor carrier' when used in this act, shall mean any person who or which undertakes, whether directly or by lease or any other arrangement, to transport passengers or property, or any class or classes of property, for the general public, by motor vehicle for hire over regular routes. * * *" Sec. 68-1302, N.M.Sts.1941.

The following definitions have been often used: "A common carrier is one who, by virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him; and everyone who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier." Jackson Architectural Iron Works v. Hurlbut, 158 N.Y. 34, 52 N.E. 665.

But it is said to be too broad; that a better definition is,

"One who offers to carry goods for any person between certain termini or on a certain route, and who is bound to carry for all who tender him goods and the price of carriage." The Neaffie, 17 Fed.Cas. page 1260, No. 10,063, 1 Abb.U.S. 465.

An early definition of a common carrier, is one who undertakes as a public employment the transportation of goods for persons generally from place to place, to be delivered to the place appointed, for hire or reward, and with or without a special agreement as to price. McHenry v. Philadelphia W. & B. R. Co., (Del.) 4 Har. 448;

Ace-High Dresses v. J. C. Trucking Co., 122 Conn. 578, 191 A. 536, 112 A.L.R. 86.

In State v. Diamond Tank Transport Co., 2 Wash.2d 13, 97 P.2d 145, a Washington statute similar to ours was construed and the Washington court held that one engaged in collecting garbage in the city was a contract carrier and under the definition of "garbage" some of the things mentioned as garbage have a property value. It was held, however, that a garbage collector was a contract carrier and therefore could not be a common carrier, Also, in City Sanitary Service Co. v. Rausch, 10 Wash.2d 446, 117 P.2d 225, it was held that a company which entered into a contract with the city in which the company was granted exclusive right to collect garbage within the city for a certain period, pursuant to an ordinance, was a contract carrier.

In Masgai v. Public Service Comm., 124 Pa.Super. 370, 188 A. 599, 600, it was held that under a Pennsylvania law defining a common carrier as including "any and all common carriers * * * engaged for profit in the conveyance of * * * property * * * between points within this Commonwealth," that "common carrier" included one who hauls garbage for the public by dump trucks. The court stated: "The character of appellant's service is not affected by the fact that but a fraction of the public have need for a dump truck. Within the field of those who need this service, it is of a public character. Nor can we accept the argument of appellant that because his dump trucks are frequently used in the haulage of garbage, ashes, cinders, and other refuse to the dump or incinerator, that such materials are not property as contemplated by the common carrier section of the Public Service Company Law. Although the owner of such materials may regard them as of no value, still the right to their possession and the need for their disposal are within the control of the individual owner. All of these materials have certain valuable uses under varied circumstances, and even though the owner desires to dispose of or destroy such materials, the right of property continues until disposed of or destroyed. In performing such disposal service, appellant was clearly engaged in the business of a common carrier."

Notwithstanding "garbage," that is removed by a garbage collector for hire, may at times have something of value in it; it is refuse, and worthless to the owner. He pays to have it removed from his premises as worthless to him, not as property or goods to be delivered to an owner or consignee. Garbage collected to be removed and thrown away insofar as the owner is concerned, is not goods or personal property in the sense used in the definition of "common carrier." It must be carried for a consignor to a consignee as goods or something of value.

Whether in the Sanchez case we had reference to our statutory, or the common law definition of "common carrier," it is immaterial. The appellee was not a common carrier in either sense. He was merely a contract carrier as held by the Washington court.

The judgment of the district court is reversed and cause remanded to the district court with instructions to proceed with its trial not inconsistent herewith.

It is so ordered.

LUJAN, SADLER, McGHEE and COMPTON, JJ., concur.

197 P.2d 884

ARLEDGE v. MABRY, Governor, et al.

No. 5144.

Supreme Court of New Mexico.

Sept. 21, 1948.

Rehearing Denied Sept. 27, 1948.

A. T. Hannett, H. O. Waggoner, and Stanley W. P. Miller, all of Albuquerque, Robert W. Ward, of Lovington, for informant.

C. C. McCulloh, Atty. Gen., for respondents.

Adams & Chase, Martin A. Threet, and Harry O. Morris, all of Albuquerque, for D. A. (Danny) Macpherson, real party in interest.

D. A. Macpherson, of Albuquerque, pro se.

Everett M. Grantham, U. S. Atty., of Santa Fe, amicus curiae.

SADLER, Justice.

The primary question for decision is whether that portion of Precinct No. 17 in Sandoval County, acquired by the United States through condemnation proceedings

and incorporated into what is popularly known as the Los Alamos Project, is "in New Mexico" within the true meaning of Art. 7, § 1 of the New Mexico Constitution defining the qualifications of an elector entitled to vote at all elections for public officers. Incidentally, the right to vote of residents of other portions of the lands comprising the Los Alamos Project lying within Precinct No. 17, as affected by the fact of acquisition for its use from areas of the public domain, will be discussed and determined. And, finally, but for determination only in the event of a holding that the portion of said precinct so acquired through condemnation is not "in New Mexico" within contemplation of the constitutional provision mentioned, whether conduct of an election at which all polling places for the precinct are located in the condemned area, invalidates such election.

The questions arise out of a contest between R. F. Deacon Arledge, the Informant, and D. A. "Danny" Macpherson, his opponent, rival candidates in the primary election of June 8, 1948, for the democratic nomination for the office of Judge of the District Court of the Second Judicial District, Division No. 2. The Informant, appearing upon the face of the returns to have received the larger number of votes, was declared to be the nominee by State Canvassing Board and a certificate of nomination was duly issued to him. Thereafter, both candidates having requested a recount of the ballots in certain designated precincts and voting divisions of the three counties comprising the Second Judicial District, the vote received by the candidates mentioned, after recount of the votes, was retabulated by the respective Boards of County Commissioners, acting as county canvassing boards. The result disclosed that Informant's previous majority was overcome and a majority of 78 votes accumulated in favor of his opponent.

The corrected result of the primary election for democratic nomination for the office mentioned having been certified to the State Canvassing Board composed of the Governor, Chief Justice and Secretary of State, the officers named were about to meet as the State Canvassing Board, recanvass the amended returns for the nomination involved, and as Informant had good reason to believe, cancel Informant's certificate of nomination and issue another one to his rival candidate. Thereupon, the Informant applied to this Court for a writ of mandamus against the above named state officers, composing in an ex-officio capacity the State Canvassing Board, as respondents, commanding them to recanvass the returns in the office of the Secretary of State for the nomination mentioned, employing the amended returns resulting from the recount, but omitting and excluding therefrom returns from all voting divisions in Precinct No. 17 of Sandoval County. It is argeed that if the returns

from said precinct be ignored, the Informant is rightfully entitled to the certificate of nomination which he now holds. We authorized issuance of an alternative writ and now the matter is before us on the writ and answer with all facts essential to a decision covered by written stipulation filed herein.

It could only result in confusion to endeavor to detail in this opinion the various steps by which the United States acquired title to the lands embraced in Precinct No. 17 of Sandoval County, New Mexico. Hence, only the basic, ultimate facts touching this phase of the case and deemed essential to our decision will be stated. Suffice it to say that the Los Alamos Project of the Atomic Energy Commission is a tract of land, located partly in Sandoval County and partly in Santa Fe County, New Mexico, containing approximately 68,991.30 acres. Title to all this land is held by the United States of America with custody and use of the land in United States Atomic Energy Commission, an agency of the government. Precinct No. 17 (Los Alamos) Sandoval County, New Mexico, is a tract of land within the Los Alamos Project of the Atomic Energy Commission. It contains approximately 580.29 acres and lies wholly within Sandoval County, New Mexico. Title to different parcels of this tract was acquired by the government in two different ways.

Title to an area comprising 172.90 acres within Precinct No. 17 was acquired by the United States, together with a large additional quantity of land, from Mexico in 1848 under the terms of the Treaty of Guadalupe Hidalgo, 9 Stat. 922. It thus became a part of the public domain and enjoyed that character when on January 6, 1912, 37 Stat. 1723, New Mexico was admitted into the Union as a sovereign state. It came immediately under administration of the Department of the Interior following its acquisition and in 1905 this tract, along with other lands, was established as a forest reserve. Subsequently, in 1905 the administration of forest reserves was transferred by congress to the Department of Agriculture. This tract remained as a part of the national forest reserves, finally being incorporated into and becoming a part of Santa Fe National Forest. It was such when the custody, use and occupancy of this and other lands, by agreement between governmental departments passed, first, to Corps of Engineers of United States Army and, finally, by Executive Order No. 9816 of the President, 42 U.S.C.A. § 1802 note, under authority of the Atomic Energy Act of 1946, Public Law 585, 79th Congress, 42 U.S.C.A. § 1801 et seq., into the custody, management and control of the Atomic Energy Commission. So stood the title, control and management of said tract of 172.90 acres at all times material to this case.

The United States acquired title to the remaining 407.39 acres of Precinct No. 17 on June 18, 1943, through condemnation proceedings instituted against Los Alamos Ranch School, Inc., a corporation, in the United States District Court for the District of New Mexico. These lands, along with others included in the same condemnation proceeding, were acquired by the United States on behalf of the War Department and devoted immediately to the use and assigned to the custody of Manhattan District Corps of Engineers of the United States Army. Thereafter on December 31, 1946, and by the same Executive Order No. 9816, mentioned above, the President of the United States under authority of Atomic Energy Act of 1946, transferred this 407.39 acres, along with all other property, real or personal, owned or in the possession, custody or control of the Manhattan Engineer District, War Department, to the Atomic Energy Commission. Such was status of the title, control and management of said tract of 407.39 acres at all times material to this proceeding.

It having been provided by § 355, Rev. Stat., as amended by the Act of February 1, 1940, 54 Stat. 19, and by the act of October 9, 1940, 54 Stat. 1083, 40 U.S.C.A. § 255, in effect, that unless and until the United States has accepted jurisdiction over lands acquired or in which any interest shall have been acquired after February 1, 1940, it shall be conclusively presumed that no such jurisdiction has been accepted, the Secretary of War under date of November 19, 1943, by letter addressed to Honorable John J. Dempsey, then Governor of New Mexico, at Santa Fe, gave notice that the United States was accepting and thereby did accept exclusive jurisdiction over all lands acquired by it for military purposes within the state of New Mexico, title to which had theretofore vested in the United States, and over which exclusive jurisdiction had not theretofore been obtained. This letter from the Secretary of War further gave notice that:

"Exclusive jurisdiction is also accepted over all lands reserved from the public domain for military purposes, over which such jurisdiction has not heretofore been obtained."

Subsequently, under date of August 21, 1944, the Secretary of War addressed another letter to the Honorable John J. Dempsey, Governor of New Mexico, at Santa Fe, referring to his letter of November 19, 1943, and to another letter of identical language from the Secretary to Governor Dempsey dated August 8, 1944, the letter of August 21st purporting to give a list of all military reservations over which exclusive federal jurisdiction had been accepted, "comprising lands acquired and/or reserved from the public domain as of August 8, 1944." Included in the list submitted

was "Los Alamos Demolition Range" in Sandoval County, which embraces the lands of Precinct No. 17 in said county.

It was later discovered by the Secretary of War that he had made an error in compiling the list of lands over which United States accepted and claimed exclusive jurisdiction. Accordingly, under date of September 7, 1944, he addressed another letter to the Honorable John J. Dempsey, Governor of New Mexico, at Santa Fe, reading:

"Reference is made to my letter of August 21, 1944, furnishing a list of military reservations in the State of New Mexico comprising lands acquired or reserved from the public domain as of August 8, 1944.

"Exclusive jurisdiction has been obtained over all land in the State of New Mexico acquired in fee simple by the United States for military purposes prior to August 8, 1944, by purchase, condemnation, or donation; also over all lands set apart from the public domain for the Fort Wingate Military Reservation and the Fort Bliss Target Range.

"It has been discovered that in compiling the list furnished with the letter of August 21, 1944, certain military reservations, in addition to Fort Wingate and Fort Bliss Target Range, were included which consisted entirely of public domain land. Since the laws of the State of New Mexico do not cede exclusive jurisdiction over land reserved from the public domain for military purposes, excepting lands so reserved for the Fort Wingate Military Reservation and the Fort Bliss Target Range, it was not the intention of this Department to include in the list such reservations. Therefore, in order to correct your records, there has been prepared and is inclosed a new list of military reservations in the State of New Mexico which are wholly or in part under the exclusive jurisdiction of the United States.

"It is regretted that the previous list furnished you included lands over which exclusive jurisdiction had not been obtained."

Each of the ballot boxes in use at said primary election on June 8, 1948, in Precinct No. 17 of Sandoval County, contained ballots cast by persons who resided within the National Forest Area (public domain lands) within said precinct. They also contained ballots cast by persons who resided on lands within the Condemned Area within the precinct, some of whom were residents of New Mexico, residing on land now within such precinct, prior to the time title to the Condemned Area within such precinct was acquired by the United States and prior to the date that the letters from the Secretary of War to the Governor of New Mexico, above referred to, were written or received.

A portion of the lands contained in the Los Alamos Project, including part of Precinct No. 17, is devoted exclusively to scientific and technical purposes, being separated from the residential area and other parts of the project. No persons reside on the area so devoted to scientific and technical purposes and none of the voting places in the primary election were located there. All of the polling places employed in the primary election of June 8, 1948, were located within the residential and business areas of the town of Los Alamos, upon lands acquired by condemnation, as aforesaid.

The condemned area within Precinct No. 17 was acquired by the U. S. Government for the United States Army in 1943 at a time when the United States was engaged in war. At the time of said election and at the present time, it is operated by the Atomic Energy Commission for the purpose of providing community and administrative facilities in connection with operation of the project designated as "Los Alamos Project," which in turn is operated for one or more of the purposes set forth in Chapter 14, Title 42, §§ 1801 to 1819 inclusive, U.S.C.A., and Executive Order No. 9816 signed by the President of the United States of America dated December 31, 1946.

Precinct No. 17 (Los Alamos), Sandoval County, is an unincorporated community of approximately 8000 inhabitants located partly upon lands acquired by the United States by condemnation from private owners, and partly upon lands previously within a national forest. Certain community functions frequently performed by municipal corporations, such as fire protection, electric, water and gas utility service, sewage disposal, garbage collection, and other matters, are at present conducted by the Zia Company, a corporation chartered under the laws of New Mexico, having its principal place of business at Los Alamos, and operating under a cost plus fixed fee contract with the United States, executed by and under the administration of the manager's office of Santa Fe Directed Operations, U. S. Atomic Energy Commission.

This community, known as Los Alamos and as Precinct No. 17, Sandoval County, is within a larger area, all of which is guarded by armed guards in uniform employed by the Atomic Energy Commission, and for which passes are required to enter. Within this larger area there are other restricted areas for which an additional pass is required to enter. Passes are granted to persons having business within said precinct, or desiring to visit persons who reside there. The Government does not interfere (except insofar as is necessary for security reasons and is consistent with its position as land owner) with the conduct in the community, either by persons who reside within Precinct No. 17 or

those who do not, of such matters as the following: sale of insurance, sale and distribution of newspapers, and the conducting of political campaigns.

Persons residing in Precinct No. 17, including those who reside on the condemned area therein and who voted in the Democratic primary election on June 8, 1948, have at all times material hereto paid or borne the incidence of New Mexico income taxes, sales taxes, gasoline and tobacco taxes; they have obtained New Mexico license plates for their private automobiles and resident hunting and fishing licenses. A deputy registrar of the Bureau of Vital Statistics has an office within the precinct and reports births and deaths therein to the New Mexico Bureau of Vital Statistics; they obtain marriage licenses from the County Clerk of Sandoval County for marriages conducted in said Precinct No. 17. A United States Commissioner holds court outside of the precinct in a building located immediately outside of the main gate of the project and tries cases involving federal offenses committed within the precinct. This commissioner does not attempt to enforce any state laws within the precinct. So far as the parties to this stipulation are informed, there have been no prosecutions by state officials for violations of state laws committed within the precinct, nor do the parties hereto have knowledge of the occurrence of any such violations.

Concessionaires operating various business enterprises within Precinct No. 17 and upon the condemned area therein, returned for assessment, and the county assessor of Sandoval County assessed for taxation during the year 1948, their personal property used in connection with said businesses.

With the foregoing facts in mind, we seek first an answer to the primary question propounded at the outset of this opinion, namely, whether that portion of Precinct No. 17 in Sandoval County, acquired by the United States through condemnation proceedings and incorporated into the Los Alamos Project, is "in New Mexico" within the meaning of Art. 7, § 1, of the New Mexico constitution defining the qualifications of an elector entitled to vote at all elections for public officers. If we could give an affirmative answer to this primary question, answers to the other two which were put along with this one, would follow as a matter of course. However, we may not so easily resolve our labors. Controlling precedents, affording unanimity of judicial opinion seldom encountered, convince us that a negative answer to the primary question submitted is called for.

There are three principal methods by which the United States may acquire land within a state. First, the method known as the constitutional method, as provided by Clause 17, § 8, Art. 1, of the federal constitution. Second, by purchase

without obtaining the consent of the state. Third, where the land acquired by the government was the property of the state, such acquisition being by a cession by the state to the federal government in the nature of a gift. Fort Leavenworth R. R. Co. v. Lowe, 114 U.S. 525, 5 S.Ct. 995, 29 L.Ed. 264; Lowe v. Lowe, 150 Md. 592, 133 A. 729, 46 A.L.R. 983. Different consequences follow acquisition under the three means permitted. When acquisition is made in the constitutional method, ordinarily exclusive jurisdiction for all purposes over the lands acquired attaches in favor of the federal government, with the single exception of the right in the state to serve civil and criminal process through its officers on such land relating to acts and offenses outside such land. This concurrent right in the state usually is recited in acts of cession passed by the legislature of the state in which the land lies. We have such an act in this state which will be referred to presently.

The constitutional provision mentioned is U.S.Const.Art. 1, § 8, cl. 17, giving congress power, among other things:

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other needful Buildings."

The New Mexico statute whereby consent was given to the United States to acquire any land in New Mexico under the clause of the federal constitution quoted above for sites for arsenals and other purposes was enacted in 1912 as L.1912, c. 47, the portions thereof material to this controversy, reading:

"The consent of the state of New Mexico is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the Constitution of the United States to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this state required for sites for custom-houses, court-houses, post-offices, arsenals, or other public buildings whatever, or for any other purposes of the government.

"Exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this state; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands." 1941 Comp. §§ 8-202 and 8-203.

Although the United States constitution, in the clause quoted, mentions acquisition by purchase, it has long been settled that the same consequences attach from a jurisdictional standpoint where land is acquired through condemnation proceedings. Indeed, land so acquired is deemed to have been secured by purchase and the same consequences attach. Kohl v. United States, 91 U.S. 367, 23 L.Ed. 449; Hanson Lumber Co. v. United States, 261 U.S. 581, 43 S.Ct. 442, 67 L.Ed. 809; United States v. Becktold Co., 8 Cir., 129 F.2d 473; United States v. Beaty, D.C., 198 F. 284; United States v. 2.74 Acres of Land, D.C., 32 F.Supp. 55. Furthermore, the term "exclusive legislation" employed in said Clause 17 of the federal constitution is held to be synomymous with and to carry the same meaning as if the term "exclusive jurisdiction" had been employed. Fort Leavenworth R. R. Co. v. Lowe, supra; Surplus Trading Company v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091; James v. Dravo Contracting Co., 302 U.S. 134, 58 S.Ct. 208, 82 L.Ed. 155, 114 A.L.R. 318; Johnson v. Morrill, 20 Cal.2d 446, 126 P.2d 873.

In a variety of situations, other than that involving the right of residents of ceded land to exercise the elective franchise, both state and federal courts have held the jurisdiction of the United States to be full and complete, or as the selected word, "exclusive", implies. For instance, in People v. Hillman, 246 N.Y. 467, 159 N.E. 400, it was held that an accused charged with a robbery alleged to have been committed on a road through the West Point Military Reservation was not subject to prosecution in the state courts. In Commonwealth v. King, 252 Ky. 699, 68 S.W.2d 45, a county court was denied jurisdiction to try a bank official charged with making false entries upon the books of a bank operating on the Ft. Knox Military Reservation. In Lowe v. Lowe, supra, the Supreme Court of Maryland held that the plaintiff in a divorce suit, the only claim to residence being the fact of domicile on a military reservation, could not meet the statutory requirement of residence in the state essential to maintaining his action.

In Standard Oil Co. v. People of State of California, 291 U.S. 242, 54 S.Ct. 381, 383, 78 L.Ed. 775, the court ruled that gasoline sold on the Presidio Military Reservation was not subject to tax. The court said:

"A state cannot legislate effectively concerning matters beyond her jurisdiction and within territory subject only to control by the United States."

In the case of Johnson v. Yellow Cab Transit Co., 321 U.S. 383, 64 S.Ct. 622, 88 L.Ed. 814, in perhaps the latest expression by the United States Supreme Court on the subject, it was held that seizure at

Oklahoma City, Oklahoma, by state enforcement officers of a shipment of liquor enroute from East St. Louis, Illinois, to Officers Club, as consignee, at Ft. Sill, Oklahoma, was illegal and its return to the carrier was ordered. The basic ground of decision was exclusive jurisdiction in the United States over Ft. Sill Military Reservation.

The foregoing citations represent cases where exclusive jurisdiction in the United States over lands acquired in the constitutional method within the borders of states was fully sustained in respect of acts done or attempted not involving exercise of the elective franchise. However, there are several precedents in the books where that issue was involved. Without exception, under circumstances similar to those here present, the courts have denied the claimed right upon the ground of want of residence within the state by the person asserting it. Sinks v. Reese, 19 Ohio St. 306, 2 Am.Rep. 397; In re Town of Highlands, Sup., 22 N.Y.S. 137; Opinion of the Justices 1 Metc. 580, 42 Mass. 580; McMahon v. Polk, 10 S.D. 296, 73 N.W. 77, 47 L.R.A. 830; State v. Willett, 117 Tenn. 334, 97 S.W. 299; Herken v. Glynn, 151 Kan. 855, 101 P.2d 946, on this point approved in the late case of Miller v. Hickory Groves School Board, 162 Kan 528, 178 P.2d 214; State ex rel. Parker v. Corcoran, 155 Kan. 714, 128 P.2d 999, 142 A.L.R. 423.

The status of lands over which the government of the United States, by cession from a state, has acquired exclusive jurisdiction, except for concurrent right to serve civil and criminal process in relation to offenses and causes of action originating outside such lands, is well stated by the courts in the following cases, to-wit: Collins v. Yosemite Park Co., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502, and Yellowstone Park Transportation Co. v. Gallatin County, 9 Cir., 31 F.2d 644. In the Collins case, the court said [304 U.S. 518, 58 S.Ct. 1016]:

"Except as to this reserved jurisdiction, California 'put that area beyond the field of operation of her laws.'"

The United States Circuit Court of Appeals for the Ninth Circuit in Yellowstone Park Transportation Co. v. Gallatin County, supra [9 Cir. 31 F.2d 645], said:

"In other words, after the date of cession, *the ceded territory was as much without the jurisdiction of the state making the cession as was any other foreign territory,* except in so far as jurisdiction was expressly reserved. For this reason, the taxing laws of the state of Montana are wholly inoperative in that portion of the Yellowstone National Park within the territorial limits of the state." (Emphasis ours.)

And, in Consolidated Milk Producers for San Francisco v. Parker, 19 Cal.2d 815,

123 P.2d 440, 441, where the question was whether State Director of Agriculture had jurisdiction to regulate milk distribution on the Presidio Military Reservation, the court said:

"California ceded exclusive jurisdiction over the Presidio to the United States by Act of March 2, 1897 (Cal.Stats. 1897, page 51) reserving only the right to execute civil and criminal processes therein. (Citations omitted). *The area thus became a federal territory* removed from jurisdiction of the state." (Emphasis ours.)

The same declaration occurs in some of the so called "vote cases" since, indeed, all rest their decisions on the hypothesis that the land on which residence is claimed is outside the state territorially, within contemplation of law, so far as intended by the constitutional requirement of residence as a condition of the right to vote. In the case of In re Town of Highlands, supra [22 N.Y.S. 139], the court said:

"We turn to the question of the right of these people to vote. That has been decided in numerous cases. In the case of Com. v. Clary, 8 Mass. 72, the supreme court of Massachusetts held that the people on the government property at Springfield had no right to vote, and the question also arose, and was decided, in a case reported in 1 Metc. 583, (Supp.) * * * *So, as Judge Field says, there is a uniform current of authority from the beginning of the government down to the decision of this* (Ft. Leavenworth) *case in 1884,—all to the effect that this territory is not part of the state.* (Emphasis ours.) * * *

"We all know that the District of Columbia was ceded by the state of Maryland to the United States, and no resident of the District votes anywhere; and of course a resident on the West Point property occupies the same relation to the government and the state of New York as a resident of the District of Columbia does to the state of Maryland. He has no right to vote. The effect of this is to exclude from the right to vote persons who have no other qualifications as residents except a residence on the West Point property."

Counsel for respondents, and more especially Honorable Everett M. Grantham, United States Attorney for the District of New Mexico, appearing amicus curiae, would have us believe that the law as declared in the foregoing quotation represents an earlier and strict construction, since abandoned in favor of a new approach, stemming from a more liberal philosophy toward the jurisdictional question involved. We find nothing in the decisions to warrant this conclusion. Indeed, the latest cases on the subject, under

similar facts, adhere to the earlier precedents. See Herken v. Glynn, supra, decided by the Supreme Court of Kansas in 1940, and the still later case of Miller v. Hickory Groves School Board, supra, from the same court in 1942. We may add to these the decision of the United States Supreme Court in Johnson v. Yellow Cab Co., supra, in 1944, where under different facts, the same principle of exclusive jurisdiction in the federal government is reaffirmed.

It is argued by counsel, although neither persuasively nor too hopefully, that the condemned area, as a whole, is not a "site" within the meaning of our consent statute; that by use of the words "custom houses, court houses, postoffices, arsenals or other public buildings whatever," the legislature intended only building sites; and that in adding the phrase "or for any other purpose of the government," under the doctrine of ejusdem generis, it could only have had reference to other purposes of a similar nature to those previously mentioned.

The argument hardly seems tenable in view of the obvious fact that our consent statute was adopted to afford cooperation on the part of the state with the federal government in acquiring lands for necessary governmental functions and purposes. Indeed, reference appears in the act, 1941 Comp. § 8-202 et seq., to U.S. Const. Art. 1, § 8, cl. 17, which itself does not employ the word "sites," but rather the word "places"—for forts, magazines, arsenals, etc. The second section of our act cedes exclusive jurisdiction over "any land" so acquired, yet in reserving jurisdiction to serve process relates the reservation to "such sites," disclosing that the words "sites" and "land" were to have a synonymous meaning, that meaning to embrace all lands acquired for the purposes stated. Certainly, such has been the meaning given it in all cases brought before the courts and that, too, without seeming question. To give it the narrow, restricted meaning urged by counsel would practically nullify the broad purposes reflected in clause 17, § 8, Art. 1 of the federal constitution and our consent statute enacted in pursuance of same.

Counsel argue at some length over status of the condemned lands as an "arsenal." We have no difficulty in classifying them as such in view of their acquisition for the United States Army in 1943 while we were at war and general knowlelge on the extent to which, since acquisition, they have been devoted, among other things, to experimentation with fissionable materials and the manufacture and assembly of the most destructive agency the mind of man has ever succeeded in devising—the atom bomb.

We are forced to the conclusion that residence on the condemned area of Los Alamos Project will not meet the constitutional requirement of "residence" for voting purposes.

