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293 P.2d 314

Frances E. HATCH, Appellant,

v.

Virginia KEEHAN, Appellee.

No. 6022.

Supreme Court of New Mexico.

Jan. 30, 1956.

Glenn G. Stiff, O. O. Askren, Roswell, for appellant.

Willard F. Kitts, Santa Fe, for appellee.

E. P. Ripley, Santa Fe, amicus curiae.

COMPTON, Chief Justice.

Appellant, plaintiff below, brought this action to require restoration by appellee of public moneys allegedly paid her for personal services not rendered and to enjoin further receipt by her of public funds. The cause was tried to the court, and from an adverse judgment, appellant prosecutes this appeal to review alleged errors.

The applicable statutes, § 40–8–12 and § 40–8–13, 1953 Comp., read:

"40–8–12. Except in the case of payments covering lawful vacation periods and absences from employment because of sickness, any person who receives payment, or any person who makes payment or causes payment to be made from public money where such payment purports to be for wages, salary, or other return for personal services and where such personal services have not in fact been rendered, shall be guilty of a felony and shall be punished by a fine of not less than one thousand dollars ($1,000.00) nor more than five thousand dollars ($5,000.00) or by imprisonment for not less than one (1) year nor more than two (2) years, or by both such fine and imprisonment."

"40–8–13. With respect to payments made or to be made by any state officer, employee or agent, any citizen of the state of New Mexico, and, with respect to payments made or to be made by any officer, employee or agent of any county, municipality or political subdivision, any citizen of the state of New Mexico, resident in such county, municipality, or political subdivision, may file suit in the district court *to restrain the payment or receipt of public money* in violation of section 1 (40–8–12) hereof. Jurisdiction to entertain and adjudicate such suits is hereby conferred upon the several district courts and such suits shall be subject to the same rules, statutes and law with respect to procedure, venue, appeals and the like as ordinary civil actions for injunctive relief." (Emphasis ours.)

In August 1952, Tom Wiley, then Superintendent of Public Instruction, employed appellee as Director of Guidance and Special Services of New Mexico State Department of Education. As a part of her contract of employment it was agreed that

during the summer months she might pursue courses directly related to her duties as such Director in some recognized college or university as to enable her the better to discharge her duties as Director in New Mexico. Thereafter, during the summers of 1953 and 1954, for a period of approximately eight weeks, she was enrolled as a student at the University of Colorado, during which time she received a salary of $535 per month. Her services with the department continued at least until the date of the trial.

[redacted] The question presented is whether appellee in fact rendered personal services to the state while pursuing her studies at the University of Colorado. We are relieved of the necessity of discussing the question to a conclusion. The statute confers no authority upon a private citizen to bring an action for the recovery or restoration of public funds. Compare State ex rel. Hannett v. District Court, Santa Fe Co., 30 N.M. 300, 233 P. 1002. Clearly, the authority granted private citizens is restricted to the bringing of actions to restrain the payment or receipt of public funds and we take note of statements of counsel at the oral arguments that appellee is no longer employed as Director by the Department of Education. Consequently, the question is moot and it is contrary to the policy of this Court to try purely academic causes. State ex rel. Hughes v. McNabb, 38 N.M. 92, 28 P.2d 52; Board of Com'rs of Bernalillo Co. v. Coors, 30 N.M. 482, 239 P. 524; Yates v. Vail, 29 N.M. 185, 221 P. 563.

The appeal should be dismissed and the cause remanded, and it is so ordered.

LUJAN, SADLER and McGHEE, JJ., concur.

KIKER, J., not participating.

[redacted]

293 P.2d 652

James R. OWENSBY and Jessie C. Owensby, Appellants,

v.

Paul NESBITT, Appellee.

No. 5922.

Supreme Court of New Mexico.

Feb. 7, 1956.

[redacted]

Gore & Nieves, Clovis, for appellants.

Rowley, Davis & Hammond, Clovis, for appellee.

KIKER, Justice.

Motion for rehearing having been filed and considered, the conclusion has been reached that the former opinion entered in this case should be withdrawn and that the following should be substituted therefor.

Opinion

Plaintiffs-appellants instituted suit for damages for injuries to the knee and hip of Jessie C. Owensby, one of the plaintiffs herein, which were injured, they alleged, by reason of defendant-appellee's negligent driving of his automobile and the resulting collision.

The case was tried to the court sitting without a jury. The trial court entered a judgment which contained the following:

> "* * * the Court * * * finds:
>
> That the damages complained of by the plaintiffs in this cause were not the result of any injury suffered by the plaintiff * * * in the accident described in plaintiffs' Complaint; * * * It is, therefore, ordered adjudged and decreed that the above-entitled cause be dismissed with prejudice to and at the cost of the plaintiffs."

Appellants' sole argument on the appeal in this case is that the finding of fact con-

tained in the judgment, as quoted above, is not supported by substantial evidence.

The trial was had on the 3rd day of November, 1954. The judgment was entered on the 17th day of November, 1954. Neither of the parties requested findings of fact and conclusions of law before the judgment was prepared.

On November 26, 1954, within ten days after judgment was entered, the appellee presented to the court a request for a finding of fact as to contributory negligence, in addition to the single finding made in the judgment. The court refused the request for the finding, so neither of the parties can claim prejudice on account thereof, judgment being for appellee.

Appellants had from the 3rd to the 17th day of November, 1954, to make and file written requests for findings of fact and conclusions of law; and, after judgment was entered, still had ten days in which they might have asked the court to amend the finding previously made or to make additional findings and to amend the judgment accordingly. This right is given by Rule 52(c) of our Rules of Civil Procedure of the District Courts, which is as follows:

"(c) *Amendment.* Upon motion of a party made not later than ten days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or had made a motion to amend them or a motion for judgment."

At no time, we repeat, did appellants make any requests for findings of fact and conclusions of law. Appellants made no objections to the sole finding of fact the court made.

The rule above quoted was adopted from the Federal Rules of Civil Procedure. Before this court had placed a definite interpretation upon the rule, several federal courts of appeal had differed in their interpretation of it, as shown in the opinion written by Mr. Justice McGhee in Duran v. Montoya, 56 N.M. 198, 242 P.2d 492, 493, in which he said:

"It is true that some federal courts have construed the last sentence of the rule in accordance with the contention of appellant, as, for instance, Monaghan v. Hill, 9 Cir., 140 F.2d 31; but in Fleming v. Van Der Loo, 82 U.S.D.C. 74, 160 F.2d 906, the Court of Appeals of the District of Columbia held the rule should be construed in

connection with Rule 46, 28 U.S.C.A., Federal Rules of Civil Procedure, and the claimed error called to the attention of the trial court before a review of the evidence could be invoked on appeal.

"In Prater v. Holloway, 49 N.M. 353, 164 P.2d 378, the sentence in question was discussed but its effect was not decided. We have, however, since the adoption of the rule repeatedly held a party could not obtain a review of the evidence where he failed to make requested findings or file exceptions. See Carlisle v. Walker, 47 N.M. 83, 136 P.2d 479; Rubalcava v. Garst, 53 N.M. 295, 206 P.2d 1154; Teaver v. Miller, 53 N.M. 345, 208 P.2d 156; and Chavez v. Chavez, 54 N.M. 73, 213 P.2d 438. We do not feel these decisions should be overruled."

This court, several years ago, elected to adopt the construction placed upon the rule above quoted in Fleming v. Van Der Loo, supra, and we think that we should not now overrule the action of the court in so doing.

It cannot be said that appellants had no opportunity to file requested findings of fact or conclusions of law, or to make objections to the finding of fact made by the court in the judgment in this case; and the interpretation previously placed upon the rule above quoted, as shown by the above citation, leaves nothing before this court for consideration.

The judgment of the trial court should be and hereby is affirmed.

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

293 P.2d 654

Cleotilde MARTINEZ, Appellant,

v.

John N. FIDEL, Joe N. Fidel and Toufick N. Fidel and Estate of A. S. Nider, d/b/a El Fidel Hotel, Employer;

Mountain States Mutual Casualty Co., Insurer, Appellees.

No. 6009.

Supreme Court of New Mexico.
Feb. 6, 1956.

Lorenzo A. Chavez, Arturo G. Ortega, Albuquerque, for appellant.

Hannett & Hannett, A. T. Hannett, G. W. Hannett, T. G. Cornish, Albuquerque, for appellees.

LUJAN, Justice.

This is a Workmen's Compensation case and the question is whether or not the accident and injury arose out of and in the course of employment of claimant by the defendant El Fidel Hotel in Albuquerque, New Mexico. At the close of claimant's case the trial judge directed a verdict in favor of defendant and its insurer, and claimant appeals.

The accident for which compensation is sought happened on January 12, 1954. For

seven months prior to this time the claimant had worked for the defendant, El Fidel Hotel, as a chambermaid for which she received $4.00 per seven hour day. Her duties were performed entirely on the hotel premises. The hotel is located on the southwest corner of Fifth Street and Copper Avenue. There is an entrance for guests on each street.

On the south side of the hotel there is a rear door which the employees of the hotel are required to use when entering and leaving the building. There are several ways of approach to this rear entrance. There is no requirement that any of the employees must use any particular approach to the door. On the south side of the hotel there is an alley between it and the Sears Roebuck Company's building which runs east and west. On the east side it runs into Fifth street and on the west into Sixth street. To the west side of the hotel is an open lot used by some other firm for parking vehicles. The Santa Fe Trailways Bus Company occupies the ground floor of the southwest corner of said hotel for a bus depot which abuts the alley in question.

The claimant contends that: "There is sufficient evidence of record to raise a question of fact on the issue whether or not appellant sustained an injury by an accident arising out of and in the course of her employment."

Subdivision (*l*), Section 59–10–12 of 1953 Compilation provides in part, as follows:

> "The words 'injuries sustained in extra-hazardous occupations or pursuit,' as used in this act shall include death resulting from injury, and injuries to workmen, as a result of their employment and while at work *in or about the premises occupied, used or controlled by the employer*, and injuries occurring elsewhere while at work in any place where their employer's business requires their presence and subjects them to extra-hazardous duties incident to the business, *but shall not include injuries to any workman occurring while on his way to assume the duties of his employment or after leaving such duties, the approximate cause of which injury is not the employer's negligence.*" (Emphasis supplied.)

On the date claimant was injured, she with other employees of the hotel emerged from the building at the entrance and exit required to be used by them, although she, nor any other employee, was required to use any particular route to the street. She had walked east along the alley way and was about to enter Fifth Street when she slipped on ice and fell down. When this happened she had finished her work for the day, her pay had stopped, and her employer's authority over her had ceased, and she was no longer engaged in furthering her employer's interests. She was simply

on her way home, on her own time, over a route which she could follow and use according to her own choice and volition. It was optional with her what route she would take after she left the hotel building through the rear door. She could have gone either through (1) the parking lot; (2) the bus station; (3) down the alley to Sixth Street; or (4) up the alley to Fifth Street.

Our act makes it clear that only injuries "'arising out of and in the course of'" employment are compensable. Cuellar v. American Employers' Ins. Co. of Boston, Mass., 36 N.M. 141, 9 P.2d 685. "Out of" points to the cause or source of the accident, while "'in the course of'" relates to time, place, and circumstances.

An accident occurring upon a public way, when the employee is not doing anything for the employer by reason of the employment is not compensable "because not arising out of his employment" and not occurring in the "course of his employment", Olguin v. Thygesen, 47 N.M. 377, 143 P.2d 585, unless the negligence of the employer was the proximate cause. Cuellar v. American Employers' Ins. Co. of Boston, Mass., supra.

Ordinarily "injuries" sustained by employees while on their way to assume the duties of their employment or after leaving such duties are not compensable. Caviness v. Driscoll Const., Co., 39 N.M. 441, 49 P.2d 251. But there are exceptions to the rule. Among them, where the employment requires the employee to travel on the highways. Stevenson v. Lee Moor Contracting Co., 45 N.M. 354, 115 P.2d 342. Where the employer contracts to and does furnish transportation to and from work. Barrington v. Johnn Drilling Co., 51 N.M. 172, 181 P.2d 166; Wilson v. Rowan Drilling Co., 55 N.M. 81, 227 P.2d 365.

Manifestly, in the case at bar, the injury did not result in any proper sense from a risk incidental to the employment as was the situation in McKinney v. Dorlac, 48 N.M. 149, 146 P.2d 867. It seems plain that the danger of the claimant's slipping upon the ice in a public way was not peculiar to her work, but was a hazard common to persons engaged in any employment who had to travel along the alley. The risk of slipping upon the icy pavement was common to the public generally who had occasion to pass over it on foot. Barton v. Skelly Oil Co., 47 N.M. 127, 138 P.2d 263. It was a danger due to climatic conditions to which persons in the vicinity, however employed, or if not employed at all, were equally exposed. As the hazard of slipping on the ice in the alley was not a causative danger peculiar to the claimant's employment, the injury received could not properly be found to have arisen out of the employment.

We have carefully examined the record and we fail to find any substantial evidence from which the jury would have

been authorized to infer negligence on the part of the defendant hotel.

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

It is so ordered.

COMPTON, C. J., SADLER and McGHEE, JJ., and EDWIN L. SWOPE, District Judge, concur.

293 P.2d 656

Margarita RUBALCAVA, Plaintiff-Appellant,

v.

Stephen Q. GARST, Administrator of the Estate of Emilio Papa, Deceased, and the National Surety Company of New York, New York, a corporation, and Mrs. Jennie Innerbichler, Attorney in Fact, Defendants-Appellees.

No. 6008.

Supreme Court of New Mexico.
Jan. 25, 1956.

Rehearing Denied March 1, 1956.

William J. Eaton, Socorro, for appellant.

Marron & McRae, Joseph Phil Click, Albuquerque, for appellees.

McGHEE, Justice.

The plaintiff appeals from a summary judgment entered by the lower court dismissing her complaint upon the ground that the matters sought to be adjudicated thereunder have been settled by prior final decree entered in the probate proceedings upon the estate of Emilio Papa, deceased.

Before proceeding to a description of the plaintiff's complaint and the matters raised on this appeal, a brief reference to prior litigation affecting the said estate will illumine certain aspects of the case.

Emilio Papa died intestate in 1945 leaving an estate of real and personal property in Socorro County, New Mexico. In 1900 the plaintiff's mother, a widow, gave the plaintiff to Emilio Papa and his wife, relatives of the plaintiff who were childless, in consideration of their promise to take the plaintiff, rear her as their child and devise to her all property of which they died seized. Until the plaintiff was seventeen years of age, when she married with the consent of the Papas, she lived with them as their child. Mrs. Papa died in 1935.

In Rubalcava v. Garst, 1949, 53 N.M. 295, 206 P.2d 1154, this Court affirmed a judgment in favor of the plaintiff against the present defendant Garst, administrator of the estate of Emilio Papa, deceased, for performance of the oral contract of Emilio Papa to devise his property to the plaintiff. The chief contention upon that appeal was that Ch. 66, Laws of 1947, barring such actions upon oral contracts in the absence of a sufficient memorandum thereof signed by the decedent, became effective prior to the plaintiff's filing of her complaint and that the same was barred thereunder. Against this contention it was held application of the statute to the contract entered into and performed by the plaintiff prior to its effective date would be an unconstitutional impairment of the obligation of contract.

In 1952 litigation concerning the estate of Emilio Papa was again appealed to this Court. Rubalcava v. Garst, 56 N.M. 647, 248 P.2d 207, and connected and consolidated cases: Papa v. Garst, and In the Matter of the Estate of Papa, both reported at 56 N.M. 651, 248 P.2d 209. The contention upon appeal was that Sadie Papa and her children were the widow and children of Victor Papa, deceased, a cousin of Emilio Papa; that Victor Papa sur-

vived Emilio Papa and was his only known heir and that his widow and children were indispensable parties in the action brought by the plaintiff, Mrs. Rubalcava, to determine the heirship of Emilio Papa and to establish and enforce his oral agreement to devise property to her. This contention was upheld as to the real estate involved in the estate. The cases were then remanded to the district court for the inclusion of indispensable parties and further proceedings.

Included in the record of the present case is the final decree filed June 30, 1953, in the probate proceedings upon the estate of Emilio Papa. The decree recites that the matter came on to be heard on the final and supplemental accounts of the defendant administrator, together with his petition praying for his discharge; that the final account and petition were filed on June 5, 1950; that the hearing of the final account was delayed due to the filing of objections and protests thereto; that at the time of the entry of the final decree all objections, petitions and protests had been disposed of and the administration was ready to be closed. It was further recited that requisite notices in the estate had been duly published, that all claims against the estate were fully paid, except $67.21 for the state succession tax; that a supplemental report was filed by the administrator showing his acts and doings to the date of the decree and that the supplemental and final accounts were just, true and correct and should be settled as rendered. Immediately preceding the decretal portion of the final decree it is recited that the plaintiff, Margarita Rubalcava, was the sole heir at law of Emilio Papa, deceased, and that the court in earlier civil cause in the district court had held her to be the owner of and entitled to all the residue of the estate of Emilio Papa.

The decretal portion of the final decree is as follows:

"It Is Therefore, adjudged and decreed by the Court that the final account and the supplemental account of Stephen Q. Garst, administrator of the estate of Emilio Papa, deceased, be, and the same are hereby approved, allowed and settled; And that said administrator forthwith pay, out of the moneys in his possession belonging to said estate, to the Treasurer of the State of New Mexico, succession tax in the sum of $67.21; That he execute and deliver to Margarita Rubalcava, good and sufficient deeds and bills of sale conveying to said Margarita Rubalcava, all the real estate and personal property remaining in his possession belonging to the estate of Emilio Papa, deceased; That the residue of said estate, after paying the above claim, said administrator pay to Margarita Rubalcava, the heir of Emilio Papa, deceased.

"It Is Further Ordered by the Court that upon compliance with the above

orders and filing the receipts, checks and vouchers issued and received by him as administrator, the said administrator be, and he is hereby discharged, and his bondsmen are hereby released from future liability on his bond."

No appeal was taken from this final decree.

The substance of the plaintiff's present complaint is that the defendants, Stephen Q. Garst, as administrator, and the National Surety Company of New York, surety on the official administrator's bond, have not kept, performed and fulfilled the conditions of the official bond, to the damage of the plaintiff in the sum of $14,000.