Having reached the conclusion announced as to the condemned area or "deeded land" as a situs of residence for voting purposes in the constitutional sense, we proceed to determine the status of public domain lands within Los Alamos Project —172.90 acres in extent—within the precinct as a situs of residence for such purposes. In this connection it will be recalled that, although the Secretary of War at one time asserted and claimed "exclusive jurisdiction" of such lands along with condemned lands, nevertheless, by declaration contained in letter of September 7, 1944, he made a correction as to public domain lands, stating:

"Since the laws of the state of New Mexico do not cede exclusive jurisdiction over land reserved from the public domain for military purposes, excepting lands so reserved for the Ft. Wingate Military Reservation and the Fort Bliss Target Range, it was not the intention of this department to include in the list such reservations."

It will be observed, as the Secretary's letter states, that the New Mexico consent statute does not cede exclusive jurisdiction over land reserved from the public domain for military purposes. See, also, 16 U.S.C.A. § 480, recognizing concurrent jurisdiction as to national forest lands. It is not land acquired in the constitutional method as a place "for the erection of forts, magazines, arsenals, dockyards, and other needful buildings." The result is that the United States occupies and uses such lands in a proprietary capacity only. Fort Leavenworth R. Co. v. Lowe, supra; Surplus Trading Co. v. Cook, supra; Six Companies v. De Vinney, D.C., 2 F.Supp. 693. The lands remain subject to the jurisdiction of the state in matters not inconsistent with the free and effective use of the land for the purposes for which it was acquired. Johnson v. Morrill, supra. In Six Companies v. De Vinney, supra [2 F.Supp. 697], the court said:

"Upon the question of acquisition it is contended by plaintiff that the setting aside of this land out of the public domain and withdrawing the same from public entry 'was an acquisition thereof within the meaning of that statute as fully as if the United States had purchased the land from others.' The fallacy of this contention lies in the fact that after the land had been withdrawn from entry and set apart for the purposes specified, no change had occurred in ownership. All that was done with the land was in exercise of ownership, consisting of the withdrawal of offers for its acquisition by the public and the setting of the same aside for certain uses or purposes of the government. The Unit-

ed States did not acquire anything it did not already own. Surplus Trading Co. v. Cook, 281 U.S. 647, 50 S.Ct. 455, 74 L.Ed. 1091; Woodruff v. North Bloomfield Gravel Mining Co. (C.C.) 18 F. 753."

We conclude that exclusive jurisdiction has not been ceded to the United States by the state as to so much of the area of Los Alamos Project within Precinct No. 17 as was carved from the public domain. Bona fide residence for the stated period on such portion of lands within the precinct meets the constitutional requirement in that particular for voting. Hence, so many of the votes cast in said primary election by residents of this portion of lands within the precinct by electors otherwise qualified should have been received and counted, if legally cast.

This brings us to the third and final question, viz., the effect of holding the election on the condemned lands within the precinct. As already shown, this land was under exclusive jurisdiction of the United States, except for the right to serve thereon civil and criminal process from state courts. In legal effect, the case is not different from what it would have been if the polling places had been located and the balloting had occurred in Colorado or some other state. Nor is the position of respondents aided by the enactment of L. 1947, c. 100, 1941 Comp.1947 Pocket Parts § 56-101, purporting to make residents upon lands such as the condemned lands here involved residents of New Mexico within the constitutional sense. Sinks v. Reese, 19 Ohio St. 306, 2 Am.Rep. 397. In this case the court said:

"* * * It is not constitutionally competent for the general assembly to confer the elective franchise upon persons whose legal status is fixed as nonresidents of the state."

We are unable to avoid the conclusion that presence of the polling places outside the state, in legal intendment, is fatal to validity of the election. The voters participating in the election, some of whom without doubt were bona fide residents and qualified electors in New Mexico, did not, within the true meaning of state Const. Art. 7, § 1, personally appear and cast their ballots in the precinct of their residence "in New Mexico." Chase v. Lujan, 48 N.M. 261, 149 P.2d 1003. There are a few cases holding that under certain conditions an election held outside the precinct of the voter's residence, although inside the state, will not be declared invalid. People v. Graham, 267 Ill. 426, 108 N.E. 699, Ann.Cas.1916C, 391, and Smith v. Hackett, 129 Md. 73, 98 A. 140. In each case, the court cited somewhat critically and as holding otherwise or, at least, as being distinguishable, such cases as Chase v. Miller, 41 Pa. 403; Twitchell v. Blodgett, 13 Mich. 127, and Bourland v.

Hildreth, 26 Cal. 161, or one or more of them. These are cases cited approvingly and relied upon in reaching the conclusion we did in Chase v. Lujan, supra, and in the earlier case of Thompson v. Scheier, 40 N.M. 199, 57 P.2d 293, holding unconstitutional the law permitting absentee voting.

Even in those states permitting such voting, in order to avoid constitutional barriers, the ballot is deemed cast in the precinct where canvassed and counted—that of the voter's residence. There is here no ground for indulging this somewhat fictional theory since the ballots were cast, canvassed and counted outside any area in New Mexico able to supply basis for a voting residence. And, in view of our holdings in Thompson v. Scheier, supra; Chase v. Lujan, supra, and Baca v. Ortiz, 40 N.M. 435, 61 P.2d 320, that a statute purporting to authorize voting otherwise than through personal presence of the voter in the precinct of his residence in New Mexico was invalid, it would seem somewhat anomalous to hold that the same thing the statute could not lawfully authorize, where done without the purported authority of a statute, will be given the badge of legality. It follows that there was no primary election for Precinct No. 17 in Sandoval County on June 8, 1948.

Counsel for respondents as well as counsel appearing amicus curiae argue strongly that the conclusions we have reached are not to be indulged in view of the previous holdings of this court in Tenorio v. Tenorio, 44 N.M. 89, 98 P.2d 838, and State v. Mimms, 43 N.M. 318, 92 P.2d 993. We do not consider that the decisions reached in those cases are controlling. In the Tenorio case we were dealing with the status of Pueblo Indian lands in relation to the question of "residence" for purposes of a divorce suit. We noted the difference between their status for the purpose indicated and property acquired by the United States in the constitutional method when viewed for the same purpose. We said [44 N.M. 89, 98 P.2d 842]:

"The status of the Pueblo Indian lands is so different from that of United States property acquired in the 'constitutional method' mentioned in the majority opinion in Lowe v. Lowe, that we do not deem the case decisive of the question involved, even if we were prepared to affirm its correctness, a conclusion we should be slow to announce without further study in view of the persuasive reasoning and forceful precedents employed by Chief Justice Bond in his dissent from the majority view."

The seemingly tentative approval, provisional though it be, given the dissenting views of Chief Justice Bond in Lowe v. Lowe, supra, referred to in the quotation next above is, of course, to be qualified by what we today say and hold in the case before us.

The case of State v. Mimms, supra, presents more of a puzzle. It was a stipulated fact in the case that the land involved at Elephant Butte Dam was acquired for reclamation purposes pursuant to Art. 1, § 8, cl. 17 of the federal constitution. It was upon a record containing such a stipulation that the court trying the defendant, and this court in reviewing its judgment, decided the case. Counsel amicus curiae reminds us, however, a fact perhaps to be noticed judicially, that the lands having come to the United States under the Treaty of Guadalupe Hidalgo, did not fall within the purview of the consent or cession statute. Nevertheless, as he says, it must be assumed the case was tried on the record before the court. So viewed, he and counsel for respondents as well find in it a precedent in favor of their position. They support their analysis of the case by the vigorous contention that, if acquired by condemnation under federal constitutional provision mentioned, exclusive jurisdiction in the government passed immediately by virtue of the consent statute, as argued by Informant. Nevertheless, we upheld concurrent jurisdiction in the state.

On the other hand, counsel for Informant say the case was correctly determined, even on the stipulated fact as to manner of acquisition. The purpose of acquisition being to promote the government's program of reclamation, the mere fact that lands are acquired by condemnation, under U.S.Const. Art. 1, § 8, cl. 17, without more, does not necessarily conclude the question whether exclusive jurisdiction, ipso facto, passes with the cession. So runs the engaging argument of Informant's counsel. They cite and rely on Silas Mason Co. v. Tax Commission of State of Washington, 302 U.S. 186, 58 S.Ct. 233, 82 L.Ed. 187; James v. Dravo Contracting Co., supra, and Johnson v. Morrill, supra.

We will not decide the issue between them. State v. Mimms having been correctly decided under the true fact as to character of the land involved, we have no hesitancy in saying we should decline to give it stare decisis effect whether correctly determined or not on a false fact, inadvertantly stipulated to be true. So considered, we pass the effect of our decision in the Mimms case.

We are reminded by counsel of the several acts of jurisdiction exercised by the state on the lands in Precinct No. 17, Los Alamos Project, as to which the jurisdiction in the United States has been held to be exclusive. They point out, as the stipulated facts disclose, that residents of Los Alamos, including those who voted in this primary election, pay or bear the incidence of New Mexico income taxes, sales taxes, gasoline taxes and tobacco taxes; that cost and cost-plus fixed fee contractors doing work for the government on the condemned area within Precinct

No. 17 carry Workmen's Compensation insurance under the New Mexico Compensation statute; and so on as to certain other acts and things done according to state law. Most, although not all, of the matters stipulated as being done, are expressly authorized by congressional acts and represent a recession to the state of jurisdiction on the part of the government in the particulars indicated. See what is known as the Buck Act, 4 U.S.C.A. §§ 104 to 108, giving states authority to apply gasoline taxes, sales, use and income taxes on federal areas; also Act of June 25, 1936, 40 U.S.C.A. § 290, to the same purport regarding extension of state Workmen's Compensation Laws in federal areas.

To the extent any of the acts and things done on the condemned area in an application of state law are outside the purview of congressional authorization, they cannot impinge upon the exclusive jurisdiction of the federal government otherwise obtaining. If exclusive jurisdiction over certain landed areas be ceded to the United States by a state, such jurisdiction cannot be recaptured by the state by later statute without consent of the United States. Rogers v. Squier, 9 Cir., 157 F.2d 948; United States v. Unzeuta, 281 U.S. 138, 50 S.Ct. 284, 74 L.Ed. 761. We find no federal statute receding jurisdiction of the condemned area to New Mexico in the particulars here involved. We are informed by counsel in argument that such a measure was introduced in the recent special session of the congress and never reached the floor for consideration due to the shortness of the session. The question is a legislative one and, however strong our wish that residents of this community might enjoy the elective franchise, we may not properly further that desire by an act of judicial legislation.

The conclusion that residents of the condemned area in Precinct No. 17 may not enjoy the elective franchise, based on residence there, does not necessarily mean they do not possess the right to vote elsewhere. As pointed out in a few of the so called "vote cases," particularly, In re Town of Highlands, supra, and Herken v. Glynn, supra, certain residents of the condemned area may still have a voting residence at the place of their former domiciles. N.M.Const. Art. 7, § 1, provides that no person shall be deemed to have acquired or lost a residence by reason of his presence or absence while employed in the service of the United States or of the state, nor while a student at any school. Any residents of the condemned area in said precinct, to whom this constitutional provision applies as well as those from other states with like constitutional provision, and, indeed, aside from the effect of any such provision, where the only thing evidencing an intention to change a former voting residence has been the futile act of seeking to acquire one in this federal area,

absent a fixed resolve to abandon the former residence at all events, may if otherwise qualified, cast his ballot at the place of former residence, in person, where so required as in New Mexico; or, by absentee voting in states, where permissible.

As to those residents of the portion of Precinct No. 17, which is not a part of the condemned area, who are qualified electors of the county and precinct in which they reside, a heavy responsibility rests on the Board of County Commissioners of Sandoval County to proceed forthwith with all dispatch and on their own motion to relocate the polling places, for the voting districts in such precinct to the end that the qualified electors therein may not be denied the right to vote in the forthcoming election. Time yet remains for such action and as well a remedy in the electors to compel same in the event of a refusal, which is not to be anticipated. See 1941 Comp.1947 Pocket Parts, § 56-201.

It follows from what has been said that the alternative writ should be made permanent.

It is so ordered.

McGHEE, J., and MARSHALL and ANDERSON, District Judges, concur.

FOWLER, District Judge, dissenting in part.

On Motion for Rehearing.

FOWLER, District Judge (dissenting).

The dissenting opinion heretofore filed by me disagreeing with the majority opinion, in part, is withdrawn and the following substituted therefor:

I do not agree that the election held in Precinct 17 (Los Alamos), Sandoval County, New Mexico, on June 8, 1948, was a nullity. The majority opinion admits that those persons who live on the 172.90 acres of former Forest Reserve lands in said precinct were or may have been qualified electors entitled to vote at said primary election. The election is declared a nullity, as to such persons, because all the polling places in said precinct were situated on the 407.39 acres of condemned land, which is said to be under the "exclusive legislation" or "exclusive jurisdiction" of the United States, and as such is deemed to be effectually "out of the State" for all election purposes.

New Mexico does have jurisdiction over said condemned land for some purposes. The State reserved some of this jurisdiction by its own acts of cession; some, on the other matters, was retroceded to the State by Acts of Congress, and it appears that the authorities agree that even after it has ceded jurisdiction the State still retains certain jurisdiction over the lands until and unless Congress acts by def-

initive legislation to prescribe for the acquired lands. If New Mexico retains any jurisdiction over this territory—and it does—then it cannot be a country "without the State." Subject to the right of the United States to exercise exclusive jurisdiction over it (which right the United States has waived by receding a part of such jurisdiction), this territory is still Precinct 17 of Sandoval County of the State of New Mexico. Collins v. Yosemite Park et al., 304 U.S. 518, 58 S.Ct. 1009, 82 L.Ed. 1502.

The County Commissioners of Sandoval County fixed the polling places at sites within the confines of Precinct 17. Provisions regarding the fixing of polling places within a precinct are directory merely, and it is not the policy of the law to disfranchise and penalize electors merely because the public officials in charge have made some slight miscalculation in setting up the voting sites, if they did so, especially where this did not result in depriving a single elector of his chance to vote, and where no fraud is charged or appears. The election was held and the polling places were in the precinct where the electors offered to vote. No function or control of the government was in the least embarrassed nor was its jurisdiction impinged upon thereby.

As pointed out in the Court's opinion, the weight of authority is to the effect that those persons who reside on lands which are acquired by the United States by the "constitutional method," as were the 407.39 acres of condemned lands in Precinct 17, do not have residence within the State within the meaning of the election laws. Although criticism might be leveled at this rule on principle, it is probably too well established now for change. It may be inferred from these facts that there were illegal votes cast at said election which should not be counted or considered in the result. We are not informed how many such votes there were, and of course no one knows for which one of the candidates any one or more or how many of the ballots were cast. The stipulation does not show that the number of these votes, by residents of the condemned lands, were sufficient to change the results, or were sufficient to invalidate the election in the precinct. I think the election was valid as to the qualified electors of said Precinct 17 living on the former Forest Reserve lands.

Holding these views, I am of the opinion that further proofs should be called for or allowed to show the number of ballots cast by residents of the 407.39 acres of condemned lands, and, if need be, for whom such ballots were voted, and that proper order of direction under the writ be made then according to the facts; or that, failing such further proofs, the alternative writ should be discharged.

Entertaining the views expressed, my dissent to the action of the majority in denying motion for rehearing is herewith noted.

197 P.2d 897

FLOECK v. UNITED BENEFIT LIFE INS. CO.

No. 5067.

Supreme Court of New Mexico.

Sept. 24, 1948.

Otto Smith, of Clovis, for appellant.

J. V. Gallegos, of Tucumcari, for appellee.

SADLER, Justice.

The question for decision is whether the proration clause found in the standard form of accident insurance policy, limiting liability of insurer to a specified part of total amount of like indemnity in all policies covering the same loss, absent written no-

tice to company of the other insurance, is applicable to death benefits.

The plaintiff below, the appellee here, is the widow and sole beneficiary designated in two certain policies of insurance in which her husband, Gerald Edgar Floeck, was named as insured, taken out during his lifetime and in full force and effect at the time of his death on May 26, 1946. The policy in suit was issued by the defendant, United Benefit Life Insurance Company of Omaha, on October 18, 1945, insuring the plaintiff's husband, among other things, against loss of life resulting directly from bodily injuries sustained through purely accidental means, in the sum of $2,500. It contained the standard proration clause as section 17 thereof reading:

"17. If the Insured shall carry with another company, corporation, association or society other insurance covering the same loss without giving written notice to the Company, then in that case the Company shall be liable only for such portion of the indemnity promised as the said indemnity bears to the total amount of like indemnity in all policies covering such loss, and for the return of such part of the premium paid as shall exceed the pro rata for the indemnity thus determined."

The other policy mentioned was with Federal Life Insurance Company of Chicago and afforded indemnity against loss of life sustained solely and directly by being struck, knocked down or run over by any mechanically propelled vehicle, while on a public highway. It was dated November 5, 1941, and was taken out by the plaintiff with her husband as insured while he was on a hunting trip. She saw an advertisement of the policy in the Denver Post, a daily newspaper published at Denver, in the State of Colorado and, the amount of the premium being small, filled out the form of application appearing in the advertisement and mailed it to addressee named along with the premium of $1.75. She never informed her husband of the existence of this policy and he died in ignorance of its issuance. Following his death, the plaintiff was paid the sum of $1,050 under this policy. The defendant having declined to pay the sum provided for death benefit under the other policy herein sued upon, except on the basis of proration provided by clause 17, supra, this suit followed.

It was stipulated at the trial that no notice, written or otherwise, was ever given the defendant of the fact that this additional policy had been taken out and that it first learned of same following the death of its insured. The facts already recited all are within the trial court's findings and it made certain other findings of importance to a decision, as follows:

"7. That the fact that the Federal Life Insurance Policy was in force in October, 1945, at the time that defendant's trial ex-

hibit 1 policy was issued, was not material to the acceptance of the risk in issuing to Gerald Edgar Floeck the United Benefit Life Insurance Company policy, defendant's Trial Exhibit 1, insofar as death benefits are concerned.

"8. That the provisions in clause No. 17 of the United Benefit Life Insurance Company policy, defendant's Trial Exhibit 1, are not applicable to loss of life or death benefits, but are contained in the contract of insurance to protect the insuror against excessive or fraudulent claims for loss of earnings or loss of time.

"9. That on June 19, 1947, at the time this cause was called for trial, the defendant tendered to plaintiff the sum of $1813.-90, together with costs of suit, which tender was refused by the plaintiff."

The trial court concluded that the proration clause was not applicable to death benefits, declined to enforce its provisions and rendered judgment for the full amount provided as a death benefit. It is that judgment the defendant brings before us for review on appeal.

A consideration and appraisal of the decisions dealing with the specific question presented persuade us that the trial court erroneously excluded death payments from an application of the provisions of section 17 of the policy, known as the standard proration clause. Graham v. Business Men's Assur. Co., 10 Cir., 43 F.2d 673; Massachusetts Bonding & Insurance Co. v. Santee, 9 Cir., 62 F.2d 724; International Travelers' Ass'n v. Gunther, Tex.Com. App., 280 S.W. 172. Also, see annotations in 119 A.L.R. 765, 776 following Bowles v. Mutual Benefit Health & Accident Association, 4 Cir., 99 F.2d 44, 119 A.L.R. 756; and annotation in 50 A.L.R. 1380 following Wahl v. Interstate Business Men's Acc. Ass'n, 201 Iowa 1355, 207 N.W. 395, 50 A.L.R. 1374. Cf. Gilbert v. Inter-Ocean Casualty Co., 41 N.M. 463, 71 P.2d 56; Dustin v. Interstate Business Men's Accident Association, 37 S.D. 635, 159 N.W. 395, L.R.A.1917B, 319; Woods v. National Life & Accident Ins. Co., La.App. 166 So. 501; Aaberg v. Minnesota Commercial Men's Association, 161 Minn. 384, 201 N. W. 626.

In an able and persuasive opinion by the United States Circuit Court of Appeals for the Tenth Circuit in Graham v. Business Men's Assur. Co., supra [43 F.2d 674], dealing with the precise contention here urged by counsel, the court said:

"The second contention of plaintiff is that the provision applies only to loss of time and not to loss of life. Plaintiff argues that the reason for the provision is to protect the company against malingerers; that men might feign injury to collect large indemnities for loss of time, but do not feign death for that purpose.

But, where language used by the parties is clear, courts are not justified in ignoring it, however plausible the reasons advanced."

Likewise, the Circuit Court of Appeals of the Ninth Circuit disposed of a similar contention in Massachusetts Bonding & Ins. Co. v. Santee, supra [62 F.2d 726], on the same reasoning. It said:

"At the time of his death the insured carried another accident policy in the Sentinel Life Insurance Company. Both policies covered loss of life by accidental means. The learned trial court held that there could not be an apportionment of a loss arising out of the death of a human being, and declined to give effect to section 17 of the policy on the prorating basis. We are of opinion that this was error. The Washington statute expressly authorizes the insertion of section 17 in the policy, and since it is not against public policy it is as binding upon the contracting parties as any other provision of the contract. The meaning of the section is plain, and we can see no good reason why it should not be enforced. This prorating provision of the contract could easily have been avoided by the insured by simply giving notice of the existence of the other policy."

Dealing with a like question in International Travelers' Ass'n v. Gunther, supra [280 S.W. 173], the Texas Commission of Appeals, whose opinion was approved by the Supreme Court of that state, said:

"The rider covers loss of life only when caused by accidental means, and the policy involved in this suit covers loss of life under no other contingency. The two overlap in the only contingency provided by the rider. As to the loss of life, their coverage is identical, and the rider covers no other loss. The rider covers no loss in any respect in which same is not also covered by this policy. Therefore, they both necessarily cover the same loss in respect to the death of John F. Gunther."

While it is true, as pointed out by counsel for plaintiff, we were not dealing with a death case in Gilbert v. Inter-Ocean Casualty Co., supra [41 N.M. 463, 71 P.2d 57], nevertheless, we were called upon to construe this clause in the policy and determine its validity. We sustained its validity and the very ground upon which some courts have declined to give it effect, the "dominant feature" theory, was rejected in the application sought to be made of it. We said:

"We must disregard form and seek an understanding of the substance. The language is clear and unambiguous. If insured carries 'other insurance covering the same loss' without notice to appellant, the proration clause is operative. It makes no difference whether the 'other insurance' existed at the time appellant's policy was issued or subsequently. Unquestionably the policies of the Mutual Life Insurance

Company involved and that issued by appellant are characterized by marked differentiating features, yet they are alike in some particulars. They overlap in two places at least. Both cover death resulting from accident; in case of total permanent disability resulting in inability of insured to engage in any gainful occupation or employment for wage or profit, disability benefits may be recovered under each. Under the policy issued by appellant there are coverages not in the mutual policy. It takes death by accident or the existence of a certain condition of total permanent disability to bring into operation both policies."

We are not unmindful that some courts reach a different conclusion for various reasons other than the "dominant feature" theory. Provident Life & Accident Ins. Co. v. Rimmer, 157 Tenn. 597, 12 S.W.2d 365; Arneberg v. Continental Casualty Company, 178 Wis. 428, 190 N.W. 97, 29 A.L.R. 93; Wahl v. Interstate Business Men's Accident Ass'n, 201 Iowa 1355, 207 N.W. 395, 50 A.L.R. 1374; and State ex rel. Business Men's Assur. Co. v. Allen, 302 Mo. 525, 259 S.W. 77. It is worthy of mention, however, that every theory invoked as a basis of decision in any of these cases is rejected, either by express holding or by the rationale of our opinion, in Gilbert v. Inter-Ocean Casualty Co., supra. Take for instance the Tennessee case of Provident Life & Acc. Ins. Co. v. Rimmer, and the Missouri case of State ex rel. Business Men's Assur. Co. v. Allen. In each case the Supreme Court of the state named held the proration clause void as violating other specified policy provisions. In the Gilbert case, we not only sustained the validity of the clause but the legislature since has sanctioned its use in health and accident insurance policies. Laws 1947, c. 207, § 8(b).

Little good can result from speculation as to a reason for inclusion of the proration clause in the policy, notwithstanding the factor of moral hazard suggests itself most strongly. We may concede that this factor weighs more heavily in a disability than in a death case, yet it is present to a recognizable extent even in a death case. Be that as it may, the clause is there and the language is plain and unambiguous. As already stated, its validity was sustained by us in Gilbert v. Inter-Ocean Casualty Co., supra, and the use of it in health and accident policies since has received legislative sanction. Laws 1947, c. 207, § 8(b). Under the circumstances, nothing remains for us to do save give it effect according to its meaning.

But it is argued by counsel for the plaintiff as an ancillary proposition that the proration clause should be denied effect because the insured died in ignorance of the issuance or existence of the second policy. The trial court so found but was

never called upon to determine whether that circumstance would have rendered the proration clause inoperative, had it ruled otherwise than it did on its applicability to death benefits. Having ruled the questioned clause inapplicable to loss of life or death benefits and that the existence of other policies covering death by accident was immaterial to the risk so far as death was concerned, the trial judge may have considered immaterial as well any ruling by him on failure to give notice of other insurance covering the same loss where such failure was attributable to insured's lack of knowledge thereof. At any rate, he made no such ruling, nor did plaintiff's counsel request any.

If a ruling had been invoked and proved adverse, it might have served as a basis for assigning cross-error under Supreme Court Rule 17, § 2, 1941 Comp. § 19-201. It is barely possible, too, that in failing to rule upon this point the trial judge was giving some effect to defendant's exception to the finding on this subject, namely (1) that the insured's ignorance of the policy taken out by his wife was immaterial and (2) that such ignorance was not pleaded as a defense. It thus seems truly doubtful whether the question presented in argument is before us for review. Nevertheless, since to deny consideration to counsel's argument in this behalf would deprive the plaintiff of an otherwise valid recovery, if his contention be well taken, we shall consider and resolve the question.

Many decisions are cited by counsel for plaintiff holding that a policy of fire insurance, and even life and accident insurance policies, will not be forfeited where other insurance exists without the knowledge or consent of the insured. Continental Insurance Company v. Riggs, 277 Ky. 361, 126 S.W.2d 853, 121 A.L.R. 1421, with annotation of the subject beginning on page 1428; Pacific States Fire Ins. Co. v. C. Rowan Motor Co., 122 Or. 665, 260 P. 441; Golden v. National Life & Accident Insurance Co., 61 Ga.App. 197, 6 S.E.2d 112; Harris v. Louisiana Industrial Life Ins. Co., 19 La.App. 589, 141 So. 103. We have no quarrel with the reasoning of these cases, but they present a factual situation different from that here present. In the cases cited the courts were called upon to decide whether by reason of a claimed false answer regarding other insurance in an application therefor, as in Golden v. National Life & Accident Ins. Co., supra, or by reason of the breach of a policy provision against other insurance except upon notice to and consent of the insurer, as in Continental Insurance Co. v. Riggs and Pacific States Fire Ins. Co. v. C. Rowan Motor Co., both supra, an insured's policy should be declared forfeited and recovery wholly denied, because of the existence of other insurance taken out by third parties without the knowledge or

consent of the insured. Under such circumstances the courts of sister states in the cases cited and others of the same kind have declined to enforce a forfeiture but instead have permitted recovery. The insured's good faith played an important part in the decision where the question arose on an answer to a question about other insurance. In this very type of case, however, the courts hold an insured may not eat his cake and have it, too. Speaking upon this phase of the case in Continental Ins. Co. v. Riggs, supra [277 Ky. 361, 126 S.W.2d 856], the Supreme Court of Kentucky said:

"A person cannot, however, after the property has been destroyed, accept a policy which was procured without his knowledge or consent, and which, at all times prior to the fire, he had no intention to accept, having relied up to this time upon a policy upon the same property procured by himself, without accepting all of the provisions of the policy which had been procured without his knowledge. *After a loss one may ratify the act of another who had procured a policy for him without his knowledge or authority, yet if he does so he adopts the whole policy.*" (Emphasis ours.)

In Kennedy v. Mennonite Mutual Fire Ins. Co. of Kansas, 96 Kan. 598, 152 P. 639, 640, a fire insurance policy had been taken out by a mortgagee without insured's knowledge, according to his testimony, and was turned over to him when he satisfied the mortgage. In seeking recovery on the policy which contained the usual concurrent insurance clause, the court adverted to the plaintiff's testimony as to lack of knowledge of existence of the policy when it was issued and when he took out additional insurance. The defendant company invoked the concurrent insurance clause as a defense. The court said:

"Assuming this to be true, there was obviously no actual contract between the parties, unless it resulted from the plaintiff electing to ratify what had been done in his behalf and to treat the policy as though it had been properly issued upon his request. *But he was required to adopt the transaction as a whole, or not at all. He could not accept its benefits and repudiate its burdens.*" (Emphasis ours.)

We think the reasoning of the opinions in the two cases just quoted from is applicable here. The plaintiff in this case is the beneficiary named in the two policies mentioned. It was through her agency that the other policy issued "covering the same loss," in this case death by accident, of which the insured died in ignorance and the insurer remained in ignorance for some time following insured's death. Having collected the other insurance, she now seeks the benefit of this policy by a recovery of its full amount by avoiding the

provision of the policy stipulating that under the factual situation here present, namely, other insurance without written notice to insurer, a specified sum less than the full amount should be payable. In this respect, the beneficiary stands in the shoes of the insured. Her rights do not rise above what his would have been were he alive and seeking disability benefits following accidental injury. She must take the policy as she finds it and abide by its terms.

The judgment under review will be reversed and the cause remanded with a direction to the trial court to set aside its judgment and for further proceedings consistent and in conformity with the views herein expressed. The defendant will have its costs in this court.

It is so ordered.

LUJAN, McGHEE, and COMPTON, JJ., concur.

BRICE, Chief Justice (specially concurring).

The decision in Gilbert v. Inter-Ocean Casualty Co., cited in the opinion of the Court in which I reluctantly concurred, is in my opinion wrong, and the dissent of Mr. Justice Zinn is correct. This was the conclusion of the U. S. Circuit Court of Appeals (4th Circuit), opinion by Judge Parker, Bowles v. Mutual Ben. Health & Accident Ass'n., 99 F.2d 44, 119 A.L.R. 756, 757, in which the Gilbert case is criticized.

However, the distinctions pointed out by Mr. Justice Zinn in his dissent, between the policies therein involved, do not obtain in this case. There the dominant feature of one was life insurance, the other accident and health. Here both are accident policies, and each covers accidental death.

I stated in my concurring opinion in the Gilbert case, and restate it here, that paragraph 17 in an insurance policy is a trap to catch the unwary that should be eliminated. It has been approved in this state by statute. It should have been made unlawful and void when incorporated in a policy instead. It is not too late for the legislature to correct this blunder, and protect the public against the injustice that we find here.

197 P.2d 902

NEW MEXICO DEPARTMENT OF PUBLIC WELFARE v. CROMER.

No. 5090.

Supreme Court of New Mexico.

Sept. 20, 1948.

Otto Smith and Earl E. Hartley, both of Clovis, for appellant.

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

BRICE, Chief Justice.

The relator, a New Mexico public corporation, filed a petition in the district court, praying for a writ of habeas corpus, the object of which was to obtain possession of June Whitley Johnson, a female child seven or eight months old. The relator (it is alleged) had placed the child with the respondent for "the purpose of

boarding said June Whitley Johnson until such time as the New Mexico Department of Public Welfare (relator) could place her for adoption, pursuant to an agreement entered into between the child's mother" and the relator.

The fourth paragraph of the petition for the writ is in words as follows: "That said imprisonment or restraint is illegal in that it seeks to set aside and nullify the agreement for custody and disposition entered into between petitioner and June Whitley Johnson's guardian, and is contrary to that which is best for the welfare of said June Whitley Johnson."

The return to the writ is in substance an answer and an application for the custody of the child and for general relief. The trial court made the following findings of fact and conclusions of law:

"That the petitioner, New Mexico Department of Public Welfare, is a public corporation and an agency of the State of New Mexico.

"That June Whitley Johnson, the subject of this petition, is an infant female child, having been born December 18th, 1946; that the mother of said child is Flora Johnson Fountain. That the father of said child is unknown. And that said child was not born in wedlock.

"That the natural mother of said child has heretofore given custody of the child to the New Mexico Department of Public Welfare and has consented to the adoption of said child by any person or persons approved by the said Department of Public Welfare.

"That the said June Whitley Johnson has been supported by the New Mexico Department of Public Welfare since January 15th, 1947, in the home of the Respondent.

"That the petitioner, New Mexico Department of Public Welfare, has found a home in which it desires to place the child for adoption.

"That the respondent refuses to deliver up the said June Whitley Johnson to the New Mexico Department of Public Welfare.

"That the welfare of the said June Whitley Johnson will be best served by removal of said child from the home of the respondent and the placing of said child for adoption in a home duly approved by the petitioner.

"That the relief sought by the petitioner should be granted.

"Based upon the foregoing findings of fact, the court concludes:

"Conclusions of Law

"That the court has jurisdiction of the persons and subject matter involved herein.

"That said child, June Whitley Johnson, is a dependent and neglected child as de-

fined by the laws of the State of New Mexico.

"That the New Mexico Department of Public Welfare is now, and has been since January 15th, 1947, entitled to the custody of the said June Whitley Johnson and that the respondent's rights in the premises are inferior to the rights of the said Department of Public Welfare."

The respondent's first point is as follows: "A writ of habeas corpus will not be granted where relief may be had, or could have been procured, by resort to another general remedy."

It is true that there is a complete remedy provided by law whereby an alleged dependent and neglected child may be brought before the district court for inquiry regarding its condition, and to make it a ward of the court (if the facts justify such action) until it can be legally adopted. Art. 2, Ch. 44, N.M.Sts.1941.

We have no doubt but that this procedure should have been followed, but the court had jurisdiction to issue the writ, 25 A.J. "Habeas Corpus", Sec. 78, and the statutory remedy is not exclusive, Kennedy v. Meara, 127 Ga. 68, 56 S.E. 243, 9 Ann.Cas. 396, and see 27 A.J. "Infants", Sec. 111.

The relator originally had possession of the child and delivered it to respondent for care and attention, for which it paid her a consideration. As between the two, the relator was entitled to its possession. But dependent and neglected children are placed under the jurisdiction and control of the district court, and the right of possession as between the two litigants does not preclude the district court from exercising its jurisdiction by making the child its ward, and making such disposition of it thereafter as in its considered judgment is for the child's best interest.

The pleadings, evidence, briefs and findings all raise questions of fact and law necessary to the determination by the court of whether it should make the child its ward, and thereafter exercise its full jurisdiction, rules and regulation of appellee board to the contrary notwithstanding.

Among the conclusions of law (which are set out in this opinion) is the following: "That said child, June Whitley Johnson, is a dependent and neglected child as defined by the laws of the State of New Mexico." This, we think, is an ultimate fact and we will consider it so. In the trial court's "Memorandum Decision," which is not in fact a part of "The Decision of the Court," it was held that the child in question was a dependent and neglected child. The court stated: "As such, the child, as a dependent and neglected child, is made a ward of this court." But this was omitted from the judgment, no doubt by inadvertence.

A dependent and neglected child is defined as follows: "The words 'dependent and neglected' child as used in this act (§§ 44-201–44-207) mean any child, of either sex, under the age of sixteen (16) years, who is destitute, homeless or abandoned or dependent upon the public for support or has not proper parental care or guardianship; or is found begging or soliciting or receiving alms; or is found in any house of prostitution or living with any vicious or disreputable person; or who has no responsible parent or guardian, or who has a home which by reason of neglect, abuse, mistreatment, cruelty or depravity on the part of its parents, guardians or the person in whose care it may be, is an unfit place for such child." Sec. 44-202, N.M.Sts.1941.

The court having found that the child in question was a dependent and neglected child, it followed that that court had exclusive jurisdiction of all matters relating to its care, treatment, control and disposition, as provided by Sec. 44-201, N.M.Sts. 1941; and of course may yet make it a ward of the court.

The respondent has become greatly attached to the child, as often happens in such cases. It was premature, only a few weeks old, sick, and weighed only four and a half pounds when delivered to her. Apparently it had been negligently cared for, whether by an agent of relator, the record does not disclose. It had a serious burn on one leg, and its condition was so precarious that the relator's agent, it seems, did not expect it to live. By almost constant nursing and the best of care the respondent probably saved the child's life. She is now over seven months old, apparently in good health, which is indicated by the fact that she weighs more than eleven pounds. She was under the care of respondent for about six months.

The district court stated that the respondent's home would be a good home for the child, and from the evidence in the case we are satisfied that this is correct. That court is not bound by any prearranged disposition of the child by relator, in fact the relator has no authority to place the child in any home temporarily or otherwise without the consent of the district court, after the child has been declared a ward of the court. Neither should the court be unduly influenced by the respondent's love for the child, although this is a matter of prime importance in the selection of foster parents. The welfare of a child is its first and paramount consideration.

The writer agrees with the district court that "the most difficult thing that can confront a court is what to do regarding the custody of a small child." This is the experience of the writer as a trial judge for many years. While temporary custody has been given to the relator, the question is

still open as to what should ultimately be done with this child.

The persons to whom respondent proposes to turn over its temporary custody with a view to its adoption, are unknown to the court, although they were investigated by the relator to determine whether they were proper persons to become foster parents; but not of this particular child.

There is much in the respondent's favor in this case. She probably saved the child's life, but that can only be considered by the court in determining the ultimate welfare of the infant.

The judgment of the district court should be affirmed, and it is so ordered.

LUJAN, SADLER, McGHEE and COMPTON, JJ., concur.

197 P.2d 905

NARAMORE et al. v. MASK et al.
MASK v. SARGENT.

No. 5074.

Supreme Court of New Mexico.

Sept. 18, 1948.

O. O. Askren and Richard G. Bean, both of Roswell, for appellant.

Hervey, Dow & Hinkle and W. E. Bondurant, Jr., all of Roswell, for appellee.

BRICE, Chief Justice.

The primary question is whether the appellee is entitled to recover approximately Two Thousand Dollars as liquidated damages for the failure of appellant to perform a provision in a written contract between the parties, incorporated by the court therein in reforming it.

This litigation was initiated by plaintiff and wife suing appellee and another for breach of a provision of a certain written contract, by the terms of which appellee purchased certain property from Cecil Naramore and wife, known as Riverside Camp, situated in Lincoln County, New Mexico, consisting of real estate and merchandise and other personal property. The following was a provision of the contract:

"9. That the parties of the second part hereby agree to sell the Petroleum products including oil and gasoline sold and distributed by the parties of the first part for a period of three years from this date. The parties of the first part are to deliver gasoline to the parties of the second part at Riverside at Roswell Tank Wagon prices of the major companies. It is understood and agreed that if the parties of the second part fail, neglect or refuse to carry out this provision of the contract that they shall pay to the parties of the first part the sum of Two Thousand and No/100 ($2000.00) Dollars as liquidated damages."

The plaintiffs Naramore recovered judgment against defendant (appellee here) for the sum of $2013.75. The appellee as third party plaintiff sued appellant as third party defendant, alleging in substance that Naramore and wife had sued him for breach of the contract mentioned, which, it was asserted, appellant had agreed to perform, and had assumed liability for its non-performance; as provided by a contract between appellant and appellee, by the terms of which appellant bought the Riverside property from appellee for $42,000, to be paid in cash, and a promise on his part to carry out the provisions of paragraph 9 of the Naramore-Mask contract, and assume appellee's liability to Naramore if he failed to comply therewith.

It was alleged by appellee that by mutual mistake the parties failed to incorporate in their contract appellant's agreement to comply with the quoted provision of the Naramore-Mask contract and assume liability for its breach. Upon trial the district court made the following findings of fact and conclusions of law:

"1. That J. L. Mask by contract dated July 14, 1944, purchased Riverside Camp, Lincoln County, New Mexico, from Cecil Naramore and wife, and among other things said contract included an agreement that J. L. Mask would use petroleum products, including oil and gasoline, supplied by the Continental Oil Company and Cecil T. Naramore for a period of three years. The contract further provided for liquidated damages in the event of the breach of this obligation.

"2. Riverside Camp consists primarily of a service station at which gasoline and other petroleum products are sold, together with a restaurant and saloon.

"3. Prior to March 26, 1946, Dot Sargent, Third Party Defendant, entered into negotiations with J. L. Mask and wife for the purchase of Riverside Camp. At the time of these conversations and before they were reduced to writing Dot Sargent was advised and had full knowledge of the liquidated damages clause in the Naramore-Mask contract, and Dot Sargent and J. L. Mask mutually agreed that as part of the consideration for the purchase of Riverside Camp that Dot Sargent would assume and perform said liquidated damages clause, and it was the intention of J. L. Mask and Dot Sargent that the contract to be drawn would embrace their oral agreement and understanding and that said contract should provide that Dot Sargent assume the liquidated damages clause of the Naramore-Mask contract.

"4. That upon the drawing of the contract between J. L. Mask and wife and Dot Sargent, Dot Sargent's attorney, A. B. Carpenter, because of an oversight was not advised of the liquidated damages clause in the Naramore-Mask contract and that

as a result of the mutual mistake of Dot Sargent and J. L. Mask in failing to so advise the said A. B. Carpenter no mention was made of the liquidated damages clause in the contract signed by Dot Sargent and J. L. Mask and wife."

(Findings 5 and 6 are evidentiary and immaterial to a decision)

"7. That shortly after the execution of the March 26, 1946 contract between J. L. Mask and wife and Dot Sargent, J. L. Mask delivered to Dot Sargent a copy of the Naramore contract dated July 14, 1944, intending then and there to further advise Dot Sargent of the actual contract assumed by Dot Sargent, and that at the time of the delivery of the Naramore contract copy J. L. Mask pointed out to Dot Sargent the liquidated damages clause which was read by Dot Sargent and agreed to by him as being satisfactory, and that Dot Sargent then and there reaffirmed his intention to assume and perform said clause of the Naramore-Mask contract and that Dot Sargent accepted and retained said copy of said contract without objection.

"8. Subsequent to the execution of the J. L. Mask-Dot Sargent contract, Riverside Camp was delivered to Dot Sargent in reliance upon and in consideration of Dot Sargent's assumption of said liquidated damages clause, and that Dot Sargent accepted transfer of the premises with full and actual knowledge of said clause and with full and actual knowledge of J. L. Mask's relying upon Dot Sargent's assumption of said clause.

"9. On or about August 31, 1946, Dot Sargent discontinued the use and sale of the petroleum products as specified in the Naramore-Mask contract, substituting another brand therefor, and thereby breached said contract which he had assumed insofar as said liquidated damages clause was concerned.

"10. Cecil T. Naramore in this court has recovered judgment against J. L. Mask in the amount of $2013.75 for breach of said liquidated damages clause which judgment has been paid by J. L. Mask and which judgment has been released by the said Cecil T. Naramore.

"11. That no fraud has been established."

From the foregoing findings of fact the court made the following conclusions of law:

"1. That J. L. Mask is a proper party plaintiff in this cause, and that the court has jurisdiction of the subject matter and of the parties.

"2. That the contract of March 26, 1946, between J. L. Mask and wife and Dot Sargent should be reformed because of the mutual mistake of the parties thereto to conform with their agreement and

understanding and to provide specifically for the assumption by Dot Sargent of the liquidated damages clause in the Naramore-Mask contract.

"3. That Dot Sargent after the execution of the contract of March 26, 1946, while said contract was executory, assumed by parol agreement an assignment of the liquidated damages clause of the Naramore-Mask contract, and that the J. L. Mask-Dot Sargent contract thereby was mutually modified by the addition of the assumption of the liability by Dot Sargent of the liquidated damages provision of the Naramore-Mask contract.

"4. That J. L. Mask is entitled to recover judgment against Dot Sargent for $2013.75, together with his costs, plus interest at six percent per annum from April 26, 1947."

Based upon the findings of fact and conclusions of law, the trial court entered its decree, reforming the contract of sale and purchase by adding thereto the following:

"That party of the second part (Dot Sargent) hereby assumed and agrees to perform paragraph 9 of that certain contract dated July 14, 1944, made and entered into by and between Cecil T. Naramore and Marie Naramore, and Jack Mask and J. L. Mask."

The decree provided for recovery by appellee and against appellant for $2013.75.

The appellant rests his case upon the following point:

"The court erred in determining that the parol testimony could add to the Mask-Sargent written contract that subject and provision of paragraph 9 of the Naramore-Mask contract, because that provision, if considered at all, would not be a collateral oral agreement but would be a part of the subject of the transaction, that is to say, a part of the consideration, and should have been written into the Mask-Sargent contract if Sargent was to assume said paragraph 9 of the Naramore-Mask contract; and, by so holding, the court has clearly violated the parol evidence rule to the injury of Sargent."

There is no question but that there is substantial evidence to support findings 3 and 4; but the authority of the court to reform the contract at all is questioned under proper assignments of error, and argued in appellant's brief.

As we understand the argument of appellant, it is contended that preliminary negotiations between the parties merged into the executory contract, which in turn is conclusively presumed to have been merged into the deed to the real estate, and conveyance and delivery of the personal property; that the contract is not subject to reformation after it has been completely executed, even though subject to reformation while it was executory;

and the admission of testimony to prove a mutual mistake in the preparation of the preliminary contract after it had been executed, was error.

The appellant relies upon Bell v. Lammon, 51 N.M. 113, 179 P.2d 757; Locke v. Murdock, 20 N.M. 522, 151 P. 298, L.R.A. 1917B, 267; Alford v. Rowell, 44 N.M. 392, 103 P.2d 119.

It is the general rule, as we held in the Bell case, that a complete valid written contract merges all prior and contemporaneous negotiations and agreements within its purview, and parol testimony is not admissible to vary or contradict it. But the rule does not apply when the minds of the parties have met in an agreement and in reducing it to writing, through fraud or mutual mistake of the parties, the writing does not contain the agreement actually made by the parties. In such case it may ordinarily be reformed so that it will express the agreement made, although the contract may be within the statute of frauds. The rule is stated by high authority as follows:

"The foregoing exception embraces all suits brought expressly upon the mistake for the purpose of obtaining affirmative relief from its consequences. It is therefore settled that in the suits, whenever permitted, to reform a written instrument on the ground of a mutual mistake, parol evidence is always admissible to establish the fact of the mistake, and in what it consisted; and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. * * *" Pomeroy, Equity Jurisprudence, Sec. 859.

Continental Life Ins. Co. v. Smith, 41 N.M. 82, 64 P.2d 377; Walden v. Skinner, 101 U.S. 577, 25 L.Ed. 963, and see 5 Williston on Contracts, Sec. 1552; Restatement of Law of Contracts, Sec. 502.

Findings 3 and 4 take the case out of the parol evidence rule, and it would seem that the trial court did not err, unless the merger of the contract into the deed and other conveyances precluded reformation.

It is apparent that the appellant's undertaking to assume liability for the Naramore-Mask agreement regarding the delivery of gasoline, was a purely collateral undertaking, not in any manner connected with the conveyances, except that it was a part of the consideration for the property. It could not be affected by the execution of the contract by conveying the property sold and purchased, because the liability of appellant was contingent and continued for about two years subsequent to the date the property was conveyed to appellant.

On this question we stated in Continental Life Ins. Co. v. Smith, supra [41 N.M. 82, 64 P.2d 380]:

"It is held by some courts of high standing that where preliminary contracts for the sale of real estate have been made and the covenants and stipulations are such that the mere delivery of a deed is not a full performance, then it is a question of intention, to be determined from the deed, or if not contained therein, then from other evidence, whether such stipulations have been surrendered. If covenants regarding the same subject-matter, consistent or inconsistent, with those in the contract appear in the deed, they are conclusively presumed to have merged therein; but if the deed contain no evidence of intention on the subject, then the question is open to other evidence to determine such intention, and in the absence of evidence there is no presumption that either party intended to waive stipulations in the contract by the delivery or acceptance of a deed. * * *

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

"But where there are stipulations in such preliminary contract of which the delivery and acceptance of the deed is not a performance, the question to be determined is whether the parties have intentionally surrendered or waived such stipulations. If such intention appears in the deed, it is decisive; if not, then resort may be had to other evidence. * * *

"The authorities may perhaps be reconciled by a determination of what are 'collateral stipulations.' If the stipulation has reference to title, possession, quantity, or emblements of the land, it is generally, but not always, held to inhere in the very subject-matter with which the deed deals, and is merged therein."

See Norment v. Turley, 24 N.M. 526, 174 P. 999; Morris v. Whitcher, 20 N.Y. 41; Annotation 84 A.L.R. 1017 et seq.; and cases cited in the Continental Life Ins. case, supra.

The undertaking on the part of appellant was a purely collateral stipulation. It did not inhere in the subject matter of the deed and conveyance of property. In fact its performance was contingent.

Under such circumstances the contract was subject to reformation.

The decree of the district court should be affirmed.

It is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

193 P.2d 256

STATE v. MARTINEZ.

No. 5088.

Supreme Court of New Mexico.

Sept. 28, 1948.

Mather M. Eakes, of Farmington, and Robert M. Eakes, of Durango, for appellant.

C. C. McCulloh, Atty. Gen., Robert V. Wollard and William R. Federici, Asst. Attys. Gen., for appellee.

LUJAN, Justice.

The defendant was tried upon a charge of having murdered Beraldo Archuleta and was convicted of voluntary manslaughter and sentenced to a term in the state penitentiary. From this judgment and sentence he has appealed to this court.

It is asserted that the trial court erred in overruling defendant's challenge to the jury panel, because as it is said, "A large number of jurors were excused indiscriminately and without good cause, so that the panel that is now placed upon this defendant is not made up in the order in which they came or based upon legitimate causes." It seems that forty-four jurors qualified for service for the term of court. It became necessary to discharge twenty of these, as the trial jury panel consists of twenty-four qualified persons. The court, upon excuses given satisfactory to it, discharged eighteen of these jurors, leaving twenty-six, and then called the first twenty-four names to constitute the jury for the term.

This is the ordinary procedure in selecting juries. Necessarily the court was required to release twenty of those qualified to act as jurors. Eighteen of these were discharged by the trial court for business reasons, and the panel was complete before the names of the other two were reached.

We said in State v. Sims, 51 N.M. 467, 188 P.2d 177, 179: "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.

There is nothing in the record to indicate that any member of the jury was biased or prejudiced or that the defendant was not accorded a fair and impartial trial.

We adopted the following rule from 1 Thompson on Trials, Sec. 143 In State v. Rodriguez, 23 N.M. 156, 167 P. 426, 428, L.R.A.1918A, 1016: " 'No party can acquire a vested right to have a particular member of the panel sit upon the trial of his cause until he has been accepted and sworn.

It is enough that it appear that his cause has been tried by an impartial jury. It is no ground of exception that, against his objection, a juror was rejected by the court upon insufficient grounds, unless, through rejecting qualified persons, the necessity of accepting others not qualified has been purposely created.'" There is no merit to this contention.

Dr. Rife, a ballistic expert, or one skilled in the science of ballistics, gave expert testimony on the question of whether the bullet that killed deceased was fired from defendant's gun. It is asserted that the trial court erred in permitting the witness to state as a fact and not as his opinion, that the bullet in question was fired from the defendant's gun. After qualifying as a ballistic expert, he testified as follows:

(Examined by District Attorney):

"Q. Doctor, I hand you State's Exhibit 2 and ask you to state whether you have ever seen that before: A. Yes, sir, this has been in my possession since April 18th, 1947.

"Q. And where did you get it, Dr. Rife? A. I got it from yourself, it was delivered to me in my laboratories in Santa Fe on that date at 11 A.M.

"Q. Was there anything else delivered to you by me at that time? A. Yes, sir.

"Q. Will you kindly state what it was? A. This pistol, a 25 Colt automatic No. 92031; 7 empty cartridge cases marked 'Peters ACP 25 Caliber.' The ACP stands for automatic Colt pistol. One 25 caliber metal jacketed bullet that had been fired and marked and referred to hereafter as the 'evidence bullet.' Two loaded 25 caliber Peters ACP ammunition, which I used for recoveries and comparison purposes.

"Q. I hand you State's Exhibit No. 1, and ask you what that is? A. This is a 25 caliber metal jacketed automatic bullet. This is marked 'evidence' and the same bullet as described a while ago.

"Q. Now, Doctor, I wish you would tell this jury what, if any, experiments you made with the loaded 25 caliber Peters ACP ammunition that was turned over to you. A. The two loaded cartridges were placed in a clip of a Colt automatic pistol, 25 caliber, No. 92031, and were fired into a recovery box of my own design and invention that has been copied I suppose all around the world, with the purpose of comparing the marks not only on the cartridge case but on the bullets as they went through the barrel, with the evidence bullet and evidence empty shells that I received from you on the date mentioned previously. (State's Exhibit 3 marked.)

"Q. I hand you State's Exhibit No. 3, and ask you to state what those are? A.

This box contains the recoveries from the two pieces of loaded ammunition fired through Colt 25 automatic. They are two bullets and two empty cartridge cases both fired in—I have them here. Those are your evidence shells, both fired in Colt Automatic pistol No. 92031.

"Q. Now, did you, Dr. Rife, make any ballistics examination of State's Exhibit No. 1, in connection with State's Exhibit No. 2? A. Yes, sir, I did.

"Q. Now will you please state to the jury the result of that examination? A. As I previously described before the identical ammunition, this Peters 25 caliber ACP was fired through the little gun there. The markings on the bullet, signature left by the barrel of the gun on the bullets were compared with the markings on the evidence bullet, State's Exhibit No. 1, and found to be identical. Both note what we call the class characteristics, that is, the same number of lands and grooves on the bullet, the same direction of the pitch of the rifling and the individual marks left by the lands and the grooves in the rifling of this barrel. Those markings were absolutely identical under the microscope, with the markings left on the bullet, State's Exhibit No. 1. Also the test shells, using the same ammunition, the markings from the breech face of the gun were left on the primer cups. Most of you, I think, know what they are, they are the little primer cups inside the head of the shell. Those compared identically with those left on the primer cups of the evidence empty shells.

* * * * * *

"Q. Dr. Rife, can you express an opinion from your experience as a ballistics expert, whether or not State's Exhibit No. 1 was fired from State's Exhibit No. 2, this 25 Colt No. 92031? A. Yes, sir, I can. This is an exact identification and I can prove it with my microscope there to the jury. The marks are not similar, they are absolutely identical, all of the marks that I described, and if I must put it as my opinion, I will say yes. * * *

"Q. I will ask you, from an examination of these two bullets, that is State's Exhibit No. 1—A. Which is here.

"Q. And a test bullet—A. Which is here.

"Q. Whether or not you can state what gun they were fired out of? A. Yes, sir, I can.

"Mr. Mather Eakes: I offer the same objection, if the Court please. I don't mean to be highly technical, that is not my point or purpose, it is my understanding that it is well known in legal circles that an expert, duly qualified, can give his opinion, but he cannot go beyond that * * *

"Court: The objection will be overruled.
* * *

* * * * * *

"Q. I hand you herewith State's Exhibit No. 1, which is the bullet which was extracted, according to the testimony of Dr. Chadwell, from the body of the deceased, and ask you to point out which bullet that is. A. It is the bullet nearest the jury.