In particular, wrongful acts are alleged on the part of the defendant administrator in that he, together with the defendant Innerbichler, attorney-in-fact for the plaintiff, entered into an unlawful agreement to sell and did sell certain real estate and cattle of the estate to one Allie Strozzi and that the purchase price paid therefor was less than the value thereof by $1,400; that the sale of the real estate was unlawful and the plaintiff suffered a loss of $7,000 thereby. (The paragraph containing the latter allegation does not allege that the sale of real estate complained of was the transaction with Allie Strozzi, but from the remainder of the complaint apparently this was the transaction to which reference was intended.) Next it is alleged that the defendant administrator induced defendant Innerbichler to get the plaintiff to appoint Mrs. Innerbichler as her attorney-in-fact, with the malicious and fraudulent intent of influencing defendant Innerbichler to aid him in carrying out the fraudulent purpose of selling the real estate and cattle to Allie Strozzi at a reduced price and that the defendant administrator induced Mrs. Innerbichler to agree to pay the sum of $3,000 to Mrs. Sadie Papa so that the latter would not further object to the closing of the administration of the estate, this against the strict commands of the plaintiff to enter into no compromise with Mrs. Papa, resulting in a loss to plaintiff of $3,000.

It is further asserted that after such compromise and payment the defendant administrator refused to sign the final report and close the administration until Mr. and Mrs. Rubalcava had executed deeds to Allie Strozzi for the real estate.

Next it is complained that after the close of administration an agent of the defendant surety company was notified thereof and a claim was made for the return of the unearned premium of the administrator's bond amounting to $60 and that the defendant surety company has failed and refused to pay such sum.

Lastly, it is alleged that the administrator, by the use of ordinary care and diligence should have closed the estate before July 20, 1950, but because of willful and

negligent delay the administration was not closed until August 10, 1953, for which the plaintiff is entitled to interest, presumably upon the assets of the estate on July 20, 1950, at the rate of six per cent per annum.

The defendants in their answer admitted the sale of the cattle and real estate to Allie Strozzi and denied all of the other allegations described above. The answer also alleged failure of the complaint to state a cause of action and that the final decree entered in the probate proceedings upon the estate of Emilio Papa is res judicata as to all matters complained of in the complaint.

Upon the defendants' motion therefor the trial court granted summary judgment against the plaintiff in which the court recited it had examined the proceedings and final decree in the probate file. The court found that the matters sought to be adjudicated by the complaint have been settled by said final decree and that the plaintiff, prior to the entry of the final decree, had notice through her attorney of alleged better prices for the sale of the land and cattle of the estate. The court concluded as a matter of law that the final decree in the probate of the Papa estate barred litigation of the matters attempted to be litigated by the complaint and ordered that the motion for summary judgment be granted and that the complaint be dismissed.

The praecipe for record filed by the plaintiff did not call for the entire proceedings in the probate matter; the only portions of that record included in the record before us are the final decree and copies of papers, checks, vouchers and receipts filed by the administrator in compliance with the requirements of the final decree.

An affidavit by counsel for the plaintiff, who also represented plaintiff in the probate proceedings, states that sometime around the early summer of 1947 he was told by one Kelly that the latter might consider bidding as much as $10,000 for the real estate and cattle of the estate. In answer to defendants' motion for summary judgment asserting that plaintiff had notice through her attorney of all acts of the administrator complained of in this suit and that she had notice of the final account and report, as well as the entry of the final decree approving the same, plaintiff's counsel filed an affidavit denying that plaintiff had notice through him of all of the acts of the administrator complained of in the suit, denying that he had knowledge in 1947 and in 1950 of alleged availability to the administrator of a better price for the land and cattle of the estate. The latter denial is clearly at variance with the earlier affidavit of said counsel noticed above.

The real contention made in the affidavit of answer to the motion for summary judgment is that the defendants made continuing false representations that the administrator of the estate had written authority for his acts and that the defendant

Innerbichler had authority for her acts in entering into the compromise with Sadie Papa and that plaintiff's counsel relied upon these representations, being ignorant of their falsity until after the estate had been closed.

The argument of the plaintiff on this appeal is, in substance, that the final decree entered in the probate of the Papa estate was a conditional one and that until the conditions of the discharge have been complied with, the decree has no operation as a final decree. This point is of no avail to plaintiff because her complaint does not allege that the conditions of the discharge have not been complied with by the defendant administrator, the conditions being distribution of the assets of the estate and the filing by the administrator of his receipts, checks and vouchers.

The burden of the complaint and matters filed in resistance to the motion for summary judgment is that the defendant administrator and defendant Innerbichler, plaintiff's attorney-in-fact, were guilty of fraudulent acts and misrepresentations in the probate proceedings. Although the matter is not argued to us, if the complaint be viewed as an attempt to have the final decree in probate set aside for fraud, a recognized ground for equitable intervention, Perea v. Barela, 1891, 6 N.M. 239, 27 P. 507; Candelaria v. Miera, 1913, 18 N.M. 107, 134 P. 829; Cf. Wollard v. Sulier, 1951, 55 N.M. 326, 232 P.2d 991; and Rule 60(b), Rules of Civil Procedure, still the complainant must show there existed at the time the facts became known no adequate remedy at law either in the probate court or on appeal therefrom. First Nat. Bank of Albuquerque v. Dunbar, 1927, 32 N.M. 419, 258 P. 817.

The trial court has found that the plaintiff had knowledge through her attorney of alleged better offers for the sale of the assets of the estate and we believe in view of the affidavit of plaintiff's counsel that he knew as far back as 1947 that at least one person was interested in bidding perhaps as much as $10,000 for the land and cattle that the finding has ample support in the record.

Furthermore, it is not asserted that plaintiff did not have notice of the transactions of which she now complains, but only that she was unaware of the falsity of the representations that the administrator had the consent of everybody to the transactions. There is no showing whatever of any damage sustained because unknown persons objected to the transactions and if the plaintiff did not consent thereto, she had the burden as a participant and intervener in the probate cause to come forward with her objections. In this connection it is noted, as already mentioned, that one of the allegations of the complaint herein is that after the compromise and the sum of $3,000 had been paid to Sadie Papa to prevent further litigation, the defendant

Garst as administrator, refused to sign the final report and refused to close the administration until Mr. and Mrs. Rubalcava had executed deeds to Allie Strozzi for the real estate. Also, filed among the receipts and checks in the probate proceedings, and included in the record before us, is the receipt of $8,500 deposited to the credit of the defendant administrator bearing the notation "payment in full on ranch & cattle by Allie Strozzi." Further, one of the cancelled checks on file in the proceedings was to the attorneys for Sadie Papa for the sum of $3,000. It is nowhere contended that these and other items complained about were not reported in the final and supplemental reports of the administrator.

Upon the basis of the foregoing considerations and the fact that the contents of the file in probate, except for the items already described, are not incorporated in the record before us, which file was examined by the court below, the judgment of dismissal appealed from is correct and should be affirmed.

Complaint is made that it was error for the trial court to refuse to order the taking of the plaintiff's deposition and issue commission therefor, said deposition to be used in evidence upon the motion for summary judgment. The point is without merit in view of the fact that plaintiff has not shown how she was prejudiced or damaged thereby. Bounds v. Carner, 1949, 53 N.M. 234, 205 P.2d 216; Goldenberg v. Law, 1913, 17 N.M. 546, 131 P. 499.

The judgment appealed from is affirmed, and it is so ordered.

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

KIKER, J., not participating.

293 P.2d 977

SEISMOGRAPH SERVICE CORPORATION, a Corporation, Appellee,

v.

BUREAU OF REVENUE of the State of New Mexico et al., Appellants.

No. 5895.

Supreme Court of New Mexico.

Feb. 17, 1956.

M. W. Hamilton, Santa Fe, for appellants.

Seth & Montgomery, Santa Fe, Joseph L. Hull, Jr., Tulsa, Okl., for appellee.

KIKER, Justice.

In this case appellee, a corporation, filed suit in the district court of Santa Fe County for recovery of $14,202.55 paid under protest by plaintiff to defendant, Bureau of Revenue, for taxes levied under the Emergency School Tax Act of this state. Appellee claimed that the taxes were illegally levied for the reasons: 1.) the levies are a burden upon interstate commerce in violation of Article 1, § 8 of the Constitution of the United States; 2.) the levies constitute a taking of private property without due process of law in violation of the fourteenth amendment; and 3.) the levies, being prohibited by the United States Constitution, are expressly prohibited by the provisions of the Emergency School Tax Act.

Appellants answered by admitting the levies and collection of the tax and that the amount was paid under protest but denied that the levies were unlawfully made

and that the collection was unlawfully made.

The case was tried to the court without a jury and judgment was for the plaintiff. From that judgment this appeal was taken.

The trial court made the following findings of fact:

"1. That plaintiff is a corporation organized under the laws of Delaware with its principal office and place of business in Tulsa, Oklahoma; that plaintiff maintains no branch office or agencies within the State of New Mexico.

"2. That the Bureau of Revenue of the State of New Mexico is created by the Legislature of said State, and is charged with the duty and function of collecting taxes levied by the Emergency School Tax Act of the State of New Mexico (Chapter 37, Session Laws of 1935 as Amended) hereafter referred to as Act; that Manuel Lujan is the Commissioner of said Bureau and C. J. Bergere is the Director of the School Tax Division of said Bureau; that all of the named defendants maintain their offices in the Capitol Building at Santa Fe, New Mexico.

"3. That plaintiff is principally engaged in the business of professional consultation upon geological and geophysical problems, encountered by the oil industry throughout the United States and many foreign countries. Its services are rendered under contracts with its clients, by which it agrees to furnish professional advice and corroborative information with regard to the subsurface geological formations of the earth's crust in any given area.

"4. That plaintiff's professional advice, opinions, and recommendations, supplemented by a contoured geophysical map and detailed technical discussion in writing, are formulated and prepared for presentation to its clients at plaintiff's head offices in Tulsa, Oklahoma. These opinions and recommendations, formulated by expert geophysicists and geologists assembled there, are drawn from knowledge of the geology of the region, interpretation of unrefined geophysical data as to the designated area, and worldwide experience with the problems of obtaining and interpreting geophysical information.

"5. That plaintiff maintains at its principal offices in Tulsa, Oklahoma, a pool of specially trained and widely experienced personnel, assembled there for the primary purpose of providing its clients a concentration of professional skill and judgment to be applied in the performance of the services contracted for. The functions of this group are widely advertised by plaintiff

as a fundamental factor in the quality of its service.

"6. That all contracts between plaintiff and its clients for services during all times material hereto were entered into in Tulsa, Oklahoma, or elsewhere than in the State of New Mexico, with parties each of whom were non-residents of the State of New Mexico.

"7. That the only function of plaintiff's services performed in the State of New Mexico, insofar as is material hereto, was that of gathering the unrefined geophysical data in the designated area; such data was obtained by the operation of scientific instruments and equipment by field personnel dispatched to the State of New Mexico for such purpose.

"8. That all field personnel which were employed to gather data in the State of New Mexico were dispatched by plaintiff from Tulsa, Oklahoma, or elsewhere than the State of New Mexico, were supervised and administered from Tulsa, Oklahoma, and upon completion of their particular assignments in New Mexico, were returned to Tulsa, Oklahoma, or dispatched to other points outside the State of New Mexico. No permanent establishment for any purpose was or is maintained in the State of New Mexico by plaintiff.

"9. That the contract fees which plaintiff charged to its clients covered all of the operations required in each instance to furnish the professional advice and recommendations contracted for, each such operation being an inseparable function of the overall service rendered. Plaintiff's entire income, insofar as is material hereto, consists of such contract fees received from its clients at Tulsa, Oklahoma.

"10. That, as indicated by the matters and things stated above, all of plaintiff's business transactions, insofar as is material hereto, were indivisible unitary transactions in interstate commerce.

"11. That defendants assessed taxes upon plaintiff's gross income, having arbitrarily allocated to the State of New Mexico all amounts received by plaintiff for professional services rendered to its clients for the period July 24, 1946, to June 30, 1952, in connection with any lands situated in that State, and on August 4, 1952, plaintiff paid such taxes in the sum of $14,202.55, as levied under the Emergency School Tax Act as originally enacted and amended, said payment having been made under protest. That all matters and things necessary to a proper action for recovery of said taxes by plaintiff under the laws of the State

of New Mexico have been complied with.

"12. That the said Emergency School Tax Act as applied to plaintiff specifies no definite formula for the apportionment of gross income derived from interstate commerce.

"13. That the taxes involved during the time material hereto were assessed and levied under Section 76-1404(H), New Mexico Statutes, 1941 Annotated.

"14. That the local activity carried on by plaintiff in the State of New Mexico is an integral part of interstate processes and cannot be separated from it."

Appellant defendant in the brief-in-chief has set out forty-four separate assignments of error. Thirty-eight of these assignments are presented under the following proposition stated as defendants' point one:

"The services rendered by the plaintiff were local and not interstate in character."

The findings of fact made by the trial court as above set forth are the facts in this case unless the attack made upon them by the defendant is sustained and they are set aside. Ritter-Walker Co. v. Bell, 46 N.M. 125, 123 P.2d 381; Bounds v. Carner, 53 N.M. 234, 205 P.2d 216; Renehan v. Lobato, 55 N.M. 532, 237 P.2d 100; Provencio v. Price, 57 N.M. 40, 253 P.2d 582.

The appellant has set out so much of the statute with which we are concerned as thought necessary to a determination of this case. That quoted follows:

"76-1404. Privilege taxes levied—Measured by amount of business.—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:

* * * * * *

"H. At an amount equal to two (2) per cent of the gross receipts of any person engaging or continuing in the practice of any profession, or of any business in which the service rendered is of a professional, technical or scientific nature and is paid for on a fee basis, or by a consideration in the nature of a retainer."

As appears above, the trial court made a finding, and appellant admits, that the Emergency School Tax Act specifies no definite formula for the apportionment of plaintiff's gross income from all business done in connection with New Mexico lands so that the plaintiff's operations might be charged with a part only of the gross receipts.

The admission by appellant, just referred to, is conditioned, of course, that the business done by appellee was in fact interstate commerce. Appellant asserts, however, as the first point relied upon for reversal, that appellee's business as to opinions delivered concerning New Mexico lands was not interstate business but was local to New Mexico, and that the State of New Mexico was entitled to a tax upon the gross receipts from all the business done by appellee in rendering opinions with respect to the availability of New Mexico lands for drilling for gas or oil.

Appellant states its contention as follows:

> "It is the contention of appellant that the services rendered are strictly local in character and that interstate transactions connected therewith are purely incidental to the actual services rendered. In other words, this is a tax for services rendered in New Mexico."

Appellant cites in support of its contention that the business done by appellee is local in character the following cases: Department of Treasury of State of Indiana v. Ingram-Richardson Manufacturing Co., 313 U.S. 252, 61 S.Ct. 866, 85 L.Ed. 1313; Gwin, White and Prince v. Henneford, 305 U.S. 434, 59 S.Ct. 325, 83 L.Ed. 272; Western Live Stock Co. v. Bureau of Revenue, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823; Southern Pacific Co. v. State Corporation Commission, 41 N.M. 556, 72 P.2d 15; McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 60 S.Ct. 388, 84 L.Ed. 565; Department of Treasury of State of Indiana v. Wood Preserving Corp., 313 U.S. 62, 61 S.Ct. 885, 85 L.Ed. 1188; Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604, 58 S.Ct. 736, 82 L.Ed. 1043; Lucas v. City of Charlotte, 4 Cir., 86 F.2d 394, 109 A.L.R. 297; Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416, 11 A.L.R.2d 966; American Manufacturing Co. v. City of St. Louis, 250 U.S. 459, 39 S.Ct. 522, 63 L.Ed. 1084; Braniff Airways, Inc., v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 74 S.Ct. 757, 98 L.Ed. 967; Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265; Interstate Oil Pipeline Co. v. Stone, 337 U.S. 662, 69 S.Ct. 1264, 93 L.Ed. 1613; Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815, 91 L.Ed. 993; Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157, 74 S.Ct. 396, 98 L.Ed. 583; Railway Express Agency v. Commonwealth of Virginia, 347 U.S. 359, 74 S.Ct. 558, 98 L.Ed. 337; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038.

Appellee, answering appellant's contention that the business done by appellee was intrastate, asserts that the facts given in evidence fully establish that the trial court was correct in holding that the business done by appellee was in interstate business. It is urged that by appropriate references to testimony in the transcript that the business of appellee was of this nature: a cli-

ent would request the professional services of appellee for advice as to whether certain lands in New Mexico were probably suitable for the production of oil or gas; that after a contract for services by appellee had been entered into, field personnel would be sent to New Mexico for the purpose of gathering geophysical data; that this data consisted of records of seismic wave reflections taken at appropriate locations and recorded on time-integrated film strips; that the accuracy of such record is affected by variable factors, some on account of the equipment used and some on account of subsurface geological formations; and in order to make the data secured in New Mexico usable, it was necessary to detect the proper reflections in the records, calculate the time of travel according to formulae and to apply expert, skillful judgment and experience to determine the compounding or compensating effects of the variables on these records. For this purpose, appellee maintained a group of experts at its offices in Tulsa and that upon the work done by these men, the final report was made to the client, and an opinion was given in accordance with the employment of appellee. These reports as affecting this case were made, in all but one instance, to a client located in a third state.

While the work was being done in New Mexico, appellee maintained no offices in New Mexico, sold nothing in New Mexico and produced nothing which alone had marketable value. During that period of time, trips were made from the Tulsa office by those having supervisory control and field data was regularly forwarded to the Tulsa office for work to be done there. Collections for opinions and reports made to clients were sent to Tulsa. As to the one instance in which reports were made to a client not living in a third state, the client must have lived either in New Mexico or in Oklahoma. That which was purchased and sold in any event was delivered from Tulsa, Oklahoma, to clients in a third state, or, in one instance, to a client in Oklahoma or to a client in New Mexico. It is asserted by appellee in consequence that the business done by it was interstate business and that it was not taxable in New Mexico whether all or in part. Appellee cites the following cases in support of its contention: Nippert v. City of Richmond, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760; North American Co. v. Securities Exchange Commission, 327 U.S. 686, 66 S.Ct. 785, 90 L.Ed. 945; Gibbons v. Ogden, 9 Wheat 1, 180, 22 U.S. 1, 180, 6 L.Ed. 23; Carter v. Carter Coal Co., 298 U.S. 238, 56 S.Ct. 855, 80 L.Ed. 1160.

Appellee further asserts that intangibles are no less the subject of interstate commerce than are tangible goods and commodities and cites Freeman v. Hewit, 329 U.S. 249, 67 S.Ct. 274, 91 L.Ed. 265; Associated Press v. U. S., 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013; Associated Press v. N.L.R.B., 301 U.S. 103, 57 S.Ct. 650, 81

L.Ed. 953; Lorain Journal Co. v. U. S., 342 U.S. 143, 72 S.Ct. 181, 96 L.Ed. 162; Western Union Telegraph Co. v. Foster, 247 U.S. 105, 38 S.Ct. 438, 62 L.Ed. 1006; International Text-Book Co. v. Pigg, 217 U.S. 91, 30 S.Ct. 481, 54 L.Ed. 678; Albuquerque Broadcasting Co. v. Bureau of Revenue, 51 N.M. 332, 184 P.2d 416, 11 A.L.R.2d 966.