"Q. And I will ask you to point out what the other bullet is. A. The other is a test bullet recovered by myself, as I described a while ago, from the recovery box.

"Q. Will you examine those two bullets under the microscope and state whether you can tell what gun they were fired out of? A. I have examined them in many, many hours, spent a good many hours on them. I can look at them again. They were fired from Colt 25 caliber automatic pistol No. 92031.

"Q. Now, I will ask you to demonstrate to the jury—

"Mr. Mather Eakes: I move to strike the answer to that question, in order to keep my objections straight here. The witness cannot testify beyond an opinion statement as to whether the bullets were fired from the same gun or not.

"Court: The same ruling, the objection will be overruled.

"Mr. Mather Eakes: Exception.

"Q. Will you explain to the jury and demonstrate to them, if they wish to, how you reached that conclusion: A. First of all, in comparing bullets we recover bullets through the suspected gun or the evidence gun by firing a bullet into a box that is backed with cotton waste, as a rule, it is boiler plated inside and that balls up the bullets with a little ball of cotton waste so that they are not scratched. The signature, or marks from the barrel and the rifling of guns are especially good and especially permanent on bullets of this particular nature, the automatic bullets especially because they are coated with a metal jacketing that we call gilders metal, or gilding metal, which is an alloy of about 60% copper and 40% zinc or tin. That retains not only the marks of the rifling, the lands and grooves in the gun barrel, but also the individual scratches left by the rifling cutter when the barrel is rifled at the factory. As some of you may know, the barrel is drop forged and then bored. Then when bored to the proper caliber, it is rifled with a series of rifling cutters, two types, a hook and a scrape cutter that are drawn through the barrel with a machine in this fashion, which produces the twist to the rifling. Now, in a Colt, and the Colt people are the only ones who manufacture guns with the rifling pitch to the left. All other American small arms,

Remington, Savage and Smith and Wesson, the rest, the pitch of the bullet is to the right. The Colt people pitch theirs to the left. In other words, it gives the bullet a spin to the left, that is regardless of whether it is an automatic of this type or larger, or a revolver. Now, if the lands and grooves, and by the lands I mean the spaces between the grooves in the rifle barrel, are the same in number on our test bullet as on our evidence bullet, and the number, I say the number of lands and grooves are the same, the pitch of the rifling is the same, the width of the lands and the grooves the proportion between them are the same, that eliminates a tremendous number of guns from our study. To get to the point of positive identification, say we had two Colt 25 automatics, same model, and from almost the same serial number, no two gun barrels have been found alike that will produce the identical signature on bullets fired through them. We look for the individual characteristics in the small marks in the lands and the grooves of these bullets, providing all of the class characteristics are the same. Now, how are these made? As the rifling cutter goes through the barrel of the gun, the edge of the cutter is constantly changing, being steel and brittle little pieces of metal build up in front of the cutter so that you have a continuous change in the cutting surface of the rifler as it goes through the barrel of the gun. Those leave individual distinct marks that are individual and distinct to that one gun alone, and they cannot be produced—reproduced exactly even using the same cutter, because I told you why, because the cutting edge changes and the metal of the barrel and the rifling cutter itself goes up in front of the edge and the rifling cutter is changed. They are not the same in each groove or each land, as a matter of fact, so looking the bullet round and round altogether, and putting these marks of identity together, that is the way we come to our conclusion that a certain bullet was fired from a certain gun and no other.

"Q. Then it is—you will state positively then that that State's Exhibit No. 1, the evidence bullet, was fired out of State's Exhibit No. 2, this gun? A. Yes, sir, I do.

* * * * * *

"Q. Now, Dr. Rife, as to the shells, State's Exhibit No. 4, will you kindly state, along the lines that you have just testified to about those bullets, whether or not you can determine what gun those particular shells, being two 25 shells, which were introduced here in evidence as State's Exhibit No. 4.

"Mr. Mather Eakes: I would like to make the same objection, if the Court please, as I made to a similar question before.

"Court: Yes, same ruling, and you are allowed an exception. A. When these guns are manufactured at the factory, of course they are not all assembled until the last thing, the breech face on the frame, I can show it to you, it is where the firing pin comes through, it is that part back here is filed, but when they come along an assembly line they are vised, he runs a file against the breech face, it is impossible for a man, we contend, to file two breech faces that are exactly alike, you just can't do it, passing a file maybe 20 or 25 times more or less over the breech face of this gun that leaves the file marks on the breech face when the cartridge is exploded, the recoil bounces the shell back against the breech face of the gun just as the firing pin goes through to set it off, or just afterwards. It is all part of the same mechanism, the primer caps or cups are very soft metal and they are recoiled back against the breech face of the gun with a tremendous force, and being much softer metal than the shell itself, the file marks on the breech face are left on the primer cups and every single shell that is fired from a given gun shows exactly the same file marks, exactly the same, unless the gun were taken and redressed or reworked by a gunsmith or something like that.

"Q. Now, have you examined all of those empty shells through the microscope? A. Yes, sir, I have.

"Q. From that examination can you state from what you have testified and from your examination from what gun these shells State's Exhibit No. 4 was fired from? A. Yes, sir, I can.

"Q. Will you kindly state?

"Mr. Mather Eakes: Just a moment, what was the question:

"Mr. Clancy: What gun, if you know, they are fired from?

"Mr. Mather Eakes: I object.

"Court: Objection will be overruled and exception allowed. A. They were both fired, both the evidence shells and the test shells, from Colt 25 Automatic No. 92031."

The witness was never asked for his opinion on the question posed. The defendant's objection to his conclusions stated as facts and not as opinions, were definitely overruled by the court. The witness stated without qualification, in answer to questions (1) that he could identify the gun from which the death bullet was fired; (2) "They (the death bullet and test bullet) were fired from Colt 25 caliber automatic pistol No. 92031" (defendant's gun); (3) "I will state positively that the evidence bullet (death bullet) was fired out of State's Exhibit No. 2, this gun," (defendant's gun); (4) "Both the evidence shells and the test shells were fired from

Colt automatic 25 caliber pistol No. 92031." (Defendant's gun).

Can we say that, while the rules of evidence do not permit experts to testify to the facts sought to be proved, but are confined to expressing their opinions from their experience and tests made, that the jury could not have been misled? We are satisfied that modern science has established that this class of ballistics is almost, if not an exact science; yet those who testify as ballistic experts have varying ability and their testimony should be confined, like that of experts generally, to opinion testimony.

"The tracing of a bullet to the particular weapon from which it was discharged, by identifying the marks on the bullet with the physical features of the weapon, has now become possible by the development of the science of ballistics, aided by the arts of microscopy and photography. * * * The use of such evidence involves two separate inferences. One is based on a general fact of ballistics recently discovered; the other is based on the testimony of the individual witness. The general fact of ballistics is that no two missiles discharged from the same or different firearms bear the same trace-marks. From this fact, when conceded, we can infer that the marks on a particular missile, when examined with suitable methods, indicate the firearm from which it was discharged. This general truth was until recently unknown and disputable; judicial opinion now recognizes it as a conceded fact of which judicial notice may be taken.

"The second inference is based on the assertion of the individual witness that he has indeed used methods suitable to disclose the detailed marks, and that the marks thus disclosed are identical in the missile and the firearms in the particular case. Obviously it is at this inference that one case may differ from another. The witness may not be qualified to use the method; or he may not have used it correctly; or he may not be correct in his assertion that the marks are the same. It is at this point that courts must be on their guard against charlatan witnesses claiming to be qualified. The science itself is so convincing in its revelations that its misuse by a charlatan is dangerous." II Wigmore on Evidence, Sec. 417a.

It may be true that such witnesses as Colonel Goddard, who testified in Evans v. Commonwealth, 230 Ky. 411, 19 S.W.2d 1091, 66 A.L.R. 360, and other reported cases, are so skilled in the science of forensic ballistics that the chance of error is negligible. But the rule is general, and must apply to all witnesses permitted by trial courts to testify as experts or skilled in that science. The belief of a witness that his skill is so transcendent that an error in judgment is impossible, may it-

self be false or a mistake, assuming that the science is exact.

There are cases in which such evidence stated as facts has been approved (People v. Jennings, 252 Ill. 534, 96 N.E. 1077, 43 L. R.A.,N.S., 1206; State v. Kuhl, 42 Nev. 185, 175 P. 190, 3 A.L.R. 1694, both finger print cases) but we are inclined to follow Evans v. Commonwealth, supra, and hold that a witness skilled in the science of forensic ballistics could testify only as to his opinion, although it may be stated as his conclusion from experiments with the gun, bullets and shells in evidence. The witness in the Evans case stated [230 Ky. 411, 19 S.W.2d 1096], "I am convinced as a result of this test that the bullet in evidence was fired through the pistol in evidence." This was held to be an opinion, and not a statement of fact.

In State v. Campbell, 213 Iowa 677, 239 N.W. 715, 724, the same witness Goddard testified, "'The conclusion I reach as a result of the study of these pictures was to the effect that both of these bullets had passed through the same barrel.'" It was held, "The conviction or conclusion of an expert or skilled witness is, after all, only his belief, his opinion, or best judgment." And see to the same effect, State v. Boccadoro, 105 N.J.L. 352, 144 A. 612, in which the same witness Goddard testified as to his "conviction" that two bullets in evidence had been fired from the same gun. See also State v. Shawley, 334 Mo. 352, 67 S.W.2d 74; State v. Couch, 341 Mo. 1239, 111 S.W.2d 147; Dobry v. State, 130 Neb. 51, 263 N.W. 681; Ferrell v. Commonwealth, 177 Va. 861, 14 S.E.2d 293. These cases held that one skilled in ballistics could testify only to his opinion resulting from his experiments.

The case of State v. Steffen, 210 Iowa 196, 230 N.W. 536, 538, 78 A.L.R. 748 is not materially different from the present case except that the witness was testifying as a finger print expert. He testified in detail as to the manner and means of indentification of persons by means of their finger prints. He was not asked to express an opinion, but for a fact of identity. The court stated: "we are not disposed to change the rule which has been established in this court for many years to the effect that while an expert may be permitted to express his opinion, or even his belief, he cannot testify to the ultimate fact that must be determined by the jury. Such testimony would invade the province of the jury and determine the very issue which they must decide."

We are not disposed to agree with the Iowa court that this testimony was that of an ultimate fact. It was undoubtedly an evidentiary fact and a link in the chain of facts from which the jury could determine that the defendant was guilty of murder. But the fact itself, it was held, could not be

testified to by an expert witness. Three of the justices of the Iowa court dissented, holding that the witness could testify positively to the fact involved, citing the Kuhl and Jennings cases, supra, as authority.

The trial court erred in permitting the witness to testify to the facts stated.

The defendant was arrested near Aztec, New Mexico, and thereafter signed a statement regarding the killing of the deceased. The statement was in substance that he was present at the dance at which the deceased was killed; that he saw one Ulibarri, a soldier in uniform, fire the shot that killed the deceased. He and others, including Ulibarri, were in an automobile going to his home in Colorado when arrested. He stated that there was a fight at the dance; that he had fired several shots into the ground to keep the crowd off of him as he was trying to leave in his automobile. He denied that he fired the shot that killed deceased. This statement was introduced after the trial court heard testimony regarding whether it was voluntary.

It is contended that the statement was made by defendant in consideration of a promise of one Eddie Mack, an investigator for the district attorney's office, to the effect that Mack would help defendant, and assured him that "it would go much easier" with defendant if he would plead guilty to having murdered the deceased. There is nothing in the testimony to indicate that Eddie Mack promised him any assistance except in case he would plead guilty to the charge of murdering the deceased. The following is the testimony on this point:

"Q. Did you at any time see him alone? (Eddie Mack) A. Yes, I did.

* * * * * *

"Q. Will you state what he said then and what you said: A. Well, he told me that I had killed a guy up in Martinez Town and that the other witnesses had stated that I was the one that killed him, and then he told me that if I plead guilty it would be easier on me, if I plead guilty. Then I told him I couldn't plead guilty because I wasn't the one that had killed the guy. Then he told me—

"Q. Did he say he would do anything for you? A. If I plead guilty he said he can help me in anything that he could, if I plead guilty, and if I didn't plead guilty, if they found me guilty it was going to be worse for me, they would send me to the penitentiary. That's what he told me, and the best thing for me was to plead guilty.

"Q. What did you tell him? A. I told him I couldn't plead guilty because I wasn't the one that had killed the guy.

"Q. Did he ever tell you that anything you said would be used against you? A. He didn't told me that.

* * * * * *

"Q. Did any one tell you that? A. Well, Mr. Palmer told me that.

"Q. Bud Palmer told you? A. Yes, sir."

On cross-examination he testified:

"Q. Were you forced to sign that statement? A. No, sir I wasn't.

"Q. You signed it voluntarily did you not? A. Yes, I did.

"Q. Did any one threaten you up here before that statement was taken, or during the time it was taken? A. No, sir."

To all appearances it was a free and voluntary statement, without hope of reward, and made without force or threats of violence.

It was not error to admit it in evidence.

There is no merit in the contention that the testimony of Dr. Chadwell was inadmissible. He examined the body of the deceased and testified that in his opinion the deceased died from the effects of a gun shot wound that he found on the body.

Other points are made, but in view of our conclusion it is unnecessary to determine them.

The judgment of the district court is reversed and cause remanded to the district court with instructions to set aside its judgment and grant defendant a new trial.

It is so ordered.

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

198 P.2d 444

LOVERIDGE v. LOVERIDGE.

No. 5108.

Supreme Court of New Mexico.

Sept. 16, 1948.

LaFollette & Shaffer and William B. Darden, all of Albuquerque, for appellant.

Iden & Johnson and James T. Paulantis, all of Albuquerque, for appellee.

SADLER, Justice.

The plaintiff (appellee) sued defendant for a divorce, dissolution of the community and division of property. She was awarded a divorce upon the ground of incompatibility and certain real property was set over to each as his or her separate property. Without attempting to say with any definiteness or certainty whatsoever just what property set over to each as his or her separate property represented a division of the community, or an alimony award or, save in one particular, was purchased with trust funds of the wife, the court sought to fortify its awards by decreeing that the awards made the wife should be considered

as made to her on four separate theories, to-wit:

"First: Of her separate property;

"Second: The enforcement of a constructive trust;

"Third: As her share in the community property, and

"Fourth: In lieu of alimony."

The defendant appealed and has assigned several claims of error, all relating to the division of the property. No effort is made to question here the trial court's action in granting plaintiff a divorce. The errors assigned are argued under six points and will be disposed of in the order argued so far as found necessary to a decision.

Under point 1, counsel advances the novel idea that where husband and wife have become permanently separated, a statutory cause of action for dissolution of the community thus arising, the community is frozen and placed in a state of suspense; that all property subsequently acquired by either spouse becomes the separate property of him or her so acquiring it, to be so adjudged whenever dissolution of the community subsequently occurs, by suit or otherwise. It is pointed out that the law does not favor litigation. Hence, that a party to the marital union should not be penalized for failing to lead his mate, or hers, into court to air domestic strife or incite public gaze. It is said the due process clause of the constitution of the United States is violated by drawing into the community property acquired by either spouse following permanent separation. If the community property system, deriving from the civil law of Spain and Mexico, dictates otherwise, it runs counter to the due process clause of the federal constitution and must give way to it. So runs the argument.

As a doctrine of morality, something perhaps can be said in support of the position taken in argument by counsel. We are not prepared to express an opinion on it when so viewed. As a legal proposition, however, it falls flat for want of support either in our decisions or in applicable statutory provisions. Where the legislature intended to alter the legal consequence attaching to property of either spouse acquired after marriage otherwise than by gift, devise or descent, it so provided. 1941 Comp. § 65-307, giving the wife as separate property her personal earnings accumulated while living apart from the husband following a separation. We find no such provision in the statutes in favor of the husband. Achievement of the result approved by counsel must await legislative action. We cannot supply it here. No violation of due process is involved.

It is next urged that the trial court erred in holding the husband (defendant) liable as a constructive trustee of a sum approx-

imating $650, realized by him in liquidating the equity of the wife in residence property in El Paso, Texas. It was separate property of hers which was being foreclosed against under a mortgage theretofore executed. The fund when realized was to be used, as found by the trial court, in the purchase of certain residence lots, among others, described in Exhibit "B" of the plaintiff which was introduced in evidence. Instead, it was used to support the community, under the court's findings. Accordingly, the ten (10) lots mentioned in Exhibit "B" were awarded to plaintiff as her separate property.

While challenging sufficiency of the evidence to support these findings, defendant's counsel fails to comply with Supreme Court Rule 15, Sec. 6, 1941 Comp. § 19-201, by stating in his brief the substance of all evidence bearing upon the issue, with proper reference to the transcript. Under the conditions mentioned, ordinarily, we will not entertain such a claim of error. The burden of counsel's argument in this connection seems to be that defendant's state of health and financial condition at the time, being such as they were, as the wife, the plaintiff was legally obligated to contribute to his support. Hence, any use by him of funds so realized from her El Paso property in supporting the family, a community obligation, could not be charged to him as a constructive trustee.

If otherwise disposed to waive non-compliance with the Supreme Court rule mentioned, we shall here make no attempt to review the evidence for testing its substantiality, since this and all other characterizations of property, either as separate or community, or as alimony awards, are rendered so doubtful, uncertain and equivocal by the trial court's decree, as hereinafter pointed out, that all must be denied recognition.

The most serious claim of error assigned arises on the court's failure to declare the basis of the various property awards made. The error was saved below and is argued under Point V, reading:

"It is a flagrant abuse of judicial discretion, for a Trial Court to award any property to a party-litigant, without first attempting to justify the exact amount or to give a clear reason for the award, as to say, 'If what is given, cannot be construed as in lieu of alimony, it will be considered as for a constructive trust or as a share of community property,' for, if the Trial Court, with his discretion and proximity to the evidence, cannot allocate each division of the award to its just and proper place, the Trial Court has clearly established its gross abuse of justice and judicial discretion."

The paragraph of the decree carrying into effect this wavering opinion on the

basis for awards made has been quoted already. The finding upon which it is based, emphasizing even more fully the state of indecision on the subject under which the court labored, reads as follows:

"Any award herein made to the wife in an attempt to untangle this muddled situation may be considered as an award:

"1st: Of her separate property.

"2nd: The enforcement of a constructive trust, which the Court finds exists as a matter of law.

"3rd: As her share of the community property.

"4th: An award of property in lieu of alimony."

We cannot but view sympathetically the difficulties confronting the trial court in its efforts to identify given pieces of property as separate estate or community in character. This is not an unusual situation where dissolution of the community and a division of the property of the spouses are to take place. Katson v. Katson, 43 N.M. 214, 89 P.2d 524; Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010; McElyea v. McElyea, 49 N.M. 322, 163 P.2d 635.

It is, of course, often difficult, sometimes even impossible, to determine from the evidence whether a given piece of property in separate estate or community in character. If acquired subsequent to marriage it is naturally presumed to be the latter. Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601; Carron v. Abounador, 28 N.M. 491, 214 P. 772. Hence, in the case at bar, entertaining ultimate doubt, the trial court may resolve the doubt by holding the property to be community in character, if acquired after marriage. Nor can the trial court's right, subject to review, to set over real estate to the wife in lieu of alimony, be questioned. 1941 Comp. § 25-706. Likewise, it is not only the trial court's right, but its duty as well, to award to the wife as her separate estate, any real estate purchased by the husband in his name, with funds of hers wrongfully diverted by him.

But whether the award be made on the one theory or another, the court must be prepared to say from the evidence, or lack of it, which theory it acts upon, to the end that either party may be enabled to review before this court the propriety of the awards made. Merely to declare an award is made, in the alternative, on any one of four separate theories renders a complaining party either helpless in the premises, or unduly burdened by the necessity of challenging successfully all four theories.

This claim of error must be sustained. The judgment will be reversed and the cause remanded to the district court with a

direction to the trial court to set aside its judgment, award a new trial and proceed further conformably to the views herein expressed. The defendant (appellant) will recover his costs on this appeal.

It is so ordered.

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

198 P.2d 801

SAWEY et al. v. BARR.

No. 5069.

Supreme Court of New Mexico.

Sept. 8, 1948.

Rehearing Denied Nov. 12, 1948.

H. A. Kiker, Manuel A. Sanchez, and Charles C. Spann, all of Santa Fe, for appellant.

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

SADLER, Justice.

We are asked to determine whether mineral rights in described real estate, secured by deed dated June 22, 1929, which was not recorded until May 23, 1931, are extinguished by a sale for 1931 taxes, delin-

quent on the real estate, where the sale was on account of the 1932 and 1933 delinquencies as well, and the property was struck off to the purchaser for a lump sum bid aggregating the amount due on account of taxes for all three years.

On June 22, 1929, S.C. Rundle and Edith M. Rundle, his wife, by deed bearing that date conveyed to C. M. Barr, one of the appellants, a specified mineral interest (undivided one-half) in the minerals under certain described lands, only a portion of which are involved in this suit. The deed was not immediately placed of record, having been filed for record on May 23, 1931. In the meantime, the property became subject to assessment for the 1931 taxes, the lien of which attached as of January 1, 1931.

The land in which the mineral interest is claimed was assessed for 1931 to S. C. Rundle. It stood of record in his name on January 1st and the taxes for that year, as well as for 1932 and 1933, becoming delinquent and being in default, the property was struck off and sold to the state on December 7, 1934, at the annual delinquent tax sale held in December of that year. Tax sale certificate No. 455, issued and recited a sale of a portion of the lands described in the deed mentioned above from Rundle and wife to Barr for the lump sum of $359.59 including interest, penalty and costs. Likewise, on the same day, to-wit, December 7, 1934, and at the same tax sale, certain other of the property described in the deed from Rundle and wife to Barr was struck off and sold to the state for 1931, 1932 and 1933 taxes, for the lump sum of $51.89, including interest, penalty and costs, as evidenced by tax sale certificate No. 969, dated December 7, 1934.

Thereafter, and on April 15, 1937, the period of redemption having expired, tax deed to the state was issued by the county treasurer covering a portion of the lands described in tax sale certificate No. 455, reciting a sale of the property conveyed pursuant to said certificate for taxes, penalties, interest and costs in the sum of $161.12. And on May 21, 1937, following, no redemption having occurred, the county treasurer also issued a tax deed to the state covering the lands described in tax sale certificate No. 969, reciting sale of the property pursuant to said certificate for taxes, interest, penalties and costs in total sum of $140.03.

Tax deeds to the state having issued, its title to the premises in controversy between the appellant, C. M. Barr, and the appellee, Charles M. Sawey, Sr., passed to the latter by mesne conveyances purporting to convey the entire interest in the lands decribed. Thereafter, Sawey, Sr., as plaintiff below, with his co-plaintiff, A. W. Hockenhull, instituted the present suit to quiet title in severalty to a large acreage, including the premises in which Barr

claims a mineral interest as against Sawey, Sr. The trial court's judgment quieted title in the latter to the entire interest, both surface and mineral, in certain described lands. It also quieted title in him to the entire interest in the surface, and a specified mineral interest in other described lands, including those in controversy between the appellant, Barr, and the appellee, Sawey, Sr. It adjudged Barr to be without right or interest in the lands in dispute. He prosecutes this appeal for a review of the judgment so rendered against him.

Findings of fact and conclusions of law consistent with the judgment appear in the decision filed of record by the trial court. The rationale of its decision is that the premises in controversy, having been duly assessed for 1931 under a description purporting to cover the entire interest and the tax lien of the state having attached prior to the severance of the mineral interest of record, the tax sale for 1931 taxes carried with it the entire interest, mineral as well as surface. A review of our previous decisions compels us to agree with this conclusion.

The appellant places strong reliance on the case of Sims v. Vosburg, 43 N.M. 255, 91 P.2d 434. It is not in point. The distinction between it and the present case is brought out by the facts stipulated in the former. The question was whether the mineral rights under a certain 320 acres of land passed by a tax sale under an assessment of the property according to government surveys for the year 1931, where the mineral rights therein, prior to asssessment, had been severed by conveyances to various persons, admittedly of record, even though such persons, themselves had failed to return the property for taxes. We held the mineral rights did not pass by a tax sale under the facts stated.

Furthermore, we felt called upon to note that nothing in our opinion was inconsistent with our former decisions in Alamogordo Improvement Co. v. Hennessee, 40 N.M. 162, 56 P.2d 1127, and Alamogordo Improvement Co. v. Prendergast, 43 N.M. 245, 91 P.2d. 428, 122 A.L.R. 1277, holding title conveyed by tax deed is a new and paramount title in fee simple absolute, striking down all previous titles and interest in property; and, based on the same consideration, that nothing said in Sims v. Vosburg was inconsistent with our previous holdings in Hood v. Hood, 42 N.M. 295, 77 P.2d 180, and N. H. Ranch Co. v. Gann, 42 N.M. 530, 82 P.2d 632, touching the effect of curative and other provisions found in the statutes for the protection of tax titles.

Certain language employed in our opinion in Sims v. Vosburg, supra [43 N.M. 255, 91 P. 20, 436], emphasizes the distinction between its facts and those in the present case. It is stated:

"It is true that owners of property are required by statute to list it for taxation, and that a tax levied against land in the name of one not the owner does not invalidate the tax. But unless it appears that the severed mineral interests in land *evidenced by a duly recorded deed* have actually been taxed in the name of the owner of the remainder of the estate as shown by the record, the taxes levied on land merely described by government surveys or metes and bounds, is not against the severed mineral rights.

"It is evident from the facts in this case that the taxing authorities did not take into consideration the severed mineral interests in this property in valuing it for taxation. It was classed as grazing land and its value fixed at exactly the same value as that of other grazing land, from which the minerals have been severed. The severed mineral interests were neither assessed nor sold for taxes and the appellant obtained no title thereto by virtue of his certificates and tax deed." (Emphasis ours.)

Just as it was evident to us in Sims v. Vosburg from the facts of record that the taxing authorities did not take into consideration the severed mineral interest in the property assessed in valuing it for taxation, so here it is equally obvious that the taxing authorities did take into consideration the entire interest in the property, of whatsoever kind, in valuing it for taxation under the 1931 assessment. Severance of the mineral interest in real estate by an unrecorded deed does not operate to defeat a tax title deriving from foreclosure of lien for taxes attaching under an assessment of entire interest in the property prior to recordation of the deed. Sims v. Vosburg, supra; cf. Barthold v. Dover, La.App., 153 So. 49, where the court's opinion fully sustains appellee's contention that severance of mineral estate by an unrecorded deed does not defeat tax lien attaching prior to recordation of deed, even though upon other grounds the tax title was held invalid.

Our taxing laws provide that all taxes levied upon real estate "shall be a lien thereon from the first day of January of the year in which the levy is made and *continue as such until paid or foreclosed by sale.*" (Emphasis ours.) 1941 Comp. § 76-412. When this property was placed on the rolls for 1931, just as in all previous years after it became subject to taxation, the assessment was based on valuation of the entire interest in the property. The assessor had no knowledge or notice that more than a year before a severance of the mineral estate had occurred. Recordation prior to tax sale of the deed severing the minerals does not alter the state's right to enforce lien for taxes previously attaching. We approve the language of the Court of Appeals in Louisiana in its opin-

ion in Barthold v. Dover, supra [153 So. 51], where it is said:

"Can the security of the holder of a legal mortgage upon land be impaired by the alienation of a part of the complete ownership of that land recorded subsequent to the attaching of the mortgage? We think not. As we see the case, while the mineral rights were not and could not be assessed, the whole property, including the mineral rights, being owned by the tax debtor at the time of the filing of the tax rolls, was affected by the resulting lien and legal mortgage and became security for the payment of the taxes. As the tax sale was but a legal enforcement and consummation of this lien and mortgage, the rights of the tax purchaser dated back to the time it attached to the property, and, unless otherwise invalid, conveyed the mineral rights. It seems to us clear that, if the tax debtor could not have transferred the whole property, after the attaching of the lien and mortgage so as to defeat them, he could not legally transfer such a part of them as the mineral rights have been held to be. We therefore conclude that the tax sale, if valid, conveyed a complete title."

We come next to appellant's claim that the tax title must fail because the property was sold for the delinquencies of 1931, 1932 and 1933, for a lump sum bid, severance of the mineral interest admittedly being a matter of record when the property was assessed for 1932 and 1933. The position on this point is well summarized in his counsels' brief, as follows:

"We now assume, but do not concede, that a sale of the land for taxes for the year 1931 only, would have conveyed the mineral rights, because the deed conveying them had not been recorded at the date of the assessment. Assuming the assessment for 1931 would have validly included the mineral rights, the assessments for 1932 and 1933 are clearly invalid in any attempt to include the mineral rights. These rights are required to be separately assessed and specifically described. The tax deed under which Appellee claims was issued in 1935 for delinquent taxes for 3 years and for two of these years the assessments were invalid as attempting to include the mineral rights."

The appellant is foreclosed on this argument, both by the curative provisions of 1941 Comp. § 76-726 and the limitations provided for testing tax proceedings in 1941 Comp. § 76-727 as construed in such cases as Hood v. Bond, supra; N. H. Ranch Co. v. Gann, supra; and De Gutierrez v. Brady, 43 N.M. 197, 88 P.2d 281, 283. Indeed, in the last mentioned case, the very contention now advanced was presented. The land was sold for taxes for last half of 1931 and for all of the year 1932. Both delinquencies were included in one sale and the property was struck off to

the county for a lump sum bid. A tax sale certificate issued thereon, followed in due course by a tax deed. Touching this very question, we said:

"We agree with the trial judge that if the land was lawfully sold for the 1932 taxes any defects as to the 1931 taxes would be unavailing even though both delinquencies are covered in a single sale. But granting existence of the defects claimed, they do not penetrate the protective shield afforded tax titles by the curative provisions quoted above. The plaintiff makes no claim that the property was not subject to taxation. The trial court found the taxes were unpaid and became delinquent and that there was no redemption. Neither is it asserted that there was an entire omission to list or assess the property, the claim merely being that by including other property along with the plaintiff's, the assessment is invalid. Under a long course of decision in this state such attacks cannot prevail against the curative effect of this and earlier statutes of like tenor."

So here, it is not claimed that the mineral interest was not subject to taxation for 1931. It is not disputed that the tax was unpaid. No claim of redemption is asserted, nor is it affirmed that a single condition named in 1941 Comp. § 76-726 exists to take the case outside the protection of the curative provisions therein provided. Accordingly, the appellee's tax title stands invulnerable to the attacks made upon it. The judgment is correct and should be affirmed.

It is so ordered.

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

199 P.2d 986

CITY OF RATON v. RICE.

No. 5143.

Supreme Court of New Mexico.
Nov. 24, 1948.

H. M. Rodrick, of Raton, for appellant.

William P. Kearns, Jr., of Raton, for appellee.

COMPTON, Justice.

This appeal is from a judgment of conviction of a city ordinance, the particular charge being, that Lillian Rice, on or about the 8th day of November, 1947, at about 1:45 p. m. did drive an automobile in a careless and reckless manner such as to indicate either a wilful or a wanton disregard for the safety of persons or property and did seriously injure one John Cunningham, Jr.

At the conclusion of the trial appellant's motion, challenging the sufficiency of the evidence, was overruled, the denial of which is assigned as error.

The case turns on the sufficiency of the evidence to support the judgment of the court. Consequently, a review of the evidence is necessary.

There is evidence that appellant, while driving an automobile south on North Second Street in the City of Raton, ran into John Cunningham, Jr., a child three years of age, who had suddenly darted into the street from among trees and bushes near the curb on the east side of the street. He ran diagonally across the street in a southwesterly direction laughing and hallooing. He was on his way to play with Erick Budd who lived just across and down the street. Appellant, on sighting the child applied her brakes thereby leaving rubber marks upon the pavement, astride the center line of the street, for a distance of 34 feet. The car rolled past John and when it stopped he was under the car between the rear wheels near the south end of the rubber marks. Appellant lived near the scene of the accident and frequently used the streets going to and from work. She knew that children frequently played in the

street. It was narrow, only 30 feet wide, and as a precaution she usually drove near the center to avoid the possibility of an accident. The street being clear at the time, appellant estimates that she was driving 25 miles per hour, or less, when she first saw the child, 25 miles being the maximum speed fixed by ordinance. State and City police immediately investigated the accident. At their request appellant permitted a test to be made of the car for mechanical defects, if any, and for the purpose of estimating its speed immediately prior to the accident. Two tests were made, one by Anton Zukie, the other by Jack Robertson. The former test left no skid marks, nevertheless, its brakes were in good mechanical condition. The latter test, made by Jack Robertson of the State Police over approximately the same area and while the car was driving 30 miles per hour, left skid marks for a distance of 28 feet. The officer Robertson, however, testified that he did not consider the test made by him to be accurate or dependable. Erick Budd, nine years of age, and Margaret Cunningham, nine years of age, a sister of John Cunningham, Jr., saw the car strike John but did not testify as to the speed of the car.

Obviously, it is appellee's theory that excessive speed alone as shown by rubber or skid marks, indicates a wilful or wanton disregard for the safety of persons or property.

It should be conceded that appellee, if the judgment is to be sustained, must establish that degree of negligence as would constitute the basis of the crime of involuntary manslaughter had death resulted from the injury. Mere negligence is insufficient. Negligence, not amounting to wilful or wanton disregard of consequences cannot be made the basis of a criminal action. People v. Allen, 321 Ill. 11, 151 N.E. 676; State v. Harris, 41 N.M. 426, 70 P.2d 757; State v. Sisneros, 42 N. M. 500, 82 P.2d 274, 281.

In State v. Sisneros, supra, the defendant while operating an automobile drove it diagonally across a road into a car parked on the opposite side, negligently killing two persons. The court reversing the judgment, said it was encumbent upon the state to prove criminal negligence and that there was a failure of proof in this respect.

The specially concurring opinion of Mr. Justice Zinn tacitly expresses our conclusion in the following language: "Mere negligence is not sufficient. It may be sufficient to compel the driver to respond in damages. However, when it comes to responding to an accusation of involuntary manslaughter, with the possibility of a penitentiary sentence, a different rule is called into play. In the instant case I can not find from the evidence where the appellant was guilty of reckless, wanton and wilful negligence. State v. Harris, supra."

These cases are controlling. We are unable to find from the evidence that appellant's conduct was so reckless, wilful or wanton as to manifest a disregard of consequences. The court erred in failing to sustain appellant's motion to dismiss.

Other points are urged for a reversal of the judgment but the conclusions reached render a discussion of these points unnecessary. The judgment will be reversed with directions to the trial court to reinstate the case upon its docket, enter an order sustaining the motion and discharging appellant, and it is so ordered.

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

199 P.2d 987

FIRST NAT. BANK IN ALBUQUERQUE v. ROWE.

No. 5125.

Supreme Court of New Mexico.

Nov. 24, 1948.

Miller & Chavez and Hannett & Hannett, all of Albuquerque, for appellant.

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

SADLER, Justice.

The question for decision is whether the trial court erred in holding the appellant, defendant below, to the trial of a single issue which the parties had stipulated in advance should be the sole one for determination, after granting defendant leave to amend in a respect that injected a new and independent issue.

The suit was one to foreclose two certain real estate mortgages executed by the defendant, allegedly as collateral security for money already loaned, and as collateral security as well for money to be loaned by plaintiff bank to L. & B. Packing Company, a co-partnership composed of George Lescallett and Neil Bungard. The co-partnership was engaged in large scale carrot farming near Los Lunas, New Mexico, during the years 1945 and 1946. During the same period, Lescallett was manager of the Albuquerque office of the Reconstruction Finance Corporation where the defendant served as his secretary from December, 1939, to August, 1946.

In 1945 the partnership borrowed money from the plaintiff bank to finance its operations for that year. They proved unsuccessful and by January, 1946, the partnership had become indebted to the bank to the extent of $12,000 evidenced by the partnership note in that sum. It was secured by chattel mortgages of the partnership equipment and an assignment of a lease held by the partnership from the Atchison, Topeka and Santa Fe Railway Company, including the vegetable packing shed. This security comprised practically all the assets of the partnership.

In February, 1946, the partnership sought further loans from the plaintiff to finance the current crop year. On February 21, 1946, and for value received, the partnership executed a note to plaintiff for $12,000 maturing January 2, 1947, and a few days later on February 27, 1946, the partnership note to plaintiff in the sum of $5,000 with the same maturity was executed. In order to secure an aggregate indebtedness of the defendant, L. & B. Packing Company, up to a total of $24,000, the defendant Regina Rowe, on February 27, 1946, executed and delivered to plaintiff the two real estate mortgages whose foreclosure was asked in this suit. Each mortgage contained a clause making it security

for "any indebtedness at any time owing by debtor to mortgagee."

The $12,000 note dated February 21, 1946, was a renewal of indebtedness then owing the plaintiff bank representing partnership losses for the 1945 crop year. The $5,000 note executed on February 27, 1946, represented the initial advance of the new loans from the bank to finance the 1946 cropping year to approximate the agreed sum of $12,000, to make a total indebtedness of the partnership to the bank, if advances to the full extent agreed were made, in the sum of $24,000. The two real estate mortgages mentioned were made and delivered to secure said total indebtedness as claimed by the plaintiff bank. According to the defendant's contention the mortgages mentioned were not to secure the $12,000 note dated February 21, 1946, a copy of which was attached to the plaintiff's complaint as Exhibit "A." Each mortgage had a copy of the $5,000 note attached. No copy of the $12,000 note was attached to either. After the pleadings were made up, a pre-trial stipulation was entered into by the parties agreeing to all the facts save one. The one remaining fact left open for trial by the stipulation is contained in paragraph 6 thereof, reading as follows:

"6. The only issue to be determined in this case is whether the promissory note shown as Exhibit 'A' to the complaint is secured by the two real estate mortgages shown as Exhibits 'C' and 'G' thereof."

When the plaintiff had introduced testimony on the single issue reserved for trial, counsel for defendant Rowe asked leave to amend her answer by adding the following allegations, to-wit:

"That at the time the defendant, Regina Rowe and just before she signed the mortgages represented by Plaintiff's Exhibits 'C' and 'G' she made inquiry of plaintiff's agent as to the risk involved in her behalf and plaintiff's agent undertook to make a disclosure to the effect that the debtor was indebted to plaintiff in the amount of $12,000.00, but failed to further disclose that the debtor had no free assets; That all the assets of the debtor were mortgaged to the creditor; That the $12,000.00 note, in fact, represented a renewal note of past and over-due debts. Wherefore, defendant, Regina Rowe prays that plaintiff's foreclosure suit be dismissed."

In proposing the amendment counsel stated that upon inquiry of plaintiff's agent as to the risk involved at time of signing the mortgages the latter, although undertaking to do so, had failed to make full disclosure by informing defendant that the partnership had no "free" assets. The trial judge denied the application to amend, pointing out that such not only was an issue outside the stipulation, but also something which very well might have been as-

certained by deposition or otherwise prior to trial.

Again, and at the conclusion of the trial, counsel for defendant renewed his application to amend the answer and leave so to do was granted by virtue of the following proceedings, to-wit:

"Mr. Chavez: I would like to ask permission of the Court at this time to again offer the amendment to my answer, but before I do so, I would like to settle the law. It isn't only on the basis of the testimony that there is fraud and I want to re-offer my amendment to our answer to conform to the evidence under Rule 15b. I believe under the rule, such procedure is permissable.

"The Court: The Court is fully cognizant of that. The Court has based its ruling on the stipulation. In thinking it over, I believe the Court will reverse itself insofar as refusing to permit the amendment and allow the amendment. However, I don't mind telling counsel, at this time, that in view of the stipulation, even though the amendment is there, I believe (the defense) is barred, but the pleadings may be amended. The Court will allow that.

"Mr. Chavez: In other words, the answer of the defendant, Regina Rowe, will be amended in accordance with the amendment I dictated into the record this morning?

"The Court: Correct."

It is to be admitted that confusion results from the contradictory nature of the trial court's ruling. In making the ruling the judge said, in effect, that he deemed barred by the stipulation the issue of fraud sought to be injected by the amendment; nevertheless, that he would permit the amendment. The record leaves it inconclusive as to just what was in the judge's mind. The irreconcilable implications arising from the opposite rulings, at most, seem to neutralize each other. Accordingly, we must endeavor to interpret and give them meaning, or establish a lack of it, in the light of the record.

If, as counsel for defendant strongly argue, the plaintiff waived the stipulation by litigating the issue of fraudulent concealment sought to be injected by the amendment, then the trial court's ruling becomes unimportant since the pleading can be amended in this court to conform to the proof. Canavan v. Canavan, 17 N. M. 503, 131 P. 493, Ann.Cas.1915B, 1064. On the other hand, if there was no acquiescence by plaintiff in litigating the questioned issue, by the same token the leave granted becomes innocuous since there is no proof to which the amending allegations of fraud may conform. Thus it is that we are sent to the bill of exceptions for a review of the testimony to find evidence of waiver by acquiescence. In order to constitute ac-

quiescence the plaintiff must voluntarily have joined in litigating an issue not pleaded which, by timely objection, he might have ruled out of the case. With this test in mind we turn to a review of the evidence.

As shown above, the sole issue reserved for trial under the stipulation was whether the $12,000 note, dated February 21, 1946, representing the partnership losses during the cropping year 1945, was secured by the two mortgages sued upon. The defendant was the mortgagor in each and the plaintiff, the mortgagee. It thus became a matter of intention between the parties as to what indebtedness the mortgages were given to secure. The plaintiff's testimony was direct and positive that they were to secure not only the $12,000 already owing, but also so much of an additional $12,000 agreed to be advanced as the partnership might call for. A recitation in each mortgage that it was to be security for "any indebtedness at any time owing by debtor to mortgagee" supported the plaintiff in its claim and testimony in this behalf.

The defendant, of course, testified with equal positiveness as her understanding that the two mortgages were only to secure payment of the $5,000 note described in the mortgages and future advances which, along with the amount of said note, would not exceed $24,000. With this sharp conflict in the testimony of plaintiff's witness, the officer who handled the transaction for plaintiff on the one hand, and the defendant herself on the other, it seems too obvious for dispute that evidence of any facts and circumstances having a tendency to influence the defendant's willingness or unwillingness to bind herself as surety for the partnership on these mortgages in accord with plaintiff's claim would be highly pertinent and material. The plaintiff could no more object to testimony having a tendency to influence her unfavorably toward inclusion of this past due indebtedness than could the defendant herself keep out testimony calculated to influence action favorable to its inclusion. Certainly, knowledge on defendant's part of the financial condition and standing, or lack of it, of the partnership bears directly on whether she intended to become surety for the partnership and for what.

Primarily, counsel argue that permitting cross-examination of plaintiff's officer on his failure to inform defendant that the partnership had no unincumbered assets, and his failure to advise her that the $12,000 then owing represented an operating loss for the preceding year, all without objection, amounted to acquiescence by plaintiff in litigating the issue of non-disclosure of material facts. When this cross-examination occurred plaintiff's counsel would have had to be possessed of a sixth sense to detect that defendant was slipping in, unobtrusively, an issue foreign

to the single one reserved for trial by the stipulation. Furthermore, no objection conceivable could have stopped this line of testimony since *it was material and relevant on the very issue reserved for trial.* Then why should a party be deemed to have waived something by failing to object to a line of cross-examination which he was powerless to prevent? A careful review of the record satisfies us that every item of testimony adduced by either party, and relied upon by defendant as voluntary acquiescence on plaintiff's part in litigating an unauthorized issue, was relevant and material on the sole question reserved for trial by the stipulation. It cannot be made the basis of waiver.

The trial court having found on substantial evidence that the $12,000 note was secured by the two mortgages as the parties intended, ordered their foreclosure to satisfy the sum of $13,310.52 adjudged due and attorney's fees of $1,963.85, plus interest. This appeal, raising the question hereinabove discussed and resolved, has resulted.

We should notice two of our former decisions before closing. The case of Putney v. Schmidt, 16 N.M. 400, 120 P. 720, strongly relied upon by counsel for defendant on the effect of fraudulent non-disclosure by a creditor to one about to become a surety for his debtor, in view of our conclusions, becomes unimportant as relating to an issue not here involved. Likewise, our former decision in the case of Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719, where we held an issue properly before the court because voluntarily litigated, if not actually open to litigation under a stipulation filed in the case, is removed from decisive consideration for lack of the waiver there found to exist.

The conclusions reached dispose of all questions necessary to a decision. Having found no error, the judgment below will be affirmed.

It is so ordered.

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

[redacted]

199 P.2d 991

HOOVER v. WAGGOMAN.

No. 5095.

Supreme Court of New Mexico.

Nov. 24, 1948.

[redacted]

Iden & Johnson and James Paulantis, all of Alburquerque, for appellant.

W. A. Keleher and A. H. McLeod, both of Alburquerque, for appellee.

BRICE, Chief Justice.

The question is whether certain restrictive covenants contained in a deed conveying city lots, restrict the use of the land so that the grantee is precluded from its use for parking automobiles.

This action was brought by plaintiff (appellee) to enjoin the defendant from paving and using lots 1 and 2 of Block 55 of the University Heights addition to the City of Alburquerque for storing automobiles.

The material facts found by the court and its conclusions of law are in substance as follows:

"That the provisions of the deed from the subdivider and owner, conveying Lots 1 and 2 in Block 55 of the University Heights Addition, as well as the provisions in all other deeds conveying property in said addition (except the small portion designated for business), read as follows:

" 'The said party of the second part in consideration of the premises and of the sum of One Dollar to her in hand paid by the party of the first part, the receipt whereof is hereby acknowledged, for herself and her heirs and assigns, hereby covenants and agrees with the said party of the first part, its successors and assigns,

that the said party of the second part, her heirs or assigns, shall not erect upon said premises or permit or suffer to be erected or placed upon said premises any tent house and no building other than dwelling houses and such barns, garages or outhouses as may be necessary in connection with the use of said premises for dwelling purposes nor more than one dwelling house to be erected on any one lot. Nor shall any building of less than restricted value on the rear of the lot be used for dwelling purposes longer than four months from the date of construction, and all adobe buildings must be cement finished on the exterior within six months after construction, and no dwelling house and accompanying barns, garages, outhouses or porches thereon be placed nearer than 25 feet to the front line of the lot, and no dwelling house and accompanying barns and outbuildings shall be of less value than $4,100, nor shall any of such lots be subdivided or buildings fronted on side streets, nor shall any open or dry toilets be permitted on said premises, nor shall any solid board fences be constructed on the lots, nor shall any building erected on said lots be used as a store or sanitarium (sanitarium being defined as any place harboring three or more people afflicted with tuberculosis) or for any other purpose than as private dwelling places. It is understood and agreed that said covenants on the part of the grantees herein shall attach to and run with the land hereby conveyed, and the party of the first part or any owner of a lot in said Addition shall have the right to enforce compliance with said covenants by injunction or other legal proceedings, and in case the said party of the second part, her heirs or assigns shall persist in the violation of said covenants after notice to desist, the title hereby granted shall revert to and revest in the said party of the first part or its successors or assigns, shall be entitled to the immediate possession of said premises.'

"That the plaintiff is the owner of Lot 22 of Block 50 of the University Heights Addition to the City of Alburquerque, New Mexico, and that such lot is used by the plaintiff as a residence for himself and family.

"That the defendant has recently built a business block or unit on all or part of Block 56 of the University Heights Addition to the City of Alburquerque, New Mexico, and that such business unit contains a total of twenty-nine separate store units which are rented or are offered for rent for the conducting of different kinds of business.

"That the defendant is the owner of Lots 1 and 2 of Block 55 of the University Heights Addition to the City of Albuquerque, New Mexico, and that defendant intended to use such lots for parking

purposes for the tenants and their employees who will have store space in the business unit above referred to.

"That the defendant had graded said Lots 1 and 2 of Block 55 and intended to place an asphalt top of two inches on such property, and when paved defendant intended to have such lots used for parking in connection with the business unit above referred to.

"That it was the intent and purpose of the subdividers and owners of all the property which was platted as the University Heights Addition, that it was to be a restricted residential district, restricting the use of said property for private dwellings or residential purposes, excepting a certain small area that was designated in the Addition for business. The area designated for business does not cover Lots 1 and 2 of Block 55. The business designated district is very small as compared with the large portion of the district designated for private residences or dwellings. The whole general intent and purpose of the owners and subdividers of the district to restrict the property to private residences or dwellings would be thwarted, and the purchasers of the property who relied upon said restrictions to maintain homes in a restricted residential district would also be thwarted if the real estate could be used for business purposes or any other purposes except for private dwellings, regardless of whether the lots had actual buildings upon them, or not; that is, regardless of whether the buildings on the lots were used for other than residential purposes or merely whether the lots were used for purposes other than private residences.

* * * * * *

"That the intent and purpose of the subdividers at the time the University Heights Addition was platted was to confine such property to private dwelling places, except for an area that was designated for business. Such area designated for business, however, does not cover Lots 1 and 2 of Block 55."

The trial court concluded that the building restrictions contained in the chain of title to Lots 1 and 2 of Block 55 of the University Heights Addition prohibits the use of such lots for any purpose other than private dwelling places, and particularly for the use of such property for parking automobiles.

The trial court entered a decree accordingly, perpetually enjoining the defendant from using, or attempting to use, the lots in question "as a parking lot, either for the customers that might trade at the business unit on Block 56 of said addition, or as a parking lot for the tenants in such business unit, or as a parking lot for the tenants' employees, or for any other purpose than as a place for private dwelling

places and the defendant is perpetually enjoined from paving such property for use as a parking lot."

It is asserted that the restrictions imposed upon the lots in question relate only to buildings that may be erected thereon, but do not restrict the use of the land itself.

The part of the restrictive covenant here involved is in effect that "no building other than dwelling houses, and such barns, garages or outhouses as may be necessary in connection with the use of said premises for dwelling purposes, nor more than one dwelling house to be erected on any one lot * * * nor shall any buildings erected on said lots * * * be used for any other purpose than as private dwelling places."

It will be observed that no specific restriction is included in the covenant that applies to the land alone. As we understand the contention of defendant, it is that under the rule of strict construction which applies in such cases, the owner may use the land itself, before or after the construction of a dwelling house thereon, for any purpose, business or other purpose, for which it might have been used if such covenants were absent; provided the use shall not require the erection of buildings thereon. In other words, that there are no restrictions that preclude the use of the land for any "open air" business.

This contention is supported by numerous authorities, of which the defendant cites the following: Granger v. Boulls, 21 Wash. 2d 597, 152 P.2d 325, 155 A.L.R. 523; Jenney v. Hynes, 282 Mass. 182, 184 N.E. 444; Id., 285 Mass. 332, 189 N.E. 102; Shaddock v. Walters, Sup., 55 N.Y.S.2d 635; Cooke v. Kinkead, 179 Okl. 147, 64 P.2d 682; Himmel v. Hendler, 161 Md. 181, 155 A. 316. The deed involved in the Granger case had substantially the same restrictions as in the case here considered. It was held that such restrictions applied only to buildings, and did not prevent the owner of the land from using it for grazing or keeping cattle, pigs, chickens, and rabbits thereon. The Washington court said [21 Wash.2d 597, 152 P.2d 326]:

"The appellants contend that, since the court dismissed the private nuisance action, from which respondents did not appeal, it was error to restrain the appellants from pasturing or using the land to support any cattle, pigs, chickens, or rabbits in so far as it could be done without the use of a barn, chicken house, pig sty, or rabbitry on the premises covered by the covenant. The language of the covenant prohibits the erection of buildings to be used for any purpose other than as a private dwelling, but permits the erection of necessary out-buildings for residence uses.

* * * * * *

"Covenants, such as the one at bar, are very common. By their use, people ac-

complish the exclusion from the neighborhood of their residence, of the unpleasant and unattractive activities which however indispensable in the world are nevertheless capable of segregation without hardship or inconvenience. Undoubtedly, the covenants in the instant case were for the purpose of segregating the land into a private residential district. That it failed to restrict the use of the land itself for farming is clear, but is equally clear that it did prohibit the erection of farm buildings as distinguished from private dwellings."

In the Shaddock case a similar provision was construed where the question was whether a part of the lots could be used as a parking field for automobiles and trucks as accommodation for owners of water craft in the Bellmore Canal. The court stated [55 N.Y.S.2d 637]:

"A restrictive covenant, such as this, is to be construed most strictly against the covenant. An injunction should not issue unless the thing enjoined is plainly within the provisions of the covenant. Clark **v.** Jammes, 87 Hun 215, 33 N.Y.S. 1020. A close reading of the aforesaid restriction shows that it does not restrict the land to residential use. Its meaning is that no building shall be erected on the premises except one to be used for residential purposes only. No building has here been erected. It is only the use of buildings erected upon the property that is restricted to residential purposes. The covenant, therefore, does not prohibit the use to which defendants' property is being put."

The other cases are equally as strong in their support of defendant's contention.

But there is another rule adopted by some courts, not quite so strict, which no doubt the trial court had in mind in making his last two findings of fact hereinbefore quoted, and that is, that effect is to be given to the intention of the parties as shown by the language of the whole instrument, considered with the circumstances surrounding the transaction, and the object of the parties in making the restrictions.

In this connection the plaintiff argues:

"Plaintiff would like to call the court's attention to plaintiff's Exhibit 'A' (Tr. 62) which is a plat of the University Heights Addition. It will be noted from this plat that there are approximately 1380 lots in the subdivision, and the testimony of D. K. B. Sellers is that with the exception of only a few lots, residential restrictions were placed in all of the deeds conveying such lots, the only difference in such restrictions being that as to a certain part of the subdivision, the requirement as to the

cost of a residence was increased by $1,000.00.

* * * * * *

"If the defendant's contention is correct, that the restrictions do not apply to the use of the land, but only to the use of buildings constructed, we would have a situation where some several hundred people who have purchased lots and built residences in the addition could be greatly damaged. The owner of a home in the addition could overnight find that an outdoor skating rink, a tennis court, a baseball diamond, a football field, a swimming pool, or even a sawmill without walls around it, had sprung up next to his home and that his use of property as a residence had been greatly damaged. There are many other examples that could be cited as to what use the land could be put, if defendant is correct in his contention."

In support of his view plaintiff cites Laughlin v. Wagner, 146 Tenn. 647, 244 S.W. 475; Wilber v. Wisper et al., 301 Mich. 117, 3 N.W.2d 33; Mellitz v. Sunfield Co., 103 Conn. 177, 129 A. 228, which support his contention, and other cases supporting the general rule stated.

The facts stated are borne out by the record.

The covenant construed in the Laughlin case was as follows:

"Any house erected on the Belvedere side be used for residence purposes only, to be two stories or more in height, and to be built on established house lines."