Both appellant and appellee have quoted extensively from the cases cited by them. Many of these cases have been cited and discussed in decisions of this Court; and we believe that the question for determination here has been settled by opinions previously rendered by this Court, so, though having seriously considered again the cases cited, we enter upon no discussion of them, but turn to the consideration of the decisions of this Court.

Before taking up the New Mexico cases, it should be said that appellant in its brief made a statement of facts without reference whatever to the transcript and substantially different from the findings made by the court; but appellee for its statement of facts set out in full the facts as found by the trial court. In the argument there is little difference between the parties as to the manner in which appellee conducted its business.

It is said by appellant in its brief that the sole question involved in this appeal is whether the business of appellee was interstate commerce so that the tax levied and collected was a violation of the Commerce Clause of the Constitution of the United States. That is the question which has been argued by the parties and its determination is conclusive of two other propositions stated by appellant in its brief.

The first case in this Court dealing with a tax of the nature of that imposed in the case now under consideration was Western Live Stock v. Bureau of Revenue, 41 N.M. 141, 65 P.2d 863, 868. In that case the plaintiffs were publishers of a magazine at Albuquerque. The tax was assessed upon receipts from certain advertising and, having paid the tax under protest, plaintiffs sued for its recovery. The magazine had a circulation in New Mexico and in other states. One of its principal sources of revenue was advertising. Contracts were made by manufacturers and others living in other states than New Mexico and the magazine, after the publication, was delivered by mail and other means of carriage to readers in New Mexico and other states. The tax upon receipts from advertising under contracts with foreign advertisers was the basis of the suit in the case.

Mr. Justice Sadler, writing the opinion of the Court, carefully considered many cases, and listing them said of the situation presented at the time to this Court:

> "The most that fairly can be said of the tax here imposed in its relation to plaintiffs' business, it seems to us, is that it indirectly affects interstate

commerce. It is only such transactions as directly affect same and impose a direct burden thereon that fall within the interdiction of the commerce clause of the Federal Constitution."

The holding of the Court was that the statute providing for the tax and its enforcement and the imposition of the tax upon the plaintiffs did not impose an unconstitutional burden on interstate commerce. The judgment of the lower court was reversed with directions to overrule the demurrer of the defendants which had been sustained.

When this case was reinstated on the docket of the district court, the defendants' demurrer was sustained and plaintiffs' complaint was dismissed with prejudice. Again an appeal was taken. Upon that appeal, which appears at 41 N.M. 288, 67 P.2d 505, the judgment of the lower court was affirmed. The case was then appealed from this Court to the Supreme Court of the United States, 303 U.S. 250, 58 S.Ct. 546, 82 L.Ed. 823, where the proposition of the right to impose the tax was thoroughly discussed in an opinion by Mr. Justice Stone of that court. The judgment of the New Mexico court was affirmed.

Four cases have come into this Court, each entitled Albuquerque Broadcasting Co. v. Bureau of Revenue of the State of New Mexico, the members of the Bureau being mentioned also as defendants. The first of these cases is found in 51 N.M. 332, 184 P.2d 416, 11 A.L.R.2d 966, with opinion denying the motion for rehearing at 51 N.M. 356, 184 P.2d 431. The second of these cases is to be found at 54 N.M. 133, 215 P.2d 819. The opinion in the third case appears at 54 N.M. 165, 216 P.2d 698, and the fourth of the Albuquerque Broadcasting Company cases involving a similar tax as in this case, appears at 59 N.M. 201, 281 P.2d 654.

The first three of these opinions involved the same cause of action. One of these opinions was written in denial of motion for rehearing on the first appeal, the third of the opinions covered a different period of time from that involved in the earlier opinions and turned upon a plea of res adjudicata, the Court holding that, a different period of time from that in the earlier case being involved, the plea did not bar the action. The fourth appeal was by the Bureau of Revenue from a judgment of the district court holding for plaintiff. The trial court had concluded that the Broadcasting Company, plaintiff and appellee, was engaged in interstate commerce of such nature that it was "impossible to determine with any accuracy what business originating in plaintiff's studio is interstate and which is intrastate."

The New Mexico cases above cited have sufficiently distinguished as between interstate and intrastate business to lead us to declare that appellants' business, as conducted, was interstate.

For the purpose of this opinion, it is necessary to consider the latest, only, of the Albuquerque Broadcasting Company cases, 59 N.M. 201, 281 P.2d 654, 655, for the reason that in the opinion Mr. Justice Sadler, the writer, considered each of the other cases quite fully. In the opinion in this latest of the Albuquerque Broadcasting Company cases, the writer quoted from the first of the opinions cited supra, written in 1947 by then Mr. Chief Justice Brice the following, omitting the citations:

"'We conclude from these decisions:

"'(1) The states cannot lay a direct tax on interstate commerce or gross receipts therefrom. * * *

"'(2) There are various means of taxing interstate commerce by indirection so that it will bear its just share of state taxation. * * *

"'(3) If an intrastate incident is sufficiently disjoined from interstate commerce though indirectly a burden thereon, it may be a "taxable event," open to state taxation, if it does not discriminate against interstate commerce. * * *

"'(4) A valid state tax may be levied upon intrastate communications though the facilities used are also used in interstate commerce.'"

Again, Mr. Justice Sadler quoted from the opinion of Mr. Chief Justice Brice the following:

"'The findings of the Court are very explicit regarding interstate broadcasting. The pleadings as well as the findings segregate the interstate business from the local business, except as to amount. It is admitted in the complaint, and found by the Court, that the appellant was engaged in "local advertising broadcasts which originate locally in the studio of KOB." There is nothing in the findings, or in the evidence for that matter to indicate that any of this local business is interstate. To that extent the appellant's case failed of proof, unless we must say that all broadcasting is interstate business, and to this we do not agree. * * * The burden was on the appellant to show that the whole tax was void. It segregated the taxable from its nontaxable activities in its pleadings and briefs, and sufficiently presented the question, for our consideration.'"

Mr. Justice Sadler's opinion shows that the opinion from which the quotations above were taken, reversed the judgment of the lower court and sent the case back with explicit directions as to what should be done. That was not done in the lower court however, but an amended complaint was permitted with the case being tried

anew and again there was an appeal to this Court. Mr. Justice Brice on the second appeal of the case said referring to the mandate on the first appeal:

> "The new trial was limited to entering judgment for the appellant broadcasting company (appellee here) for the money paid by it as taxes, less the amount paid for local broadcasting. The amount for which judgment was ordered to be entered was easy of determination."

The opinion then pointed out that the action of the lower court in permitting an amended pleading to be filed and trying the case as if there had been no former trial was in violation of the mandate from the Supreme Court and reversed the judgment. Mr. Justice Sadler by further quotation from the opinion we have just been discussing, 54 N.M. 133, 215 P.2d 819, pointed out that the opinion gave directions for the trial court to determine the amount of taxes paid by the broadcasting company for business which was interstate as distinguished from intrastate business and to enter judgment in favor of the broadcasting company for the amount of money collected from it upon receipts from interstate business.

In the latest of the Albuquerque Broadcasting Company cases, Mr. Justice Sadler very fully considers that which is intrastate business as distinguished from interstate business; and again emphasizes that where there is local business as distinguished from interstate business, on account of which monies are received by the broadcasting company, the tax is properly laid on the monies so received from the intrastate business if that can be separated from the proceeds of interstate business. The opinion further shows that the burden was upon the broadcasting company as appellant to calculate the income from intrastate business and to pay the tax upon that business.

We hold that appellant in this case was not engaged in intrastate business in New Mexico. Work was done by the appellant in New Mexico, through its employees, which gave them the basic material necessary, after the considerations, calculations and changes above mentioned, upon which to form the opinions which were prepared for appellant's clients, these opinions being delivered to clients in other states than Oklahoma. The record shows no means by which any part of the receipts of plaintiffs can be definitely declared as receipts from operations in New Mexico. It follows that the tax laid upon the gross receipts of the appellant from the preparation of opinions and supporting data in Oklahoma, which were delivered to its clients in other states, is invalid.

Any opinions delivered to clients in Oklahoma were in intrastate commerce of Okla-

homa and the income from such opinions was not taxable in New Mexico.

The judgment of the lower court should be, and is hereby, affirmed.

It Is So Ordered.

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

293 P.2d 984

Ben GOMEZ, Emilio Guerin, Rosalio Romero, Dan Romero, Manuel Tafoya, and Benigno Torres, Plaintiffs-Appellants,

v.

The CITY OF LAS VEGAS, a Municipal Corporation of the State of New Mexico, and Estes-Matthews, Las Vegas Sanitation Company, a co-partnership, Defendants-Appellees.

No. 6007.

Supreme Court of New Mexico.

Feb. 2, 1956.

Rehearing Denied March 5, 1956.

Donald A. Martinez, Las Vegas, for appellants.

Jack Whorton, H. E. Blattman, Noble, Spiess & Noble, Las Vegas, for appellees.

SADLER, Justice.

The plaintiffs below, who are appellants here, seek the review on appeal of a judgment of the district court of San Miguel County, dismissing their complaint, in a suit wherein they seek to enjoin the City of Las Vegas from enforcing its certain ordinance No. 595 relating to garbage disposal and as well the contract entered into pursuant thereto with defendants named for garbage removal within the city.

In view of the fact that the appeal is prosecuted from a summary judgment entered on a motion interposed by defendants to the amended complaint filed by plaintiffs, based on the ground that the complaint failed to state a claim upon which relief could be granted, it becomes necessary at the outset to summarize the material allegations of such complaint.