There were thirty-five lots in the subdivision. The covenants in the deeds varied somewhat; in some of the deeds the covenant read:

"It is understood that said property is to be used for residence purposes only; that any residence erected thereon shall be erected so as to conform to the established property line on said street, and shall be at least two stories in height."

The Tennessee court said:

"In the construction of these restrictive clauses it is, of course, the duty of the court to give them a fair and reasonable interpretation, taking into consideration the position and situation of the parties to ascertain and determine the true meaning of the language used. But where the clause is susceptible of two different constructions, one favorable and the other unfavorable to the free use of the property, that construction should be adopted which assures its free use. A literal interpretation which would amount to a mere evasion of the real intention of the parties is not justified, but, if the clause may be given a reasonable interpretation in favor of the free use of the property, it should be done.

* * * * * *

"The clause does not require that a dwelling house shall be erected on the lot,

and it is not intended to prohibit all uses thereof unless the house is built. It was evidently intended to prescribe the kind of building which should be erected, and the manner of and the particular use which should be made of the building itself. In other words, if the building had in all respects complied in form and location with that suitable as a residence, nevertheless the building could not be used for purposes not ordinarily and reasonably connected with such a use. On the other hand, whatever the character or form of the building, it would be permissible to use it for residential purposes, and if there be no building at all, it could be used for purposes consistent with and incident to its use for residential purposes."

In the Wilbur case the Michigan court said [301 Mich. 117, 3 N.W.2d 34]:

"The original plattor in conveying the lots in question to his first grantees inserted the following restrictive covenant in each conveyance: 'That he will not erect, keep, operate or maintain either directly or indirectly any saloon or store thereon or any other building except the necessary buildings for residence purposes. Second parties also agree that he will, if he build at all, erect a dwelling house of not less than $2,000.00 on each of the lots above mentioned. * * *'

"In 1909 the then owners of property on Monterey avenue entered into an agreement restricting the use of their property on Monterey, which was duly recorded in the office of the register of deeds for Wayne county, and which reads as follows: * * *

" 'That between Third Avenue and Hamilton Boulevard no building shall be placed on a lot of less than 40 feet frontage on Monterey Avenue, nor within 20 feet of the front line thereof on the south side nor within 25 feet of the front line on the north side of Monterey Avenue, and that nothing but a single dwelling house costing not less than $2500.00 and the necessary out-buildings shall be built or placed on any of said lots.'

* * * * * *

"Defendant Tuxedo Theatre Company purchased lots 236, 237, 238, and 239 with the intention of using them for parking lot purposes and with full knowledge of the restrictions. While it is true that the restrictive negative covenants, strictly construed, might be held to apply solely to the erection and use of buildings, they are obviously part of a general plan to prevent the use of property for business purposes to the detriment of a strictly residential district. These restrictive negative covenants, fairly construed, prevent use of these lots for business purposes."

In the Mellitz case the Connecticut court approved the reasoning of the Laughlin case. The restrictions provided that "No

building shall be erected on said premises (with exceptions) to be used for any other purpose except dwelling or to be occupied by more than two families." The court said:

"* * * The restriction in the deed to Linsky limits the building to be erected thereon to a dwelling house to be occupied by not more than two families and limits the occupancy of the building to be errected to the purpose of a dwelling. Exclusive of this lot, 30 lots on this tract were similarly restricted, and as to the 13 fronting on Fairfield avenue the restriction limited the erection of buildings thereon to be occupied for a store, or a store with one family, and the store was to be used for the sale of ordinary merchandise. Reading these restrictions together, and considering the purpose of the grantors, it seems plain that they intended to restrict all portions of this tract, including this corner lot, to residential purposes, and that none of it was to be used for business purposes except the 13 lots on Fairfield avenue, and that the business to be conducted on these 13 lots was further restricted to stores 'to be used for the sale of ordinary merchandise.'"

The Court of Appeals of Kentucky in Holliday v. Sphar, 262 Ky. 45, 89 S.W.2d 327, 328, construed the following restriction:

"No dwelling house shall be built in any part of said addition, when laid off into streets, lots and alleys, closer than 25 feet to the pavement line, and no residence shall be built on Boone avenue or Belmont street, which is now known as the Colbyville Pike, costing less than thirty-five hundred ($3500.00)" dollars.

Holliday declared his intention to conduct a service station on one of the lots; a number of witnesses testified that the owners had restricted the use of the lots for residences only, and this had influenced their sale. It was held in this case that the restrictive covenant did not prevent the placing of the service station on one of the lots.

The same type of reservation appears in a deed construed in Dorsey v. Fishermen's, etc., Co., 306 Ky. 445, 207 S.W.2d 565, 566, in which it was held that the restriction included the land. The losing party cited the Holliday case, regarding which the Kentucky court said:

"In the Holliday case we held that, since the restrictions related only to the minimum cost of residences and to building lines, the use of the lots in the subdivision was not restricted solely to residential purposes, but would permit the construction of a gasoline service station. * * *

"While we do not feel called upon to overrule the Holliday case at this time, we may say in passing that we now entertain some doubt as to the correctness of

that ruling. A careful analysis of the wording of the restrictions pertaining to Lot 15, coupled with a consideration of all the facts and circumstances pertaining to the establishment of the Hollywood Subdivision, which have been noted heretofore, leads us to the conclusion that the chancellor erred in holding that a commercial building may be erected on Lot 15. We think it was intended that all of the lots in the Subdivision be used for residential purposes and that the words 'only one dwelling (except servants' quarters)' meant that only a dwelling house could be constructed on any of the lots in the Subdivision."

The covenant construed in Meyer v. Stein, 284 Ky. 497, 145 S.W.2d 105, recited that the property conveyed "shall be used only for the erection of a single residence and no residence shall be erected thereon that shall cost less than $5000". Regarding this covenant the Kentucky court said:

"Restrictions upon the free alienation of property are not favored by the law and are usually strictly construed against those seeking to enforce them. This rule applies to building restrictions. However, if building restrictions are reasonable, they are uniformly enforced by courts and are given the effect intended by the parties as gathered from the conveyance in the light of surrounding circumstances. * * * "No one can read the restrictive covenants in the deeds conveying this property and escape the conclusion that it was the intention of the parties to, and they did, limit the use of the property to residential purposes. If we should accept appellant's argument that such covenants related only to the building of the homes, and placed no limitation upon their use after they were once constructed in conformity with the restrictions, then building restrictions would render the owners of property no benefit and parties incorporating such restrictive covenants in their deeds would be doing a vain thing."

The restriction construed in Aller v. Berkeley Hall School Foundation, 40 Cal. App.2d 31, 103 P.2d 1052, 1054, was, "'All buildings to be erected on Doheny Drive' shall be exclusively for private residences". The California court said:

"It is clear that the restriction in the deed which provides that 'all buildings to be erected on Doheny Drive' shall be exclusively for private residences, means that all lots fronting on Doheny drive are to be used for residence purpose."

The covenant construed in Bohm v. Rogoff, 256 Mich. 199, 239 N.W. 320 recited, "Nothing but one single dwelling house, of two or more stories and the necessary outbuildings shall be erected on each lot." A miniature golf course was placed on the

land. In holding that it violated the covenant the court said:

"It avails defendants nothing to contend that the restriction applies only to the kind of buildings to be erected, and not to the use of the property. This contention runs counter to the manifest intent of the restriction, and would fritter away its benefit."

The covenant construed in Ragland v. Overton, Tex.Civ.App., 44 S.W.2d 768, 769, provided "that when the Vendee, his heirs, assigns or legal representatives, place improvements upon the lots herein conveyed, that the residence to be erected and thereafter maintained shall cost not less than $1,500.00, to be used exclusively for residence purposes". The contention was that this restriction did not forbid plaintiffs using and improving their lots for business or commercial purposes. The Texas court said:

"We think the language of the restrictive clause, when considered alone, is sufficient to prohibit the use of the lots for other than residential purposes and to prevent the construction of any dwellings thereon which cost less than $1,500 each."

This court in Rowe v. May, 44 N.M. 264, 265, 101 P.2d 391, 396, in construing a restrictive covenant indicated that the less strict rule should be followed.

"Aside from any consideration of the circumstances presented by the case at bar favoring the promotion of a high class residential area under which this addition was platted and sold (which the court had a right to, and which it did in fact consider, making findings favorable to defendants), the language of the covenant itself, identical in all deeds in the area, taken alone, could bear no other reasonable inference than that such deeds from the original grantor, the corporation, gave sufficiently adequate and clear expression to its intention that the restriction was for the benefit of all the lots, and, that since the restrictions, being of the character they were, and imposed uniformly upon all, it was inescapable by fair and reasonable inference, that the purpose was to preserve its genuine residential character, the symmetry and beauty of the area, and for the general good of all interested, in making this an attractive and valuable residential district."

Also see Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 and annotations in 155 A.L.R. 528, and 175 A.L.R. 1196.

The University Heights addition to the City of Albuquerque is made up of seventy blocks divided into more than 1300 lots, all but a few of which are so restricted. The restriction, though not as definite as it should be, leaves no doubt in our minds, when considered with the scheme of subdivision and the character of buildings permitted to be built on the lots contain-

ing the covenant, but that it was the intention of the seller and purchasers that the use of the lots as well as the buildings was limited to residential purposes, and we so hold.

The decree of the district court should be affirmed, and it is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

199 P.2d 998

BOARD OF EDUCATION OF CITY OF LAS VEGAS v. BOARMAN.

No. 5124.

Supreme Court of New Mexico.

Nov. 24, 1948.

Noble & Spiess, of Las Vegas, for appellant.

E. R. Cooper, of Las Vegas, and M. A. Otero, of Santa Fe, for appellee.

McGHEE, Justice.

The defendant and appellee was employed as a teacher in the schools of the City of Las Vegas from 1925 to 1941 when she resigned. She was again employed by the plaintiff and appellant as such teacher in September, 1945, and continued in such employment until she was discharged in May, 1947, following notification before the close of school by the school board that it did not desire her services for the ensuing year. We will refer to the parties as they appeared in the trial court.

The defendant claimed that she had acquired tenure as a teacher by reason of her services from 1925 to 1941 and demanded a hearing before the plaintiff board. This demand was refused, whereupon she appealed to the State Board of Education, which conducted a hearing on June 2, 1947, and held that the defendant did have permanent tenure under the New Mexico permanent tenure law, and directed that the plaintiff grant her a hearing.

Thereupon the plaintiff school board filed its complaint seeking a declaratory judgment. After generally reciting the facts, the complaint states:

"7. That an actual controversy has arisen between Plaintiff and Defendant as to the construction of Chapter 125 of the Laws of 1945 and as to whether the period during which Defendant was employed as a teacher in said School District prior to 1941 constitutes the probationary period required by the Teacher Tenure Law of the State of New Mexico, and as to whether a teacher who has resigned her position and is afterwards reemployed is required to reestablish tenure in said school system."

As the defendant was not reemployed until in September, 1945, her status is governed by Chapter 125, Laws of 1945, the material portion of which reads:

"On or before the closing day of school in each school district in the State whether rural, municipal or otherwise, the governing board shall serve written notice upon each classroom teacher certified as qualified to teach in the schools of the State and by it then employed stating whether it desires to continue or discontinue the services of such teacher for the ensuing school year. Notice to discontinue the service of such classroom teacher properly certified and who has served a probationary period of three (3) years and holds a contract for the completion of a fourth year in a particular district shall specify a place and date not less than five (5) days nor more than ten (10) days from the date of mailing such notice at which time said teacher may at his or her discretion appear before the board for a hearing. If the decision of the governing board is not satisfactory to the teacher he or she may appeal to the State Board of Education within ten

(10) days from date of hearing, and should the State Board of Education find alleged causes insufficient for termination of his or her services, said teacher shall be considered employed for the following year under the terms of his or her then existing contract, * * *."

At the time the defendant left the service of the plaintiff in 1941 her rights with respect to the renewal of her teaching contract were contained in Chapter 202, Laws of 1941, under which the right to discontinue her services at the end of a school year regardless of the length of her service, was vested in the plaintiff, subject only to the serving of a notice on or before the closing day of school that her services would be terminated.

Many states have passed teacher tenure statutes and most of them provide that prior service in the district for the number of years fixed as the probationary period gives a teacher tenure, but it will be noted that our statute is silent on this point. A correct determination of the issues involved here depends on whether the applicable statute is prospective only or retroactive as well in its effect.

The general rule respecting the operation of statutes was stated by this court in Gallegos v. Atchison, Topeka & Santa Fe Railway Co., 28 N.M. 472, 214 P. 579, 582, as follows:

"The general rule is that statutes are presumed to have only prospective effect. They are not given retroactive or retrospective effect, unless such intention on the part of the Legislature is clearly apparent which cannot otherwise be satisfied." See also Wilson v. New Mexico Lumber & Timber Co., 42 N.M. 438, 81 P.2d 61 and Fulghum v. Madrid, 33 N.M. 303, 265 P. 454.

Montana and California have tenure statutes very much, in legal effect, like our own. In Falligan v. School District, 54 Mont. 177, 169 P. 803, the syllabus states the gist of the opinion and is as follows:

"Laws 1913, c. 76, subc. 8, § 801, providing that after election of any teacher for the second consecutive year such teacher shall be deemed re-elected from year to year unless given notice before the 1st day of May that services will not be required for the ensuing year, does not apply, as regards election for third year, where the act was passed after teacher's election for second year, though before May 1st of that year; as a retroactive effect is not to be given to a statute unless commanded by its context, terms, or manifest purpose."

The material part of the California statute, School Code, Sec. 5.500 reads as follows:

"Every employee of a school district of any type or class, who after having been

employed by the district for three complete consecutive school years in a position or positions requiring certification qualifications, is reelected for the next succeeding school year to a position requiring certification qualifications shall, except as hereinafter otherwise provided, at the commencement of said succeeding school year, be classified as and shall become a permanent employee of the district."

In construing this Act it was held by the District Court of Appeals, Division 2, in Montgomery v. Board of Education of Los Angeles City, 137 Cal.App. 668, 31 P.2d 243, that a teacher did not acquire any rights as a permanent teacher by reason of her service prior to the adoption of the teacher tenure law.

In Merman v. Calistoga Joint Union High School District, 5 Cal.2d 438, 55 P.2d 195, the Supreme Court of California held that where a teacher had been employed for two school years, then resigned and was later employed for a term less than three years that she could not combine the two periods of employment and obtain tenure, and cited Montgomery v. Board of Education, supra, as authority for the holding.

In Freeman v. Medler, 46 N.M. 383, 129 P.2d 342, we construed Chap. 202, Laws of 1941, and held that where the school board had failed to serve notice on a teacher prior to the end of the school year such teacher had been employed for another year by operation of law. It was assumed that the Act was prospective only. The title of the Act is as follows:

"An Act Relating To The Employment And Discharge Of And Contracts With Teachers In The Public Schools Of New Mexico And Amending Section 20 of Chapter 73, Laws Of 1925, And Declaring An Emergency."

In the opinion it is stated [46 N.M. 383, 129 P.2d 344]:

"As the title of the Act indicates, it had reference to the future employment of teachers, and the reference to existing contracts or employment was solely for the purpose of fixing the status of those affected by the act. * * * The statute is not made retroactive merely because it draws upon antecedent facts, or fixes the status of a person for the purpose of its operation. Cox v. Hart, 260 U.S. 427, 43 S.Ct. 154, 67 L.Ed. 332."

The title of Chapter 60, Laws of 1943, which Chapter 125, Laws of 1945 amends, is as follows:

"A Bill Relating To The Employment And Discharge And Contracts With Teachers In The Public Schools Of New Mexico And Amending Section 55-1111 Of The New Mexico Compiled Statutes Of 1941 Being Section 1, Chapter 202 Of The New Mexico Session Laws of 1941."

The title of Chapter 125, Laws of 1945, is as follows:

"An Act To Amend Chapter 60 Of The New Mexico Session Laws Of 1943 (Sec. 55-1111 Supplement To New Mexico Statutes 1941 Annotated) Relating To The Employment And Discharge And Contracts With Teachers In The Public Schools Of New Mexico."

We find nothing in the title of either the 1943 or the 1945 Act to lead us to the conclusion that they are retroactive.

In our consideration of this case we have been mindful of the fact that the Act in question is remedial in its nature, but settled rules of construction and the Act itself require that we hold it to be prospective in its application and not retroactive. Therefore, the service of the defendant from 1925 to 1941 did not give her the status of a tenure teacher, and her service following her reemployment in 1945 was likewise insufficient to afford her the claimed status.

Our decision in this case is not to be construed as affecting the tenure status of any teacher that may have been acquired under the 1943 Act as it is not involved in this case.

In Stapleton v. Huff, 50 N.M. 208, 173 P.2d 612, the rights of a teacher having tenure under the 1943 Act are determined, but the claim that Stapleton had such status was not disputed.

In view of our disposition of the main question in the case we have not considered the other assignments of error.

The judgment appealed from will be reversed and the case remanded to the District Court with instructions to render judgment in accordance with the views herein expressed, and it is so ordered.

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

199 P.2d 1001

PUGH v. TIDWELL.
No. 5136.

Supreme Court of New Mexico.
Nov. 24, 1948.

York & Schubert, of Hobbs, for appellant.

Harris, Williams & Johnson, of Hobbs, for appellee.

COMPTON, Justice.

Appellee instituted this suit to enforce specific performance of a contract in relation to personal property. From a judgment awarding damages only for its breach appellant brings this appeal.

The contract was in writing and is as follows:

"Tidwell Motor Company Telephone 25
"301 North Turner
"Hobbs, New Mexico
"July 27, 1940

"Certificate of Deposit

"This certifies that LeRoy Pugh has deposited with Tidwell Motor Company 1939 Plymouth DeLuxe Two Door Sedan in exchange for credit on New Deluxe Plymouth in the amount of $225.00, such credit is to be used when purchaser desires and when new car is available. The new Plymouth is to be sold Mr. Pugh at prevailing price in locality at time of delivery. Mr.

Pugh gives full title to 1939 Plymouth and says there are no liens against same. Tidwell Motor Company agrees to deliver purchaser new car in body type and color available in deluxe models. Tidwell also agrees to pay $275.00 cash today and also the credit on new car for the 1939 Plymouth signed and accepted this twenty-seventh day of July, 1940 at Hobbs, Lea County, New Mexico.

"/s/ LeRoy Pugh

"Received check for $275.00 and deposit.

"Accepted /s/ J. B. Tidwell

"Tidwell Motor Co."

Pursuant to the agreement the 1939 Plymouth Sedan was delivered to appellant.

On April 1, 1946, when a new car was available, at a market price of $1,219, appellee demanded delivery and tendered the balance of the purchase price. Appellant refused to make delivery and thereby breached the contract. Thereupon, this suit was instituted to specifically enforce its performance. By answer, appellant admitted the contract, challenged the jurisdiction of the court to grant relief, and tendered the amount of the deposit.

The case was tried to the court without a jury and when the parties had offered their evidence, appellant moved for a dismissal of the suit on the ground that the contract related to personal property, consequently, was unenforceable. Over the objections of appellant, and without expressly passing upon the motion to dismiss, the trial court announced that it would entertain a motion to amend the complaint to conform to proof *in the nature of damages.* Thereupon, appellee amended his complaint and sought damages only for breach of contract. Timely objection was urged that the amendment denied appellant the right of trial by jury.

The trial court, determining damages, used as a measure the difference between the market price of the car on April 1, 1946, the delivery date, and its market price on April 1, 1947, the date of trial, the market price in the meantime having advanced $230.00, and awarded judgment accordingly. Such measure of damages is assigned as error.

As we understand the rule, the measure of damages in such case, absent circumstances warranting special damages, is the difference between the agreed price at the time and place of delivery and the market price at time of refusal. Sundt v. Tobin Quarries, Inc., 50 N.M. 254, 175 P.2d 684, 169 A.L.R. 586; McLaren v. Marmon-Oldsmobile Co., 95 N.J.L. 520, 113 A. 236; Gloekler v. Painter, 272 Pa. 131, 116 A. 110; and Mazzeo v. Berkeley Motor Sales, Inc., 183 Misc. 628, 53 N.Y.S.2d 501.

It is also contended that the court erred in denying appellant the right of trial

by jury on the issue of damages. Obviously, the trial court concluded that once having acquired jurisdiction, it retained such jurisdiction for all purposes. Ordinarily, this is true but where a cause of action is completely changed from an equitable proceeding to one at law, either party at his option may demand a trial by jury. This is a substantive right, the denial of which is error. Mogollon Gold & Copper Co. v. Stout, 14 N.M. 245, 91 P. 724; Farnsworth v. Hunter, 11 Cal.2d 27, 77 P.2d 840; Garland v. Garland, 10 Cir., 165 F.2d 131; Gulbenkian v. Gulbenkian, 2 Cir., 147 F.2d 173, 158 A.L.R. 990; Crouser v. Boice, 51 Cal.App.2d 198, 124 P.2d 358.

It is indeed commendable that the trial court sought to dispose of the issues justly and in such manner as to avoid multiplicity of suits, nevertheless, equitable relief having been abandoned, we are of the opinion that the trial court erroneously denied appellant a trial by jury.

Whether appellee is entitled to have the contract specifically enforced, if he so elects, is not here presented. The trial court did not rule upon the question, consequently, we pass it. Ordinarily, however, contracts relating to personal property are unenforceable by reason of availability of adequate legal remedies. 49 Am.Jur., Specific Performance, Sec. 125, but exceptions to the rule are numerous where there is a lack of adequate legal remedies or where the measure of damages is difficult of ascertainment, Op.Cit., Sec. 126. To the same effect, 58 C.J., Specific Performance, Sec. 244, 250. See also Elephant Butte Alfalfa Ass'n v. Rouault, 33 N.M. 136, 262 P. 185.

Other errors are urged, but the conclusion reached renders discussion of these points unnecessary. The judgment will be reversed with directions to the trial court to reinstate the case upon its docket and grant a new trial, and it is so ordered.

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

McGHEE, J., did not participate.

199 P.2d 1003

HERON v. GARCIA, County Treasurer, et al.

No. 5122.

Supreme Court of New Mexico.

Nov. 24, 1948.

Kenneth A. Heron, of Chama, pro se.

Bigbee & Kool, of Santa Fe, for appellees.

McGHEE, Justice.

The matters involved in this case are before us for the third time. See 48 N.M.

507, 153 P.2d 514, and 51 N.M. 1, 176 P. 2d 680.

We will refer to the parties as they appeared below. The plaintiff Heron and the defendants each claim title under tax deeds. The plaintiff bases his claim upon a tax sale certificate issued on January 19, 1942, for 1939 taxes, and purchased from the county treasurer on September 22, 1942. On February 1, 1944, he applied to the treasurer for a tax deed which he refused to issue on the ground that the defendant Tafoya had redeemed the land within a few days after the assignment of the tax sale certificate, and that a certificate of redemption had been issued therefor. The defendants claim under a tax deed dated May 7, 1938, which recites that it was issued pursuant to a sale held on December 6, 1935, for several years' unpaid taxes.

The plaintiff assigns error on account of the refusal of the trial court in the early stages of the case to grant him judgment by default because the defendants were tardy in filing responsive pleadings. Although the trial court was quite indulgent in this respect we do not feel that it so abused its discretion that we should hold its action reversible error.

The plaintiff asserts that the defendant Tafoya had never acquired any interest in the property and therefore he did not have the right to redeem from the sale for 1939 taxes for the reason, as he states, there was never any sale of the property; that Tafoya caused the land to be assessed in 1937 for the years 1931 to 1934, inclusive, and that a tax sale certificate immediately issued, and that the tax deed was later issued, but less than two years from the date of sale. The defendants defended against the claims of the plaintiff, but did not ask affirmative relief and the trial court entered judgment in their favor.

The trial court refused to make findings of fact to sustain the contentions of the plaintiff, but on the contrary found that the records in the treasurer's office showed that in December, 1935, the land was duly sold by the treasurer to the State for failure to pay the taxes for the years 1931 to 1934, inclusive; that on or about May 7, 1938, the lands involved were sold by the treasurer to the defendant Tafoya pursuant to the assignment in 1937 of a tax sale certificate, and that tax deed No. 82 was duly executed and delivered to said defendant who then went into actual possession of the land and opened a coal mine thereon, and that he and certain of his codefendants have at all times since been in the actual, visible, hostile possession of such land, claiming under and pursuant to the tax deed issued to the defendant Tafoya, and have since the issuance of such deed claimed and now claim the ownership of said property as against all the world, and have paid all taxes assessed against

the property since said date. Among the other detailed findings of fact are the following:

"6. That the defendant, Juan A. Tafoya, paid the taxes on the property involved prior to the issuance of the tax sale certificate to the plaintiff, but through error in the County Treasurer's office, did not receive credit for such payment and the issuance of the tax sale certificate that was assigned to plaintiff was issued pursuant to such error."

"21. That two days after Tax Sale Certificate No. 2322 was assigned by the Treasurer of Rio Arriba County to the plaintiff, the defendant, Juan A. Tafoya, properly redeemed said tax sale certificate by paying all taxes, interest and penalties and other amounts provided by statute, thereby redeeming all of the land involved in Tax Sale Certificate No. 2322."

While the plaintiff assigns error on account of the adoption of these findings, his only exception to any of the findings is contained in the order of the court adopting the findings and reads: "to all of which the plaintiff objects and excepts, which said objection and exceptions are hereby noted and allowed." The plaintiff not only contented himself with an exception which is insufficient to invoke a decision as to the correctness of the finding, but he has also failed to comply with Sec. 6 of Supreme Court Rule 15 and set out the substance of the evidence on this point. In his reply brief he does point out certain matters in an attack on Finding No. 6, but they go to the weight of the evidence which supports the finding and the failure of the plaintiff to produce documentary proof of payment. A reply brief is not the place to make an attack on findings of fact where the making of such findings is assigned as error, and, as we have stated many times, we will not search the record for the evidence on which the finding was based when there is such a disregard for our rules.

The plaintiff attempts to avoid the effect of finding No. 6, supra, by calling our attention to the fact that the defendants admitted the following allegation of his second amended complaint:

"That pursuant to a statutory delinquent tax sale held by the Treasurer of Rio Arriba County, New Mexico, on the 19th day of January, 1942, the said Treasurer issued Tax Sale Certificate No. 2322, covering the above and foregoing described lands and certifying that the said real estate had been sold to the State of New Mexico in manner and form prescribed by law for delinquent taxes for the year 1939, all of which will more fully appear from a copy of said certificate attached hereto, marked Exhibit A, and made a part of the complaint."

Even though we were to hold that the admission of this paragraph constituted an acknowledgment that the 1939 taxes had not been paid, it would not avail the plaintiff anything as he sat idly by and allowed the defendants to make proof of payment of the tax prior to the sale without interposing an objection. In such a case the pleadings will be deemed amended to conform to the proof. George v. Jensen, 49 N.M. 410, 165 P.2d 129.

An answer to the effort of the plaintiff to have us hold that Tafoya did not have the right to redeem the property from the January, 1942, sale for the claimed reason that there was in fact no sale of the property to Tafoya is found in Turner v. Sanchez, 50 N.M. 15, 168 P.2d 96, 164 A.L.R. 1280, where we held that the holder of a tax title, even though it be void, had the right to redeem from a tax sale, as he might eventually get a good title by adverse possession by complying with the statutory requirements, as even a void tax deed constitutes color of title. We will not depart from that holding.

There are many other assignments of error, but they are either without merit or are unnecessary to a decision of this case.

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

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

200 P.2d 361

ANDERSON v. MINTON et al.

No. 5138.

Supreme Court of New Mexico.

Nov. 29, 1948.

Frazier, Quantius & Cusack, of Roswell, for appellant.

H. C. Buchly, of Roswell, for appellee John W. Minton.

Hervey, Dow & Hinkle and Richard G. Bean, all of Roswell, for appellees Mrs. A. S. Windsor, Lester C. Anderson, Mrs. W. H. Busby, and James S. Anderson.

SADLER, Justice.

The question for decision is the validity of a decree distributing to the heirs certain moneys in the hands of a New Mexico administrator, and of an earlier order refusing to substitute an ancillary administrator in his stead, made by a district court of this state sitting as a court of probate in administering the estate of a decedent, a resident of California at time of his death, where administration proceedings already were pending when like proceedings were instituted here, no move having been made to open ancillary administration in this state for about a year after decedent's death and the opening of administration in California.

Arthur R. Anderson, the decedent, died intestate in California on March 8, 1945. Previously, while a resident of Chaves County, New Mexico, and on January 15, 1945, he and Mattie J. Anderson were divorced. There were four children born of their marriage, namely, two daughters, Mrs. A. S. Windsor and Mrs. W. H. Busby and two sons, Lester C. Anderson and James S. Anderson. On January 20, 1945, five days after the divorce mentioned, the decedent was married to Lillie Anderson, who with the children of the former marriage constituted his sole and only heirs at law. Lillie Anderson, as the surviving wife of decedent, was appointed administratrix of his estate in San Mateo County, California, on March 13, 1945. However, prior to application by her or anyone else to secure appointment of an ancillary administrator of the decedent in New Mexico, upon the application of Lester C. Anderson, a son, and Mattie J. Anderson, decedent's former wife, John W. Minton of Roswell, on October 1, 1945, was appointed administrator of his estate in New Mexico and forthwith qualified as such. The only property involved in the administration of decedent's estate was separate property belonging to him at the time of his death.

The findings and conclusions of the trial court so far as material to this controversy, some of which are stated above, are as follows:

"1. That the petitioners are the children of Arthur R. Anderson, deceased; and that each of them is over the age of twenty-one years. That at the time of the filing herein

of their petition for distribution, Lester C. Anderson was a bona fide resident of Chaves County, New Mexico, and Mrs. W. H. Busby has been at all times during the pendency of this cause and now is a bona fide resident of Hatch, New Mexico.

"2. That Arthur R. Anderson died in Redwood City, California, on March 8, 1945.

"3. That on January 15, 1945, Arthur R. Anderson was divorced from Mattie J. Anderson, the mother of Petitioners, and thereafter on January 20, 1945, in the State of Arizona, the said Arthur R. Anderson and Lillie Anderson were married and said Lillie Anderson is the surviving widow of Arthur R. Anderson, deceased.

"4. That on March 13, 1945, Lillie Anderson applied for and there were issued to her letter of administration in the estate of Arthur R. Anderson, Deceased, in the County of San Mateo, State of California, and from that date in said county and state, she was the duly appointed and acting administratrix, but the said Lillie Anderson did not apply for letters of administration in the State of New Mexico until subsequent to the date that John W. Minton of Roswell, New Mexico, was appointed and became qualified as Administrator of the Estate of Arthur R. Anderson in Chaves County, New Mexico, namely the 1st day of October, 1945.

"5. That John W. Minton, Administrator, has filed his Final Account and Report herein; and that the said Final Account and Report is in all respects regular, true and correct.

"6. That the sum of $4,610.63 remains undistributed in the hands of John W. Minton, Administrator; and that this money is available for distribution to the heirs of Arthur R. Anderson, deceased.

"7. That the Estate of Arthur R. Anderson, deceased, has been fully administered and is now ready to be closed.

"8. That the sole and only heirs at law of Arthur R. Anderson, deceased, and the relationship of said heirs are as follows, to-wit:—

"Lillie Anderson, surviving widow.

"Mrs. A. S. Windsor, daughter

"Mrs. W. H. Busby, daughter

"Lester C. Anderson, son

"James S. Anderson, son

"9. That the children of Arthur R. Anderson, deceased, namely; Mrs. A. S. Windsor, Lester C. Anderson, Mrs. W. H. Busby, and James S. Anderson have petitioned this Court for an order of distribution of the assets of the estate of Arthur R. Anderson, deceased, within the State of New Mexico and in the hands of the Administrator, John W. Minton and under the jurisdiction of this Court.

"10. From the record herein, the Court finds that Lillie Anderson qualified as Administratrix in the State of California, but that the inventory which she filed as Administratrix in the California proceedings discloses that there were no assets situate within the State of California that belonged to said estate and she inventoried none, but that she collected moneys to the extent of $1735, which said sum was more than sufficient to pay off and discharge claims filed and approved by the Court in California proceedings, with the exception of an allowance which the Court in California made to the said Lillie Anderson.

"From the foregoing Findings of Fact, the Court makes the following

"Conclusions of Law

"1. That this Court has jurisdiction over all the heirs at law of Arthur R. Anderson, deceased.

"2. That this Court has jurisdiction over all assets of the Estate of Arthur R. Anderson, deceased, situate in the State of New Mexico, and which have come into the possession of John W. Minton, Administrator of the Estate in Chaves County, New Mexico.

"3. That this Court has the power and authority to, and in its discretion may order distribution of the assets of said estate direct to the heirs at law of Arthur R. Anderson, deceased.

"4. That a distribution direct to the heirs at law of the decedent will more nearly attain and accomplish the ends of justice and of equity.

"5. That all the personal property in the hands of John W. Minton, Administrator, should be distributed in accordance with the laws of California, viz: One-third to the surviving widow, and two-thirds to the surviving children in equal shares, share and share alike."

It was not until February 27, 1946, following her appointment as administratrix in California on March 13, 1945, and the opening of an independent administration in New Mexico on October 1, 1945, that the appellant took steps to have herself appointed ancillary administratrix of decedent's estate in New Mexico by filing her petition in that behalf in the probate proceeding pending in Chaves County with exemplified copy of the California proceedings attached thereto. In her petition she sought removal of John W. Minton, one of the appellees, as New Mexico administrator and the substitution of herself as the personal representative of decedent as an ancillary administratrix. She also alleged the existence of New Mexico assets consisting of cash in a New Mexico bank in excess of $1200 and indebtedness due decedent's estate in excess of $8000 which as the California administratrix, she had sought unsuccessfully to collect. Aft-

er a hearing, the probate court on March 20, 1946, entered its order denying the petition. Soon thereafter upon petition of appellant, the California administratrix, the cause was removed into the district court of Chaves County.

When the estate had been fully administered in New Mexico, the administrator had on hand the sum of $4,610.63 available for distribution to the lawful heirs of decedent. The inventory filed by appellant as administratrix in California disclosed no assets of decedent in that state, but she had collected moneys due decedent from New Mexico residents to the extent of $1735 which sum was more than sufficient to pay off and discharge unpaid claims filed and approved in the administration proceedings in California with the exception of family allowance of $135 per month which appellant as widow of decedent had applied for and had allowed to herself. Accordingly, final report of the administrator having been filed, the children of decedent, who with appellant as surviving widow constitute his sole heirs at law, joined in a petition for distribution.

The appellant objected both to the final report of the New Mexico administrator and to the petition for distribution, a separate pleading containing the objections being filed to each. Passing immaterial exceptions, the basic objection to each was the claimed lack of jurisdiction in New Mexico courts to conduct an independent administration on decedent's estate in disregard of applicable New Mexico statutes relating to ancillary administration of local assets of a non-resident decedent; or, to make any order respecting surplus funds in the hands of the New Mexico administrator except to direct their transfer to the appellant as domiciliary administratrix in California. The lower court overruled all objections, approved the final report and ordered distribution of the moneys in the hands of the local administrator, being separate property of the decedent, in accordance with the statutes of descent and distribution prevailing in California, to-wit, one-third to the surviving widow, the appellant, and the remaining two-thirds to the surviving children in equal shares. The appellant prosecutes this appeal, both from the order declining to remove the local administrator and substitute herself as ancillary administratrix in his stead; and, as well, from the order approving the final report and directing distribution.

The contentions made cannot be sustained either as to action of the district judge in declining to remove the New Mexico administrator and substitute appellant in his stead, or in directing distribution here rather than transmitting surplus funds on hand to appellant as domiciliary administratrix for disposition by the California court. The probate court of Chaves County, as well as the district court

upon removal, had jurisdiction of the parties and the subject matter. It was within the sound judicial discretion of the district judge, upon completing administration of the estate, to decide whether to transfer surplus funds to the domiciliary administration pending in California, or make distribution through the local, but independent, administration pending in New Mexico.

First, let us examine the appellant's claim that the trial court erred in refusing to remove the local administrator and appoint her in his stead. The decedent had died in California on March 8, 1945. The appellant as his surviving widow had been appointed administratrix of his estate in California on March 13, 1945. She had made no move to have herself appointed ancillary administratrix in New Mexico as late as October 1, 1945. Occasion existed for the appointment of an administrator in New Mexico, not only to collect an unpaid balance of $8000 due decedent's estate from sale of his farm, represented by eight notes for $1000 each, as well as other debts due the estate; but, also, for the purpose of satisfying certain claims including an indebtedness of $4000 incurred by decedent in his lifetime secured by a mortgage which his former wife had signed.

Without doubt, the probate court of Chaves County had jurisdiction to appoint an administrator of decedent's estate. The escrow contract for sale of his farm to the purchaser, out of which the $8000 indebtedness due the estate arose, was on file with First National Bank of Roswell where payment of the notes evidencing unpaid purchase price was being made. Chaves County was the place where the principal part of decedent's estate was located. He had no mansion house or place of abode in this state. Nor was it objected by appellant that the probate court of Chaves County did not represent a proper venue for initiating the proceedings. There was no lack of jurisdiction. 1941 Comp. § 33-103.

Notwithstanding the lapse of more than six months since decedent's death and her appointment as administratrix in California, the appellant had not moved to exercise, as surviving conjugal partner, any preferential right to administer (if she had one) by applying for letters within twenty days following the death of her husband. 1941 Comp. § 33-109. Accordingly, Lester C. Anderson, a son, and Mattie J. Anderson, the former wife of decedent, contingently liable with his estate on a mortgage both had signed prior to the divorce, were quite within their rights in petitioning for appointment of an administrator by the probate judge and he had unquestioned authority to name one. 1941 Comp. § 33-110. Having the right to appoint, the probate judge did not abuse his

discretion in declining to remove the person named and substitute appellant as an ancillary administratrix in his stead. The administration here was not dependent on the proceedings opened in California by the appellant. 34 C.J.S., under Executors and Administrators, § 989, page 1234. Cf. Sheley v. Shafer, 35 N.M. 358, 298 P. 942. The very statute relied upon by her as giving preferential right to appointment in this state, 1941 Comp. § 33-204, if it does so, a question not decided, denies the claimed preference where an administrator already has been appointed. We find nothing in Chapter 33, Article 2, 1941 Comp., dealing with ancillary administrations sustaining appellant's claim that the trial court erred in declining to remove the administrator appointed by the probate court and appoint her in his place.

Neither does the appellant stand on firmer ground in contending the trial court should have declined to order distribution, directing instead transmission of surplus funds to the appellant as domiciliary administratrix in California for such disposition as the court having jurisdiction there might direct. Even if the administration proceedings in New Mexico should be treated as ancillary to those initiated by appellant in California (although obviously not so initiated) it is a matter of discretion with the court administering the estate here whether to transmit or distribute surplus personal estate remaining after payment of claims. Restatement of the Law, Conflict of Laws, page 627, § 522, where it is said:

"A court of ancillary administration will, after payment of claims, exercise its discretion as to the disposition of the balance of the local personal estate; it may order its administrator to transmit the balance of the personal estate to the court of administration at the domicil of the decedent; it may order him without such transmission to distribute the balance to the persons who are entitled to it; or it may order him to transmit part and distribute the rest."

See, also, 3 Bancroft's Probate Practice, page 1979, § 1223; In re Lathrop's Estate, 165 Cal. 243, 131 P. 752; In re Fults' Estate, 177 Minn. 334, 225 N.W. 152; In re Zimmerman's Estate, 195 Minn. 38, 261 N.W. 467; In re Easby's Estate, 285 Pa. 60, 131 A. 652; Dolan v. Anthony, 51 R.I. 181, 152 A. 873; In re Campbell's Estate, 53 Utah, 487, 173 P. 688, and annotation of subject in 90 A.L.R. 1043. The author of the annotation just cited, on page 1046, states the rule as follows:

"By the weight of authority, the rule for remission as stated in subdivision IIIa, supra, is not absolute. The view generally accepted, either as a matter of common law or under statute, is that no hard and fast rule guides the court in determining whether it should decree distribution of surplus assets in an ancillary administra-

tion in its jurisdiction, or order a remission thereof to the domicil; that such question depends upon the particular circumstances involved in each case, and can best be solved by leaving the matter to be determined within the discretion of the court."

A careful review of the record before us is convincing that there was no abuse of discretion in the refusal of the trial court to transmit surplus funds for distribution in California. More than enough money had been collected by the appellant as administratrix there to satisfy and discharge all unpaid, approved claims constituting expenses of last illness and burial, plus expenses of administration, all of which have priority over the family allowance. Cal.Probate Code, § 950. Nevertheless, according to her report as administratrix filed in the proceedings there, she had consumed the moneys collected in paying herself a family allowance of $135.00 per month, allowing the preferred claims mentioned to appear unsatisfied. The appellant already had shared bountifully in decedent's estate through the purchase on the eve of his death of a residence property in California, almost wholly with his separate funds, the title being taken in husband and wife as joint tenants with right of survivorship.

The funds on hand with the New Mexico administrator represented the proceeds of separate property, there being no community property. The decree awarded appellant as an heir of decedent the share to which she was entitled in accordance with the laws of California, the domicile of decedent. This was proper. In re Easby's Estate, supra. The remainder was distributed to decedent's children, share and share alike. Counsel for appellees say the facts warrant an assumption that if surplus funds should be transmitted, the appellant would continue paying to herself the family allowance awarded and thereby consume surplus funds. Whether the record warrants the assumption, it is unnecessary for us to determine in order to sustain the decree directing distribution here. It promotes fairness and justice on the proven facts without resort to assumptions. Some ancillary questions are argued which we find either without merit, or resolved by the conclusions announced.

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

It is so ordered.

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

McGHEE, J., did not participate.

200 P.2d 366

FLIPPO v. MARTIN et al.

No. 5130.

Supreme Court of New Mexico.

Nov. 26, 1948.

George L. Reese, Jr., and Don McCormick, both of Carlsbad, for appellants.

Leonard T. May, of Carlsbad, for appellee.

LUJAN, Justice.

The defendants bring before us for review of judgment of the district court of Eddy County awarding the plaintiff $27.00 per week for 550 weeks under the Workmen's Compensation Act of New Mexico for a condition of total permanent disability found by a jury to have resulted from an accidental injury to him arising out of and in the course of his employment as a driller's helper in a well drilling outfit. His employers were William L. Martin and Clayton L. Hurley, a co-partnership doing business as Martin and Hurley Drilling Company. In the claim filed, they were named defendants along with American Employers Insurance Company, the insurer.

At the time of the plaintiff's injury, his employers were engaged in drilling a water well near White City, Eddy County, New Mexico, and had attained a depth of ap-

proximately 800 feet in their drilling operations. From this point, we can best indicate the manner in which plaintiff suffered his injury and the claims made in reference thereto by copying paragraphs 3, 4 and 5 of his Claim for Compensation. They follow:

"No. 3. On February 2, 1947, at about 8:30 o'clock P.M., while in the employ of said employers, plaintiff sustained an accidental injury arising out of and in the course of said employment, as follows: Plaintiff was working in the capacity of driller's helper, sometimes referred to as "tooldresser", and in the said capacity was working with William *L.* Martin who is one of the employers. At about 8:30 o'clock P.M. of said day it became necessary for said employer to unwind or unreel additional 7/8 inch drill cable from spool of surplus 7/8 inch drill cable and to transfer it over to the drilling spool or drum in order to continue drilling to a greater depth. That at this time said employers were engaged in drilling a well for water for a certain Mr. Jacobs near White's City, Eddy County, New Mexico, and had reached a depth of approximately seven hundred and seventy-five feet in the drilling of said well. The employers were using a Bucyrus Erie Model 24 Spudder, or mechanical drilling machine, in the operation of drilling said well and said machine is of a portable or movable character with its own power for drilling and in operation the said 7/8 inch drill cable travels up and over a pulley or block at the top of a drilling mast and then down into the hole being drilled into the ground. The said employer, William L. Martin, on said occasion caused the machine to take up all the slack in the said 775 feet of 7/8 inch drill cable and made said 7/8 inch drill cable extremely taut and the weight of the 775 feet of said drill cable in the drilling hole put a great amount of strain and tension on the said cable. Said employer, William L. Martin, then tied said cable to a girth or cross-member of the said drilling mast using a piece of old used rope to make the tie and the plaintiff and the said employer then proceeded to unroll the surplus cable to throw the same over a divider to the drilling spool or drum and had about 20 or 25 feet of said cable unrolled when suddenly and without warning the said rope broke and permitted the weight of the 775 feet of drill cable in the drilling hole to pull the loose drill cable into the drilling hole and at this time said drill cable kinked and looped over plaintiff's right ankle and foot and dragged him several feet and over the drilling hole crushing his foot and *anckle* and also injuring him in his hip joint.

"No. 4. As a direct result of said accidental injury plaintiff has been greatly disabled and suffers permanent bodily disability. Plaintiff alleges that the said permanent bodily disability consists of a total

loss of function of the right foot and ankle, great disability to the right knee and right hip joint with a great amount of pain to plaintiff upon movement of any of said joints. Plaintiff states that his right leg and hip have a great amount of atrophy which is and will be permanent.

"No. 5. Plaintiff alleges that the said accident would not have happened but for the negligence of employers in failing to supply reasonable safety devices in general use for protection of the workmen. That the said safety devices that the employers failed to supply which would have prevented this accidental injury were cable or drilling clamps in general use in the drilling industry, and said cable or drilling clamps if they had been so provided and used by the employers would have securely and positively held the said drill cable and so would have prevented the happening of said accidental injury. Plaintiff alleges that under the terms and provisions of the Workmen's Compensation Act of New Mexico he is entitled to have the compensation he would otherwise be entitled to increased by fifty per centum (50%) by reason of the negligence of the employers as aforesaid."

While admitting that plaintiff's injury was accidental and arose out of and in the course of his employment, the defendants answered denying it was sustained in the manner alleged, that there was any negligence by defendants in the respects claimed, that it was as serious as alleged, or that it had produced total permanent disability. Trial of facts was to a jury which returned special verdicts in favor of the plaintiff. Since these special verdicts clarify the issues, they are set out herein, along with a stipulation in reference to two of them, as follows:

"We, the jury find that the plaintiff is totally and permanently disabled as a result of the accidental injury complained of. Yes.

"We, the jury find the plaintiff has suffered a 100% *per cent* permanent physical disability to his whole body as a result of the accident complained of.

"We, the jury, find that the defendants, or either of them, were negligent in failing to supply reasonable safety devices in general use for the use or protection of the plaintiff."

"Comes now the Plaintiff and the Defendants and stipulate:

"1. In addition to the three special verdicts returned by the Jury, and in addition to the special interrogatories answered by the Jury, all of which are now a part of the record proper, the Jury in this cause returned two other special verdicts in the following language:

"(a) "We, the Jury, find the Plaintiff has suffered a 100% disability of his right

leg from the knee down as a result of the accident complained of.

"(b) "We, the Jury, find the Plaintiff has suffered a 100% disability of his right leg from the hip down as a result of the accident complained of.

"2. The two special verdicts set forth immediately above were not filed at the time they were returned by the Jury upon agreement of counsel.

"3. After returning all the verdicts and the special interrogatories, the Jury was polled on motion of all counsel and stated that it was their intention to find that the Plaintiff had suffered 100% permanent physical disability to his whole body.

"4. An order may be entered herein approving this stipulation and making the two above quotes special verdicts a part of the record proper just as if they had been filed at the time the other three special verdicts had been filed."

The trial court entered an order approving the stipulation of counsel, quoted above, and making the two special verdicts recited in the stipulation a part of the record proper.

Appellants assign three errors, which resolve themselves into the following questions: 1. Whether there is sufficient evidence to support the findings of the jury that the drilling clamp or cable clamp is a safety device for the use or protection of the workman as required by Section 57-907, 1941 Comp.; 2. Whether it is in general use as a safety device for the use and protection of workmen in the water well drilling industry in Southeastern New Mexico; 3. Whether the defendants had knowledge of the existence of the same and that it was practicable and adapted for use on the machine of defendants; 4. Whether they negligently failed to supply the same; 5. Whether the failure of the defendants to use this clamp was the proximate cause of Plaintiffs' injury; 6. Whether the failure to use a safety device by the defendants entitled plaintiff to an increase of 50% under the Act; 7. and whether plaintiff is totally and permanently disabled as a result of the accidental injury.

[redacted] It has been repeatedly stated by this court that the findings of a trial court or the verdict of a jury, when supported by substantial evidence, will not be disturbed upon appeal. Roth v. Yara, 22 N. M. 361, 161 P. 1183; Candelaria v. Miera, 13 N.M. 360, 84 P. 1020.

[redacted] It will serve no useful purpose to quote the evidence on these points; suffice it to say that we have painstakingly read the record in order to ascertain whether there is substantial evidence to support the jury's verdict, and we are of the opinion that there was ample evidence submitted on these questions, which fully justified its verdict.

It is not intended by this opinion to approve an instruction given by the trial court that an employer must have knowledge of a safety appliance in general use in an industry before he is liable for the statutory penalty for failure to furnish such device.

Finding no reversible 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. An additional attorney's fee of $750.00 is hereby fixed and allowed appellee for and on account of the appeal. It is so ordered.

We concur:

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

200 P.2d 369

STATE ex rel. BLISS v. CASAREZ.

No. 5112.

Supreme Court of New Mexico.

Nov. 27, 1948.

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

Atwood, Malone & Campbell, of Roswell, and C. C. McCulloh, Atty. Gen., for appellee.

COMPTON, Justice.

This joint appeal is from a judgment enjoining the misapplication of the waters of the Roswell-Artesian basin and from a judgment in contempt.

Appellant is the owner of irrigable lands within the basin, part of which has water rights for irrigation from a shallow water basin and a part has water rights from the artesian basin.

On July 1, 1947 appellee filed a second amended complaint charging appellant with the misapplication of the waters of the basin for the crop years 1946 and 1947 by applying water from the shallow water basin upon lands having no water rights therein, and by applying water from the artesian basin upon lands having no water rights therein, and by applying the comingled waters of the basin upon lands having no water rights.

Appellant interposed a motion to dismiss with prejudice for failure to bring the action to a final determination within a period of two years after the filing of the complaint. The complaint was filed May 4, 1945, followed by a first amended complaint May 15, 1945, upon which issue was joined. Upon consideration of the motion, an order was entered dismissing the action with prejudice as to the matters alleged, but *without prejudice* as to matters occurring subsequent to May 15, 1945, the date of the filing of the first amended complaint. It does not appear that appellant objected to the order of dismissal.

On July 22, 1947, appellee instituted this proceeding by which he again seeks to enjoin the misapplication of the waters, asserting facts occurring subsequent to May 15, 1945, the date of the filing of the first amended complaint. Issue is joined by answer and plea in bar.

It is first contended that the court committed error when it dismissed the second amended complaint without prejudice and citing Sec. 19-101(41) (e), N.M.Stat. 1941 Comp. as supporting this contention. We may conclude that the trial court erred, nevertheless, the error, if any, was not cor-

rected on appeal from that judgment and failing to do so the same became final. Sec. 19-201(5) (1), N.M.Stat.1941 Comp.; Freeman on Judgments, Vol. 1, Sec. 23, et seq.; Fullen v. Fullen, 21 N.M. 212, 153 P. 294; Weaver v. Weaver, 16 N.M. 98, 113 P. 599. See also Am.Jur.Judgments, Sec. 583, et seq. The question not having been saved for review it cannot be raised here. State v. Nuttall, 51 N.M. 196, 181 P.2d 808.

It is next contended that the order of dismissal is res judicata as to the matters urged. We notice in this connection that the order of dismissal expressly reserved for future determination matters occurring subsequent to May 15, 1945. Consequently, the reservation itself became res judicata as to matters so reserved. Freeman on Judgments, Vol. 2, Sec. 704 states the rule in the following language: "If the judgment expressly provides that specified issues or matters are not determined or are reserved for future adjudication or litigation, it is not res judicata as to matters thus excluded. * * * In such cases the express reservation itself becomes res judicta, and this is true even though the judgment or decree purports to be on the merits and the reservation is erroneous and though *in effect it splits an indivisible cause of action and permits a second action upon the same cause of action.*" (Emphasis ours.)

The rule is followed generally. Powell Bros. Truck Lines, Inc., v. State, 177 Okl. 568, 61 P.2d 231; Hardin v. Hardin, 26 S.D. 601, 129 N.W. 108; Bodkin v. Arnold, 45 W.Va. 90, 30 S.E. 154.

In Powell Brothers Truck Lines, Inc., v. State, supra, [177 Okl. 568, 61 P.2d 233] the court said:

"In support of the judgment of the trial court, the defendant in error herein calls our attention to the frequently repeated rule with reference to a plea of res judicata that 'a former judgment of a court of competent jurisdiction in a case between the same parties involving the same subject-matter is final and conclusive, not only as to all matters litigated in the former case, but as to every matter which might have been pleaded or given in evidence whether the same was pleaded or not.' (Citing cases.)

"The rule as stated is generally applicable when the former decision is upon the merits of the controversy. The rule, however, is not without its limitations and restrictions. Thus in the case of Billy, et al, v. Le Flore County Gas & Electric Co., 146 Okl. 227, 293 P. 1009, 1010, we announced the following restriction of the limitations upon the rule in the fourth paragraph of the syllabus: '"A judgment or decree which expressly excepts or reserves from its operation specified rights or claims of the parties in suit, or the decision of questions in issue, *or the right to take further proceedings in respect to certain matters, is not a bar* to a subsequent action on the matters so

reserved; but, on the contrary, the reservation itself becomes res judicata and prevents the raising of any question as to the right to bring or maintain such subsequent suit." 34 C.J. 797.' " (Emphasis ours.)

It is next contended that the restraining order, unsupported by substantial evidence, was erroneously issued. There is evidence that appellant illegally used the waters for more than two years and was continuing to do so. He permitted the ditches and laterals leading from the wells to the lands irrigated by him to remain intact. This evidence is sufficient. It is true that appellant denied that he intended to continue the use of the waters. But the court is not bound to accept such denial. It is to be considered with other facts and circumstances. At 32 C.J. Injunctions, Sec. 23, 43 C.J.S., Injunctions, § 21(b), the rule is stated: "However, the mere fact that defendant denies his intention to do the threatened act is not sufficient ground for denying the injunction, as the court is not bound to accept such denial; but the denial should be accepted and an injunction refused where the evidence satisfies the court that the denial is truthful, and it has been held that this requirement is satisfied where there is no evidence to disprove the denial."

We are in accord with the above rule. That the trial court correctly resolved the question becomes obvious when viewed in the light of subsequent events.