An original complaint in the cause was filed on March 29, 1955. Thereafter, on April 18, 1955, the amended complaint, the dismissal of which is the subject of this appeal, was filed by the plaintiffs. Omitting the allegations naming and identifying the plaintiffs and defendants, it alleges that the plaintiffs are each and all in the business of hauling and disposing of garbage, trash and refuse of all kinds from residences and places of business within the City of Las Vegas and have been so engaged for several years last past; that for the year 1954 and several years prior thereto, the plaintiffs were duly licensed by the City to engage in such business; that each of them had made due application to the City for a license to engage in the business during the year 1955; offering to pay the fee therefor, but that, excepting the plaintiff, Emilio Guerin, each of them had been refused the license sought.

Paragraph 2 of the complaint alleges, further, that plaintiffs at all times have complied with the sanitary ordinances and rules and regulations of the City relating to the manner of hauling and disposing of garbage, and have at all times conducted the business in a clean, sanitary and healthful manner; that they, and each of them, have earned their living from said business, which constitutes their livelihood; that pursuant to the conduct of said business each of them has contracted with various and divers residents and business men of the City for the hauling and disposing of gar-

bage, trash and refuse of all kind from residences and places of business within the City, and to render service in connection therewith, at certain regular intervals and to receive therefor compensation as agreed upon by the plaintiffs and their various customers; that they have each invested considerable time and money in establishing their respective businesses and in purchasing equipment therefor, and that they have regular customers and enjoy extensive good will among the residents and business men of the City.

It is further alleged in the amended complaint that on or about September 14, 1936, the City adopted what is known as Ordinance No. 595 of which the parts said to be pertinent hereto are set out in this paragraph of the complaint. In substance, Section 13 of the ordinance enacts that the City, by appropriate resolution, may provide for the collection, removal and disposal of all garbage by one or more of several methods, to-wit:

(a) By appointment of a suitable person or persons as collector or collectors, in which event the fees collected shall be paid into the City Treasury, the collection and removal to be under the supervision of the City board of health.

(b) By licensing the collection of garbage to one or more persons or corporations to engage in the business of collecting specified types of garbage in accordance with provisions of the ordinance, in which event each licensee shall pay a license fee of $1 per annum for each truck or dray used, all such licenses to expire on December 31 of the year in which issued. If this method be employed, the charges collected may be retained by the licensee for his or its compensation, but no licensee to charge more than the maximum charges provided by the ordinance. In addition, provision is made for the cancellation of any such license at any time, for non-compliance of the terms thereof or of the ordinance, the license fee to be retained by the City.

(c) By contract with any person or corporation for the removal of Class 1 garbage, upon such terms and conditions not in conflict with the ordinance, as the City board of health may deem best and most advantageous for the City and the health and safety of the inhabitants thereof. Under this method the contract may provide for the charges collected to be retained by the contractor as compensation, or collected by the City and paid to the contractor, or paid into the City Treasury, and such contractor to be bound by maximum charges provided by the ordinance.

Section 15 of the ordinance fixed the charges for garbage collection at residences and at places of business and further provided for the making of such regulations concerning garbage collection as the City board of health might promulgate.

The amended complaint went on to allege that on or about March 14, 1955, the

City Council adopted a resolution of which a copy, marked "Exhibit A" was attached and by reference made a part of the complaint. It was said the resolution purported to find the method of garbage collection by individual licensees was not in the best interest of the community and that it authorized the administrative officers of the City to enter into a contract with the defendant Estes-Matthews Las Vegas Sanitation Company, for the purpose of giving said company the sole and exclusive right to collect, remove and dispose of all classes of garbage from all residences within the limits of the City. A copy of the contract entered into between defendant City and the defendant company pursuant to the resolution was attached to the amended complaint, marked "Exhibit B" and by reference made a part thereof.

It is then charged in the amended complaint that, by reason of the aforesaid acts of the City of Las Vegas, it was proposed by it to deny plaintiffs, and each of them, as well as others similarly situated, the right to engage in the business of hauling and disposing of garbage, trash and refuse of all kind from residences and places of business within said City. There follow allegations of the amended complaint charging the action of the City to be in violation of various and sundry provisions in the Constitution of the State of New Mexico and the United States, the first being Article IV, § 26, of the Constitution of New Mexico in that by such action the defendant City had proposed to grant to the defendant company the right to engage in the business of garbage collection within the City upon terms and conditions not equally available to all persons and corporations, as well as granting to said company exclusive right to engage in such business.

It is further charged in the complaint that the proposed action of the City is in violation of Art. II, § 18, of the Constitution of New Mexico, and of Section I, of the 14th Amendment to the United States Constitution in that:

(a) The proposed action would deprive plaintiffs of their right to engage in a lawful business and of their property rights in said business without due process of law.

(b) That the proposed action deprives the plaintiffs of the equal protection of the laws to the extent they are not given the right to engage in said business upon the same terms and conditions as those extended, or proposed to be extended, to the defendant company.

(c) That as citizens of the United States the plaintiffs are entitled to engage in such business, and such right is protected by the privileges and immunities clause of the 14th Amendment.

And so on and on by various subsequent paragraphs the proposed action of the City

is charged to be in violation of several other provisions of the Constitution of the State of New Mexico and of the United States, such as impairing the obligations of the contracts between plaintiffs and their customers; as constituting unreasonable, arbitrary, capricious and discriminatory action, not designed to accomplish anything for the betterment of the health, welfare, morals or safety of the community, and not a valid exercise of the police power and numerous other charges of invalidity such as being ultra vires and embracing described dry garbage which could in no manner be deleterious to the health and welfare of the community.

The amended complaint then charges that the contract entered into with the defendant company was in violation of 1941 Comp. § 14–4301, 1953 Comp. § 14–47–1, as providing for the leasing of property, to-wit, the city dump, having value in excess of $500 without submitting the question to a vote of the qualified electors of such municipality.

The amended complaint then takes out after Ordinance No. 595 and proscribes its validity on almost, but not quite, as many grounds as is the contract between the City and the defendant company said to be invalid. If other grounds of invalidity exist, additional to those charged against the proposed action of the City, the ordinance, and the contract, we feel sure the plaintiffs would have mentioned them. We may feel reasonably sure, then, that we have before us all infirmities which the challenged transaction possesses.

It was against such an amended complaint, with allegations, charges and claims of invalidity in the proposed action of the City, that the defendants interposed their motion to dismiss, upon the ground that it failed to state a claim upon which relief could be granted. The trial court heard argument and granted the motion. We think the judgment of the trial court was correct and should be affirmed. Our reasons for that conclusion follow.

We think it would scarcely be possible for any statute, ordinance or transaction to be burdened with as many legal infirmities and shortcomings as the large number said to inhere in the transaction here challenged. Some, though by no means all, of the claimed defects and infirmities pointed out, merit consideration and decision by us. All such will be taken up and resolved and the others will be disregarded as not meriting discussion.

At the outset, we desire to dispose of one challenge to the plaintiffs' right to be heard. Counsel for the defendants under their Point I say the plaintiffs have not shown a sufficient interest in the subject matter of the suit to maintain this proceeding, citing

Asplund v. Alarid, 29 N.M. 129, 219 P. 786, 790, and Asplund v. Hannett, 31 N.M. 641, 249 P. 1074, 58 A.L.R. 573. The defendants answer that this is a suit for declaratory judgment, not an ordinary suit in equity to enjoin threatened illegal action on the part of the City, and claim this denies the doctrine invoked application. We could easily become embroiled in a nice academic discussion of these varying contentions, with the possibility of saving ourselves some labor by resolving them one way or another. We prefer, however, not to do so. Indeed, we prefer to meet the issue squarely, head on, and decide the case on the merits.

Thus it is that we pass the question whether the two Asplund cases cited deny plaintiffs the right to maintain the suit by assuming they do not, still plaintiffs must fail in obtaining the relief sought upon a consideration of their claim on the merits. Likewise, we avoid determining whether the amended complaint represents a suit for declaratory judgment or an ordinary suit in equity for injunctive relief by declaring, whether the one or the other, makes not the slightest difference in our determination of the claim to a favorable judgment, present or declaratory. Let us proceed, then, to a determination of the plaintiffs' right to a judgment of either kind.

We entertain no shadow of doubt but that the ordinance in question, under which the City acted by resolution to authorize the contract with Las Vegas Sanitation Company, a co-partnership composed of J. W. Estes and O. W. Matthews, is a police measure involving the health and welfare of all members of the community, comprising the City of Las Vegas. So concluding, the action of the City must stand unless for one or more of the reasons urged against it, the plaintiffs are entitled to injunctive relief as prayed for.

Citation of authority in support of the conclusion announced touching the character of the enabling statute and ordinance, pursuant to which the contract in question was entered into with the defendant Sanitation Company, would seem unnecessary from their very nature. Nevertheless, established precedent is not wanting. 1953 Comp. § 14–32–4; Mitchell v. City of Roswell, 45 N.M. 92, 111 P.2d 41; Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P.2d 779; State ex rel. Hughes v. Cleveland, 47 N.M. 230, 141 P.2d 192. And for cases from other states dealing more directly with garbage ordinances, see Ex parte Pedrosian, 124 Cal.App. 692, 13 P.2d 389; Ponti v. Busartero, 112 Cal.App. 2d 846, 247 P.2d 597; Northern Pac. Ry. Co. v. Lutey, 104 Mont. 321, 66 P.2d 785; Imes v. City of Fremont, 58 Ohio App. 335, 16 N.E.2d 584; Kemp Hotel Operating Co. v. City of Wichita Falls, 141 Tex. 90, 170

S.W.2d 217; Richards v. City of Columbia, 227 S.C. 538, 88 S.E.2d 683.