We now turn to a consideration of the last question. At the conclusion of the trial, the parties being present, the court announced in open court that an injunction would issue and become effective immediately. The judgment was not formulated, signed and entered until October 10, 1947. In the meantime, appellant committed the acts complained of. He now strongly contends that the judgment, not having been entered as provided by Sec. 19-101(58), N.M.Stat.1941 Comp., its violation is not contemptuous. This contention is without merit. Sec. 19-101(58), supra, being our Rule 58 of the Rules of Civil Procedure, go to the time when certain rights begin and end. The rule, so far as we know, is never entertained as a defense in a contempt case. At Vol. 2, Sec. 1421, High on Injunctions, the rule is stated in the following language: "In considering the question of a defendant's liability for a breach of injunction, it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up. The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts constituting the violation. Thus, where an injunction is granted to restrain the com-

mission of waste, and before the writ actually issues, or the order is drawn up, defendant is notified of the order, and its purport and effect are verbally explained to him, the cutting of timber after such notice constitutes a breach of the injunction."

Territory v. Clancy, 7 N.M. 580, 37 P. 1108; State v. Dunn, 36 N.M. 258, 13 P.2d 557; Lake Shore & M. S. Ry. Co. v. Taylor, 134 Ill. 603, 25 N.E. 588; State v. Erickson, 66 Wash. 639, 120 P. 104.

We conclude that the order of injunction when announced fixed liability and appellant, having notice, was bound by it. Other contentions have been noticed and considered and are found without merit.

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

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

200 P.2d 372

GARCIA v. J. C. PENNEY CO., Inc., et al.

No. 5137.

Supreme Court of New Mexico.

Nov. 30, 1948.

Dailey & Rogers, A. L. Strong and Hugh R. Horne, all of Albuquerque, for appellants.

Joseph L. Smith, of Albuquerque, for appellee.

COMPTON, Justice.

Appellee instituted suit against J. C. Penney Company, Inc., as employer, and Employer's Liability Assurance Corporation, Ltd., its insurer, under the provisions of the Workmen's Compensation Act.

Appellee claims that while painting a ceiling in the office of the employer he suffered an accidental injury. That he was standing on a scaffold, slightly crouched, supporting himself with a metal strap attached to the ceiling, and while thus engaged his left foot slipped on, or from, the board upon which he was standing, twisting his body sharply, thereby sustaining an injury to his spine from which he is totally and permanently disabled.

Appellee had been employed by the J. C. Penney Company for about two years prior to the alleged injury. Previously, on February 15, 1947, he received a back injury necessitating medical treatment for some thirty days. Upon release he resumed his work with the company. He was 54 years of age, weighed 190 pounds and continued to perform heavy manual labor to the day of the later injury.

Appellants answered, first challenging the sufficiency of the claim to state facts on which relief can be claimed, and second, denying liability outright.

The case was tried to the court without a jury. At the conclusion, the court made the following pertinent findings:

"7. The Court further finds that Claimant is totally and permanently disabled by

reason of the accident which he sustained on June 13, 1947. From the stipulation of counsel, we believe this accident occurred within the scope of his employment and that there was a policy of insurance in force on the day of the accident, and on February 15, 1947. * * *

* * * * * *

"13. That the defendant J. C. Penney Co., Inc. had elected to be bound by the terms of the Workmen's Compensation Act and had provided workmen's compensation insurance for its employees through the defendant, Employers' Liability Assurance Corporation, Ltd., and that said insurance coverage was in full force and effect on June 13, 1947.

"14. That Manuel S. Garcia sustained an injury suffered by an accident arising out of and in the course of his employment while working for the defendant employer on the 13th day of June, 1947, about 1:30 P.M., while engaged in painting the ceiling of the employer's premises in Albuquerque, New Mexico, at which time his average weekly earnings were $50.

"15. That the plaintiff has and necessarily will hereafter incur X-ray, medical, surgical and hospitalization expense in excess of the statutory maximum of $700.00 to fully and completely care for the plaintiff.

* * * * * *

"18. That the plaintiff necessarily employed counsel to represent him in the prosecution of suit for recovery of benefits under the Workmen's Compensation Act."

Appellants claim error in the following respect:

"1. The Court erred in holding that Appellee received a compensable injury on June 13, 1947, for the reason that any injury resulting in the condition existing at the time of trial could only have been caused by the accident of February 15, 1947.

"2. The Court erred in holding that Chapters 87 and 92, Laws of New Mexico, 1947, were in effect June 13, 1947 and were applicable to the case at bar.

"3. That the Court erred in awarding an attorney's fee to Appellee's attorney in the amount of $2,000.00, for the reason that no evidence was introduced showing or tending to show the value of said services and that the award is excessive and in the nature of a penalty against Appellants."

Aside from the denial of liability, it is contended that appellee's disability, if any, is caused by the injury of February 15, 1947. This becomes important. The effective compensation schedule for total permanent disability February 15, 1947 is $18.00 per week, 1941 Comp. § 57-918, whereas, under an Amendatory Act, Chapter 92, Laws of 1947, the compensation schedule is $22.00 per week. The maximum allowance for surgical, hospital and medical attention effective February 15, 1947 is $400.00, 1941

Comp. § 57-919, whereas, under the provisions of an Amendatory Act, Chapter 87 of Laws of 1947, allowance for such item is $700.00, plus contingent additional benefits.

Prior to the injury of June 15, 1947 appellee was performing his normal duties with the company with no apparent ill effect from any previous injury. He felt well, was without pain, and apparently had fully recovered from such previous injury. After June 13, 1947 he was unable to work. His condition became progressively worse. Surgery was required and he was found to be suffering from herniated disc. There is constant pressure on the spinal nerves with partial paralysis of the left leg. He is stooped, weighs about 150 pounds, and now walks with the support of a cane. There is no room for dispute that he is now totally and permanently disabled. Should he recover he may be able to "sell pencils".

The medical witnesses testifying in his behalf supported the contention that his condition resulted from the injury of June 13, 1947, and that the injury is traumatic in origin. On the other hand, medical witnesses in behalf of appellants produce strong evidence that appellee's condition resulted from arthritis, or in any event, attribute his condition to the injury of February 15, 1947, thus presenting a clear conflict in the evidence. The trial court resolved the conflict in favor of appellee and following the rules so frequently announced in this and other jurisdictions the judgment will not be disturbed. Johnson v. Bonnell, 52 N.M. 123, 192 P.2d 836; Wilson v. Williams, 43 N.M. 173, 87 P.2d 683; Lillibridge v. Coulter, 52 N.M. 105, 192 P.2d 315.

It is next contended that the court erred in determining the effective date of Chapters 87 and 92 of the Laws of 1947. The following are pertinent constitutional and statutory provisions:

"Each regular session of the legislature shall begin at 12:00 noon on the second Tuesday of January next after each general election and shall remain in session not to exceed sixty (60) days." Art. 4, Sec. 5, New Mexico Constitution.

"Laws shall go into effect ninety days after the adjournment of the legislature enacting them, except * * *". Art. 4, Sec. 23, New Mexico Constitution.

"In computing time the first day shall be excluded and the last included, unless the last falls on Sunday, in which case the time prescribed shall be extended so as to include the whole of the following Monday." Art. 2, Sec. 1-202(7), New Mex.Stat.1941 Comp.

The clear language leaves little room for construction. The court took notice that the 1947 regular Legislative session adjourned at 12:00 noon, March 15, 1947 and concluded that the effective date of the acts in question is 12:00 noon June 13, 1947.

At Par. 111, Sutherland on Statutory Construction, the rule is stated:

"The rule now supported by nearly all the modern cases is that the time shall be computed by excluding the day, or the day of the event, from which time is to be computed and including the last day of the number constituting the specific period. Thus, if an act is to take effect in thirty days from and after its passage, basing on the 1st day of March, it would go into operation on the 31st day of that month. It would commence to operate at the first moment of the last day of the thirty, ascertained by adding that number to the number of the date of the passage." Suth.Stat.Const. § 111.

To the same effect O'Brien v. Wilson, 26 N.M. 641, 195 P. 803; State of West Virginia v. Mounts, 36 W.Va. 179, 14 S.E. 407, 15 L.R.A. 243; American Nat. Bank at Indianapolis v. Service Life Ins. Co., 7 Cir., 120 F.2d 579, 137 A.L.R. 1148.

We are of the opinion that the act became effective June 13, 1947, the 90th day after adjournment, consequently, appellee is entitled to benefits under the provisions of the Amendatory Acts.

Finally, it is contended that the court erred in the allowance of attorney fees. Without hearing any direct evidence touching the value of the services rendered, the trial court allowed an attorney fee of $2,000.00. It is claimed that the court erred in this respect. It is also contended that the fee is excessive.

There are many considerations entering into the fixing of attorney fees. Usually, the ability, standing, skill, the amount in controversy, its importance, and the benefits derived, go to the matter of determining fees. Elsea v. Broome Furniture Co., 47 N.M. 356, 143 P.2d 572; Anderson v. Contract Trucking Co., 48 N.M. 158, 146 P.2d 873. See also In re Dehner's Estate, 230 Iowa 490, 298 N.W. 656, 143 A.L.R. 672 where cases relating to allowance of fees are assembled. The court has the superior knowledge of the matter at hand, and its award, though not supported by direct evidence, will not be disturbed upon review unless it plainly appears from the record that there had been an abuse of discretion. 5 C.J.S., Appeal and Error, § 1584; Horvath v. Vasvary, 246 Mich. 231, 224 N.W. 365; Anderson v. Contract Trucking Co., supra.

We conclude that an allowance of $2,000.00 attorney's fee, such service resulting in an award of $22.00 per week for 550 weeks, or $12,100.00, for total permanent disability, is not excessive.

Appellee now claims additional fees for the services of his attorney for presenting this appeal. In consideration of the fee

heretofore allowed and determined, an additional fee of $750.00 will be allowed.

The judgment will be affirmed and it is so ordered.

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

McGHEE, J., did not participate.

200 P.2d 713

VILLAGE OF RUIDOSO v. RUIDOSO TELEPHONE CO.

No. 5129.

Supreme Court of New Mexico.

Dec. 6, 1948.

Frazier, Quantius & Cusack, of Roswell, for appellant.

Dudley Cornell, of Albuquerque, for appellee.

PER CURIAM.

Upon a consideration of the motion for rehearing the former opinion is withdrawn and the following is substituted therefor:

McGHEE, Justice.

The Village of Ruidoso filed its complaint seeking to enjoin the defendant telephone company from operating a telephone system within its boundaries under a franchise granted by the Board of County Commissioners on May 3, 1926, under the provisions of Section 72-103, 1941 Comp., on the ground that it had not procured a franchise from the village following its incorporation.

The defendant filed a motion to dismiss on the ground that the franchise granted by the Board of County Commissioners was a valid, existing and continuing right to use the streets and alleys for the purpose contained in the franchise, and that no further authority was required from the plaintiff. The motion was sustained and this appeal followed.

The complaint does not state the length of time that the defendant company had been operating its telephone system in Ruidoso prior to the incorporation of the village, but from the briefs and statements in the oral arguments it is clear that the system had been in operation for a number of years prior thereto.

The substance of the claims of the plaintiff in its brief and at the oral argument was that the defendant had a mere permit, revocable at will by the municipality following its incorporation, while the defendant claimed it had a perpetual franchise. We upheld the defendant's contention, based upon the statutes claimed applicable and the authorities cited in the annotation in 71 A.L.R. 121.

In its brief in chief the plaintiff contended that Sec. 14-1848, 1941 Compilation, had no application to the case at bar and that it could in effect kick the defendant out of town. Having failed in this endeavor it has in its motion for a rehearing backed away from its "whole hog or none" attitude, and would now be willing to take a smaller portion. It now urges that such section is applicable and that it is the duty of the telephone company to accept a franchise from it for the statutory period upon terms that are fair, just and equitable to all parties. The section reads as follows:

"14-1848. *Water, gas, and electric works —Construction by municipality—Submission to vote—Construction commenced before incorporation.*—All cities and towns shall have power to construct, or to contract for the construction of, water-works, gas works or electric light works which are to be owned and/or operated by such city or town; but no such works shall be erected or authorized until a majority of the voters of the municipality, voting on the question at a general or special election, by vote shall approve the same. If such question be submitted at a special election, the same shall be called, held, conducted, returned and canvassed in the manner provided for the elec-

tion of city or town officials. *Provided, that whenever or wherever, previous to the incorporation of any city, town or village in this state, the board of county commissioners of the county in which any such city, town or village shall be located shall have granted to any person, firm or corporation right of way over, upon, in and about the streets, alleys and highways of any such city, town or village for the erection, construction, maintenance or operation of water-works, gas works, electric light works or power systems, and such person, firm or corporation shall have erected or constructed or in good faith commenced the erection or construction of such works or system, no election shall be necessary in order to confer authority upon any such city council, or board of trustees, to authorize the completion of any such works or system and the continued or subsequent operation and maintenance thereof, but the city council or board of trustees of any such city, town or village shall recognize the rights so therefore (theretofore) acquired by any such person, firm or corporation and shall grant any such person, firm or corporation a franchise for the maximum term of years authorized by law, upon such terms as are fair, just and equitable to all parties concerned, and pending the granting of any such franchise, no such person, firm or corporation shall be interfered with in the free exercise and enjoyment of its rights acquired under and by virtue of the right of way theretofore granted as aforesaid by the board of county commissioners of any such county."*

The italicized portion of the present section was added by Chapter 81 of the Laws of 1909, and amended subsection 68 of Section 2402, C.L.1897, relative to the powers of the city council of cities and boards of trustees of incorporated towns and villages.

It was held that telephone companies were included in the corporations named in Secs. 72-101 and 72-103 by the Circuit Court of Appeals of the Tenth Circuit in City of Roswell v. Mountain States Telephone & Telegraph Co., 78 F.2d 379, and the sound reasoning of the opinion in that case convinces us that telephone companies are included in the language of Sec. 14-1848, supra, and we so hold.

We hold that the grant of the Board of County Commissioners to the defendant company is sufficient authority for occupying the streets of the plaintiff and doing business in the village until such time as the plaintiff has tendered to it a franchise meeting the requirements of Sec. 14-1848, supra, and a reasonable time has elapsed for its consideration. If at the expiration of such time the defendant has not accepted the proffered franchise then the plaintiff may institute a new action, and it will then be the duty of the trial court to determine whether such offered franchise meets the terms of the statute.

As the complaint in this case did not allege the tender of a franchise meeting the requirements of the statute, the decision of the trial court on the motion to dismiss was correct.

If this was a suit between private individuals we would not permit such a change of position as has occurred in this case, but in view of the interest of the public the former opinion is withdrawn and what we believe to be a correct statement of the law is set out above.

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

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

200 P.2d 715

DE BACA v. PEREA et al.

No. 5097.

Supreme Court of New Mexico.

Nov. 26, 1948.

Rehearing Denied Dec. 27, 1948.

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

J. Ernest Corey, of Albuquerque, for appellee.

LUJAN, Justice.

This is a suit to quiet title to lots Nos. 21 and 22, Block 54, Raynolds Addition to the City of Albuquerque, New Mexico. The lots came by successive grants to Victoriano Trujillo and formed part of his estate. At the time of his death this property was inherited by Manuelita Mares de Trujillo, his widow and sole heir, and she held title at the time of her death on May 17, 1939. The administration of her estate was commenced January 11, 1943, being cause No. 4956, and upon petition of I. V. Saavedra, one of the two devisees named in the Will, he was appointed administrator with the Will annexed, Demetria Valdez, the other devisee and executrix named in the Will being deceased at the time application for probate of the Will was made. Upon her death the defendant I. V. Saavedra inherited her one half undivided interest in these lots.

These lots were first sold to the State of New Mexico, jointly with lots Nos. 19 and 20 in Block A of the A. & P. Addition to the City of Albuquerque, for taxes assessed for the year 1934 by tax sale certificate No. 9223. On December 7, 1936, these four lots were again sold by the treasurer of Bernalillo County to the State, under tax sale certificate No. 11119 for taxes assessed for the year 1935. No tax deed to the State was ever made, executed, delivered or recorded for these years. On December 4, 1939, the treasurer sold these same four lots to the State under tax sale certificate No. 11995, for taxes assessed for the years 1936, 1937 and 1938. On March 4, 1942, the county treasurer, made, executed, and delivered tax deed No. 11995 to the State for taxes, penalties, interest and costs, for the years 1936, 1937 and 1938, more than two years having elapsed since the sale and the property not having been redeemed. On March 6, 1945, the State Tax Commission conveyed its interest in lots Nos. 21 and 22, Block 54, Raynolds Addition, for the sum of $350.00 to Edmundo C. de Baca and Mary Chavez. On December 16, 1946, Mary Chavez and Joe Chavez, her husband, by quitclaim deed conveyed their interest to the plaintiff.

On account of the death of Edmundo C. de Baca which occurred while the case was pending in this court, leave was granted to Eduardo C. de Baca, Alfredo C. de Baca, Horacio C. de Baca and Elizabeth C. de Baca, as his sole heirs, to revive this action in their favor. However, for clarity sake we will refer to these parties as plaintiff.

The plaintiff, by his complaint claimed fee simple title to these lots. The defendants denied that he was the owner in fee simple and alleged ownership in themselves. The trial court quieted title in favor of the plaintiff. The defendants bring this appeal assigning numerous errors said to have been committed by the court below.

In the year 1945 after these lots had been sold by the State to the plaintiff, the defendant I. V. Saavedra, claiming his preferential right to purchase the property from the State, made application therefor; such application not having been made prior to that of the plaintiff as required by law, and three years after it had been sold by the county to the State, the State Tax Commission refused his application.

No fraud having been alleged or shown, the defendants, at the very outset are confronted by statutory remedies available to them and of which they did not take advantage.

The law gives the owner of real property sold for delinquent taxes the right to redeem the same at any time before two years from the date of the sale provided for in Section 76-713, 1941 Comp., upon the payment of the amount of taxes for which it was sold, penalties, interest, and costs required by the Act. To enjoy this right the delinquent taxpayer must exercise it before tax deed is taken to the property. If not exercised in the manner and within the time provided by statute the right is lost. The defendant, Saavedra, did not exercise his right to redeem before the issuance of the tax deed to the State on March 2, 1942. The time for asserting such statutory right thus expired and the right of redemption was lost. Hood v. Bond, 42 N.M. 295, 77 P.2d 180; Aragon v. Empire Gold Mining & Milling Co., 47 N.M. 299, 142 P.2d 539; Eigner v. Geake, 52 N.M. 98, 192 P.2d 310.

In addition to the right to redeem the property before the issuance of a tax deed to the State, the law gives the former owner, or one claiming under him, the first and prior right to repurchase the property from the State after the issuance of a tax deed to it by the county treasurer by complying with the provisions of Section 76-740, 1941 Compilation. This is purely statutory and, if claimed, must be exercised in the manner and within the time provided by statute or the right is lost. To protect, preserve and enjoy the preferential right to repurchase the land from the State on the most favorable terms authorized by the Act, the former owner, or one claiming under him, must comply with its provisions. He must make application to repurchase and claim the preferential right therein given him before any other application has been made for the repurchase of the land.

The defendant, Saavedra, did not exercise his preferential right to repurchase the property from the State at the most favorable terms available to him before the plaintiff made his application to repurchase the same. While the legislature provided by the Act that a former owner, or one claiming under him, could claim his preferential right and offer to repurchase from the State at any time before any other

application and sale was made, this does not mean that such owner, or one claiming under him, may delay making his application and offer to repurchase and claim his preferential right until after another has made his for such sale, and then make the offer, assert the right and demand the benefits of a statute with which he has not complied. At the time Saavedra made his tender to repurchase asserting his statutory preferential right contemplated by the Act, it had long since expired and the right thus was lost. Hood v. Bond, supra; Aragon v. Empire Gold Mining & Milling Co., supra; and Eigner v. Geake, supra.

In addition to the right to redeem and to repurchase property sold for taxes the law gives the owner the right to test the validity of any proceedings leading up to its appraisement, assessment and sale. Section 76-727, 1941 Compilation. The defendant did not challenge the validity of the proceedings until after the plaintiff had instituted this suit and approximately five years after it had been sold to the State. In Hood v. Bond, supra [42 N.M. 295, 77 P.2d 183], this court, speaking through Justice Bickley, said: "It is further to be noted in the case at bar that the plaintiff did not bring any action to test the validity of any of the proceedings or any irregularity or neglect of any kind of any officer having any duty to perform under the provisions of the act. It is provided by section 25 that any such actions which shall not be commenced within two years from the date of the sale shall be barred."

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

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

200 P.2d 717

BARBER v. HYDER et al.

No. 5134.

Supreme Court of New Mexico.

Nov. 24, 1948.

Rehearing Denied Dec. 30, 1948.

Owen B. Marron and Alfred H. McRae, both of Albuquerque, for appellants.

Adams & Chase, of Albuquerque, for appellee.

BRICE, Chief Justice.

This is a suit for a statutory declaratory judgment.

The parties agree that the sole question to be decided is, "Whether a covenant not to assign a lease without the written consent of the landlord is enforcible against the assignee of the tenant under the circumstances present in this case." The trial court was of the opinion that the covenant was not enforcible because within the rule laid down in Dumpor's Case, 76 Eng. Reprint, 1110; and entered a decree accordingly for plaintiff (appellee).

The facts are not in dispute and are as follows:

On August 21, 1941, appellants, as lessors, entered into a written lease with Francis A. Peloso, H. A. Ingalls and Joe Barnett, as lessees, covering the premises therein described, for a fifteen year term commencing December 6, 1941, and ending on December 5, 1956. Article 6 of the lease is a covenant against assignment and underletting, the material language of which is:

"And it is further agreed by the tenant, that neither tenant nor tenant's legal representatives will underlet said premises or assign this lease without the written assent of the landlord first had and obtained thereto. * * *"

Article 9 of the lease is the conventional provision setting forth the remedies of the landlord in the event of breach or default by the tenant. The language material to the controversy is:

"It is expressly understood and agreed between the parties aforesaid * * * if default shall be made in any of the covenants or agreements herein contained to be kept by the tenant * * * it shall be lawful for the landlord * * * to declare said term ended and into said premises * * * to reenter * * *."

On October 19, 1943, Ingalls, one of the original lessees, assigned his interest under the lease to his co-tenant, Peloso, and the defendant landlords consented to this assignment.

On January 7, 1947, the remaining tenants, Peloso and Barnett, assigned the entire lease to the plaintiff, appellee, by an instrument in writing which was executed by the assignors and assignee. This assignment was consented to in writing by the appellant landlords.

The material language in the instrument by which the lease was assigned is as follows:

"* * * the assignors hereby assign to the assignee all and singular their right, title and interest in and to said lease. * * *

"To hold the same to the assignee for the residue now unexpired of the said term, subject to the payment of the rent and the performance and observance of the covenants, conditions and stipulations in the said lease reserved and contained and henceforth on the assignee's part to be paid, performed and observed.

"And assignee covenants with the assignors henceforth during the continuance of the said term to pay the rents reserved and to perform and observe the covenants, conditions and stipulations within the said lease contained and on the part of the lessee therein to be performed and observed. * * *"

In November, 1947, appellee approached appellants and advised them that he had sold his business being conducted on the leased premises, and claimed the right to assign the lease without the consent of the landlords.

Defendants have refused to give their consent to any such proposed assignment of said lease unless a money consideration therefor be paid to them.

The parties agree that we adopted the rule in Dumpor's Case in our adoption of the common law of England, Sec. 19-303, N.M.Sts. 1941, but appellant contends that the cases are distinguishable because of factual differences.

That part of the decision in Dumpor's Case material here is copied in appellant's brief, as follows:

"And in this case divers points were debated and resolved: first, that the alienation by license to Tubbe, had determined the condition, so that no alienation which he might afterwards make could break the proviso or give cause of entry to the lessors, for the lessors could not dispense with an alienation for one time, and that the same estate should remain subject to the proviso after. And although the proviso be, that the lessee or his assigns shall not alien, they shall never defeat, by force of the said proviso, the term which is aliened by their license, inasmuch as the assignee has the same term which was assigned by their assent: so if the lessors dispense with one alienation, they thereby dispense with

all alienations after; for inasmuch as by force of the lessor's license, and of the lessee's assignment, the estate and interest of Tubbe was absolute, it is not possible that his assignee, who has his estate and interest, shall be subject to the first condition; and as the dispensation of one alienation is the dispensation of all others, so it is as to the persons, for if the lessors dispense with one, all the others are at liberty." 76 Eng.Reprint 1110.

The rule in Dumpor's case was the law in England until changed by a statute of Victoria, Brummell v. MacPherson, 14 Ves. Jr. 173, 33 Eng.Reprint 487; Macher v. Founding Hospital, 1 Ves. & B. 188, 35 Eng.Reprint 74, although criticised in the Brummell case; and was thought to be binding in this country, though sometimes criticised by the American courts, until the decision in Investors' Guaranty Corp. v. Thomson, 31 Wyo. 264, 225 P. 590, 594, 32 A.L.R. 1071. The Wyoming court in an able opinion overruled Dumpor's Case insofar as it applied to the facts of the Thomson case. In each of the leases involved in Dumpor's Case and in the Thomson case there was a provision that neither the lessee *nor his assigns* should alienate the leased property without the permission of the lessor. The cases were quite similar. We will not go into the question, but refer those interested to the Thomson opinion. This case is quite different from that one. There is no covenant in the lease involved here prohibiting the lessee's assigns from assigning the lease. On that question the Wyoming court said in the Thomson opinion regarding covenants that are single as to person (as in this case) or purpose:

"First, those where the covenant or condition was actually single, either as to person or purpose. This includes, as we read the cases, Chipman v. Emeric, 5 Cal. 49, 63 Am.Dec. 80 (see Id., 3 Cal. [273], 277); Dougherty v. Matthews, 35 Mo. 520, 88 Am.Dec. 126; Murray v. Harway, 56 N. Y. 337; Lynde v. Hough, 27 Barb., N.Y., 415; Reid v. John F. Wiessner Brewing Co., 88 Md. 234, 49 A. 877; Sharon Iron Co. v. City of Erie, 41 Pa. [341], 351; Easley Coal Co. v. Brush Creek Coal Co., 91 W.Va. 291, 112 S.E. 512. In all but one of these cases only the lessee himself was forbidden to assign, and the assignees were not. In the other case (41 Pa. [341], 351) the object, the purpose, of the condition was single. There is, of course, no doubt that many conditions are single, as they were in the cases just cited. In such case the view that a waiver of the condition—since conditions are construed strictly—necessarily destroys the whole is probably correct. As was said in Granite Bldg. Ass'n v. Greene, 25 R.I. 48, 54 A. 792: 'The rule seems to be well settled that, where a condition in a lease is single, it is wholly discharged by one waiver.'

"We have no fault to find with that general rule, but to cite Dumpor's case as sustaining it, is at least misleading. True, that case necessarily includes that rule, and it may be that it has so often been cited because of that fact. See Hartford Deposit Co. v. Rosenthal, 192 Ill.App. 211. But that is not the gist of that case. The vital point of that case, the vice of it, is that it holds that a condition in a lease is single, notwithstanding the fact that it is made binding not only upon the lessee but also upon his assigns, and that hence one license destroys the whole condition."

After the first assignment with the lessor's consent, the covenant (which bound lessee only) was no longer a part of the lease; and the provision in the second assignment to the effect that the assignee would "perform and observe the covenants, conditions and stipulations within the said lease contained," did not include the covenant against assignments, which bound lessee only. See cases cited in quotation from the Thomson case on this question; and generally on the rule in Dumpor's Case; Aste v. Putnam Hotel Co., 247 Mass. 147, 141 N.E. 666, 31 A.L.R. 149, and cases in annotations in A.L.R. following this case.

The judgment of the district court should be affirmed, and it is so ordered.

LUJAN, SADLER, McGHEE, and COMPTON, JJ., concur.

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