In urging the multifarious objections by plaintiffs to the ordinance and the transaction in question initiated thereunder, they overlook the fact that once it is determined the City is moving under a reasonable exercise of its police power in the action taken, every objection here urged against validity of the challenged action vanishes into thin air. Mitchell v. City of Roswell, supra; Arnold v. Board of Barber Examiners, supra; State ex rel. Hughes v. Cleveland, supra; Middle Rio Grande Water Users Ass'n v. Middle Rio Grande Conservancy District, 57 N.M. 287, 258 P. 2d 391; Ex parte Pedrosian, supra; Ponti v. Busartero, supra.

For instance, there are constitutional guaranties against the granting of exclusive privileges to any person or corporation, N.M.Const. Art. IV, § 26, but this does not deny to the state or municipal subdivisions the power to grant to an individual the exclusive privilege to collect and dispose of garbage as a sanitary measure. Smiley v. MacDonald, 42 Neb. 5, 60 N.W. 355, 357, 27 L.R.A. 540 and note. Dealing with a similar situation in the case last cited the Supreme Court of Nebraska, among other things, said:

> "* * * But the removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is therefore a proper exercise of the police power; nor is the fact that, in this instance, the city has by contract conferred an exclusive privilege, material. From the power thus conferred upon the city is implied the duty to determine the means and agencies best adapted to the end in view. The means adopted appear to be not only a reasonable and necessary regulation, but a judicious exercise of the discretion conferred upon the city. That the object of all such regulations can be best attained by intrusting the work in hand to a responsible contractor, who possesses the facilities for carrying it on with dispatch, and with the least possible inconvenience to the public, is apparent to all."

See, also, Ex parte Sozzi, 54 Cal. App.2d 304, 129 P.2d 40; and extensive annotations of the subject in 15 A.L.R. 287; 72 A.L.R. 520, and 135 A.L.R. 1305. Indeed, the power of a municipality to move in the exercise of its police power to prevent disease and satisfy ordinary sanitary requirements is unquestioned and measured only by the exigencies of the situation, whether the hazard be to health or one from fire as in the case of dry garbage. See Town of Gallup v. Constant, 37 N.M. 211, 11 P.2d 962. Compare, Gibbons v. Town of Hot Springs, 51 N.M. 49, 178 P.2d 400.

The effort of defendants to differentiate between wet and dry garbage in an application of the City's power to regulate must fail. The former presents no greater danger to health, if allowed to accumulate, than does the latter to fire prevention when left exposed and piled up around premises. Ex parte Pedrosian, supra; compare Town of Gallup v. Constant, supra. And, where the quality of reasonableness inheres in proposed action by a municipality in respect of either class of garbage, it is not to be stayed by invoking constitutional guaranties applicable in other circumstances. *Salus populi est suprema lex* represents the highest power possessed by the State. When properly invoked all other guaranties, public or private, must yield. It is the voice of the sovereign speaking for the safety and welfare of the whole people.

It is an exercise of this attribute of sovereignty committed into the hands of the municipalities of our state that is here challenged. We find the City's action reasonable and subject to no legal infirmities. All legal objections urged against it either are resolved by what has been said or found to be without merit. Accordingly, the judgment of the trial court is correct and should be affirmed.

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

294 P.2d 276

STATE of New Mexico, Plaintiff-Appellee,

v.

Federico LOPEZ, Defendant-Appellant.

No. 6006.

Supreme Court of New Mexico.

Feb. 3, 1956.

Dean S. Zinn, Frank B. Zinn, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., Santiago E. Campos and Paul L. Billhymer, Asst. Attys. Gen., for appellee.

McGHEE, Justice.

The defendant, appellant, seeks a reversal of his conviction for assault with a deadly weapon, to-wit, a pistol, on Filiberto T. Chavez. The case is submitted here upon two points: The first, claiming improper conduct and remarks upon the part of the district attorney which, defendant says, were bound to have influenced the jury and prejudiced his case so as to deny him a fair and impartial trial; and second, that the trial court unduly limited his cross examination of a state's witness as to his intended social activity on the night of the alleged offense.

Some hours before the shooting in this case the prosecuting witness and a companion were drinking beer in a bar just north of Espanola, New Mexico, owned by Ernesto Lopez, a brother of the defendant, and Adelaido Archuleta, when, as Chavez, the prosecuting witness, claims, Archuleta, who was tending bar, informed them he was a candidate for the Democratic nomination for sheriff of Rio Arriba County, and stated his brother, Carlos Manzanares and others were holding a meeting in a room behind the bar and invited Chavez and his companion to join it. They did so but were shortly ejected by Ernesto Lopez after Chavez had insulted Manzanares by taking undue liberties with his hat. In addition, Manzanares had slapped Chavez. Here it may be stated Ernesto Lopez was the then Democratic County Chairman of Rio Arriba County and the others present at the meeting were men of prominence in such party.

Chavez and his companion left the vicinity and returned in a few hours accompanied by at least two others; immediately upon their arrival the shooting occurred outside the bar.

We have carefully read the record of this trial which lasted for approximately one week and we are unable to agree with the contention of defendant that the questions or one or two side-bar remarks of the district attorney created such an atmosphere that the case of the defendant was prejudiced, especially in view of the prompt action of the trial court in ruling favorably upon objections made by the defendant and its admonition to the jury, in effect, that

they were to rely only upon the evidence in arriving at a verdict. See Olguin v. Thygesen, 1943, 47 N.M. 377, 143 P.2d 585.

One of the defendant's claims of error in that regard is based on the fact it was brought out on cross examination of Manzanares (a citizen of considerable prominence in Rio Arriba County) that he was allied with Ernesto Lopez in a faction of the Democratic party of Rio Arriba County, but also that he was a close personal and political friend of an uncle of the prosecuting witness. It was also brought out that Manzanares had at one time represented Ernesto Lopez on a criminal charge at Chama, New Mexico. We are unable to agree the eliciting of such facts was so prejudicial that a mistrial was required.

The district attorney was apparently fearful politics might play a part in the case and before trial he filed a motion for a change of venue from Rio Arriba County, principally on the ground that Ernesto Lopez, the defendant's brother, was a man of great personal and political influence in the county; however, the defendant answered with a ringing response denying the trial might be influenced by politics, saying in part:

> "Moreover, such charges amount to an unwarranted and unjustified attack and reflection upon the caliber, intelligence and integrity of jurors of Rio Arriba County.
>
> * * * * * *
>
> "Assuming, but not conceding, that the findings of the jury will be based solely upon political considerations and party affiliations, as the District Attorney would have the Court believe, the jury panel drawn by the Court on the first day of the term is so evenly divided that the alleged political influences are completely nullified as evidenced by the following tabulation of the voting registrations of the panel members:
>
> Republican 17
> Democrat 16
> Independent 1
> Not Registered ..... 2."

If only a small part of the defendant's opinion of the jury panel was correct, the statements of which he now complains could not have influenced the verdict. On the contrary, the weakness of his claim he shot in self-defense must have been the controlling factor.

The first point must be ruled against the defendant.

We will now consider the error claimed under the second point. After the prosecuting witness and his companion, Leopoldo E. Martinez, had been thrown out of the room back of the bar, they drove around a while and then went to Eddie's Bar in Riverside, New Mexico, where they understood there would be a dance. Both Chavez and Martinez were married and their wives were at home. Martinez testified as a witness for the state and we quote from the record as to a part of his cross examination:

"Q. How long have you been married? A. Five years.

"Q. Have any children? A. Yes, sir.

"Q. How many children do you have? A. Two.

"Q. Where was your wife on the night all this took place? A. At Los Alamos.

"Q. In your home? A. As far as I know.

"Mr. Prince (District Attorney): I object to this line of testimony, I don't see where it has any bearing on the fact that this man got shot in the head.

"Court: Sustained.

* * * * * *

"Q. Now, it was then that you went to the Meadows that you decided to go to Eddie's Bar to investigate a dance over there, isn't that right? A. Yes.

"Q. And you and Filiberto wanted to go dancing that night? A. We wanted to go to the dance.

"Q. You did not have dates with you at that time, did you? A. We were alone.

"Q. You—who were you planning to dance with if you went to the dance?

"Mr. Prince: I think this is irrelevant, it has nothing to do with the fact that Filiberto Chavez was shot.

"Court: Sustained.

"Mr. Dean Zinn: I would like to say this—the reason we are going into that, it does affect the credibility of this witness.

"Mr. Prince: I object to the counsel testifying before the jury.

"Court: It may affect his morality but I don't know that it affects his credibility, I think it is more in the nature of argument—sustained.

"Mr. Dean Zinn: Exception."

The defendant strongly contends he should have been allowed an answer to the last question and also to pursue the question further, saying:

> "Surely, making the rounds of the bars and going to dance halls presumably to dance with other women while his wife was home constitutes 'general evidence of bad moral character,' and the Court below obviously recognized it and erroneously refused to permit the testimony to be elicited."

We do not believe the defendant was prejudiced by the action of the trial court in stopping the examination where it did. Defendant was allowed to show the witness was out without his wife, that he had gone to the dance hall with the intention of dancing, and if he did dance it would necessarily have been with some woman other than his wife. The effect of such conduct, or intended conduct, was then a matter for argument as the trial court observed.

We do not find any prejudicial error in the matters complained of by the defendant and the judgment must be affirmed.

It is so ordered.

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

LUJAN and KIKER, JJ., not participating.

294 P.2d 278

Carlos SANDOVAL and Procopio Sandoval, Plaintiffs-Appellees,

v.

Roman SANDOVAL, Defendant-Appellant.

No. 5881.

Supreme Court of New Mexico.

Feb. 16, 1956.

Rehearing Denied March 15, 1956.

Simms & Modrall, Vance Mauney, Albuquerque, for appellant.

Filo M. Sedillo, Belen, R. F. Deacon Arledge, Albuquerque, for appellees.

COMPTON, Chief Justice.

Appellees brought this action to partition real estate, and from an adverse judgment, appellant appeals. The denial of a motion for a new trial on the grounds of newly discovered evidence, is also assigned as error.

We will first dispose of the claim of error allegedly inhering in the judgment. The report of the commissioners was contested below and it is made the basis of multiple attacks on appeal. It is first con-

tended that the report should have been rejected because of the inequality in the division, and that allowances were not given for expenditures made by appellant in improving the premises. In this respect, the report of the commissioners is presumptively correct and their action should not be set aside on the grounds of unequal allotment except in extreme cases, as where made on wrong principle or where partition is grossly unequal. Mitchell v. Cline, 84 Cal. 409, 24 P. 164; Bergman v. Rhodes, 334 Ill. 137, 165 N.E. 598, 65 A.L.R. 344; Cooper v. Long, 115 Okl. 286, 244 P. 167, 46 A.L.R. 343; Wilkerson v. Wilkerson, 169 Okl. 232, 36 P.2d 935. There is no evidence that would bring the report within the exception.

The parties are brothers and were the owners as tenants in common of the premises involved, appellant being the owner of an undivided 7/8 interest and appellees being the owners of an undivided 1/8 interest each therein. The premises consisted of a house and lot in Grants, a seven room house of an estimated value of $7,000 in San Mateo, several small tracts of land, and about seven sections of deeded land. On the strength of all the deeded land appellant had acquired Taylor Grazing and Forest Permits exceeding fifteen sections, which land had been used by the parties jointly, appellees running some 80 head of cattle and appellant running 50 head of cattle and 700 head of sheep thereon. In making the division, the commissioners allotted appellees jointly 1120 acres of deeded land as their share, and the remaining real estate was allotted to appellant. The retention of the permits by appellant, no doubt, was a matter of consideration in making the partition.

The point is made that the decision of the commissioners was influenced by the conduct of appellees. Unquestionably, when the conduct of an interested party influences the acts of the commissioners, the reports should be rejected, Griffin v. Tomlinson, 155 Va. 150, 154 S.E. 483. But we fail to see any prejudicial conduct. The record merely discloses that appellees accompanied two of the commissioners as they went over the premises and in some instances identified the land jointly owned by the parties.

Another ground of attack is that the commissioners did not personally inspect the premises following their selection with a view to ascertain respective values as provided by § 22-13-6, 1953 Comp. The evidence discloses that subsequent to their selection, two of the commissioners went upon the premises and personally inspected most, if not all of the land, while one commissioner did not actually go upon the premises before signing the report. We conclude, however, that a report by a majority of the commissioners, is sufficient compliance with the statute. Masten v. Masten, Tex.Civ.App., 166 S.W.2d 347. Moreover, the provision that the "commissioners shall go upon the premises and make partition of said lands", is directory

only. The statute requires nothing more than that the commissioners fully acquaint themselves with and acquire first hand knowledge of the value of the premises before making partition. In this case the commissioners were long time residents of the area and testified that they had personal knowledge of the land, the residential properties and their respective values. This was sufficient even if none of the commissioners had actually gone upon the land subsequent to their selection.

The further point is made that the premises could not be partitioned in kind without manifest injury. The basis of this claim of error is that the premises contained valuable minerals. Ordinarily, lands containing known minerals are not susceptible of a fair division by metes and bounds, Sheffield Coal & Iron Co. v. Alabama Fuel & Iron Co., 185 Ala. 50, 64 So. 67; Musgrove v. Aldridge, 205 Ala. 189, 87 So. 803; Napier v. Napier, 233 Ky. 304, 25 S.W.2d 735; Tuggle v. Davis, 292 Ky. 27, 165 S.W.2d 844, 143 A.L.R. 1092, however, we must hold against appellant on this point as there was no proof whatever that the land contained minerals.

Appellant tendered many findings of fact applicable to his theory of the case, the refusal of which is assigned as error. The findings made by the court are supported by substantial evidence and the refusal to find to the contrary was not error. Guzman v. Avila, 58 N.M. 43, 265 P.2d 363.

We find the judgment free of error and now turn to a consideration of the asserted error in denying the motion for a new trial. The trial was had on June 7, 1954, and the judgment was entered August 8, 1954. Subsequently, on March 24, 1955, while the appeal was pending in this court, appellant invoked the provisions of § 21-1-1(60)(b), 1953 Comp., Rule 60(b), our Rules of Civil Procedure and moved for a new trial, claiming newly discovered evidence. The applicable portion of the rule reads:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (2) newly-discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); * * *. The motion shall be made within a reasonable time, and * * * not more than one (1) year after the judgment * * * was entered or taken. * * *"

We withheld our decision pending a disposition of the motion by the trial court. A hearing was had thereon and the action of the court in denying the motion is assigned as error.

To warrant the granting of a new trial, it must appear that the testimony relied on has been discovered since the trial and that failure to produce it was not due to lack of due diligence. Mitchell v. Forster, 59 N.M. 226, 282 P.2d 708; Ruhe v.

Abren, 1 N.M. 247; English v. Mattson, 5 Cir., 214 F.2d 406. Supporting the motion and made part of it is an affidavit by one E. V. Reinhart, a geologist, indicating the presence of uranium on a portion of the premises. Also, there were letters from a law firm of Junction, Colorado, suggesting that due to mineral deposits, the premises had a potential value of some $200,000. However, at the hearing on the motion, it developed that this potential value had dribbled to around $20,000. That the lands contained minerals, is purely speculative. In any event the matter raised by the motion was not newly discovered. The possibility that the land contained uranium, was before the court at the trial on the merits. There was evidence that prospectors were then very active in the area. Actually, the proof shows that there were six or seven exploratory mines operating in close proximity to the land involved, notice of which the parties could not escape.

In Mitchell v. Forster, supra, we restated the test required to obtain a new trial on the grounds of newly discovered evidence in the following language [59 N.M. 226, 282 P.2d 712]:

"'(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.'"

A motion for rehearing is addressed to the sound discretion of the trial court and we conclude there was no abuse of discretion shown in denying the motion.

Incidentally, since the oral arguments on submission, appellant again has moved that a decision on the merits be withheld pending presentation of matters allegedly affecting the title to a part of the premises involved. We granted a hearing on the motion and concluded that the matters raised do not present a substantial issue.

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

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

294 P.2d 282

STATE of New Mexico, Appellee,

v.

Leopoldo V. GRIEGO, Appellant.

No. 6004.

Supreme Court of New Mexico.

Feb. 15, 1956.

Dean S. Zinn, Frank B. Zinn, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., Santiago E. Campos, Fred M. Standley, Asst. Attys. Gen., for appellee.

COMPTON, Chief Justice.

Appellant was convicted by a jury of Sante Fe County of the crime of voluntary manslaughter and he appeals.

The offense occurred on the afternoon of January 1, 1955. Appellant, Francisco Gonzales, the deceased, Eusebio Mueller,

Patricio Mueller and Alfonso Mueller began celebrating the New Year early and continued to consume intoxicating liquor from time to time until about 2:00 P.M. when the party went to the home of appellant where they engaged in dancing. For some unexplained reason appellant and his wife were involved in a scuffle and he pushed her. Her head struck the door and began to bleed slightly. Patricio Mueller, seeing the blood on Mrs. Griego, made inquiry of appellant why he had struck her. In response, appellant stated to Patricio Mueller that he would also strike him, whereupon, appellant was knocked down by Patricio. While lying on the floor, Mrs. Griego attempted to tie his hands, but was unsuccessful. He was then assisted to his feet and placed on a table in another room, the kitchen. He sat there for a short while, then returned to the living room and ordered everyone out of the house. Patricio Mueller refused but was forcibly ejected. Appellant engaged in another scuffle and Gonzales was seen to fall to the floor. He was immediately taken to St. Vincent Hospital but was dead upon arrival. There was a sharp cut, smooth edge wound just below the collar bone of the upper left chest. A post-mortem examination showed a deep wound, penetrating the heart.

About 5:00 P.M. appellant and his wife were taken into custody. They were first taken to the county jail and then to the District Attorney's office where they were questioned. At first appellant maintained his innocence but later confessed. The written confession, in part, reads:

> "Patricio Mueller and I got in a fight, when he hit me, I was drunk, I became blind with anger and I picked up a knife to cut him. I threw some blows with the knife and as I was drunk and blind with anger I don't know who I cut or stabbed."

The sufficiency of the evidence to support a conviction of voluntary manslaughter is the first question. It is asserted that "sudden quarrel or heat of passion", essential elements of the crime of voluntary manslaughter, must be provoked by the party slain. It may well be that the deceased did nothing to provoke appellant's anger but this does not excuse his unlawful act. Where, in the execution of an intent to do wrong, an unintended illegal act ensues as a natural and probable consequence, the unintended act follows the wrongful intent. And, if a person intends to kill one person and unintentionally kills another, his guilt or innocence is to be determined as though the fatal act had caused the death of the person against whom the act was directed. Bolen v. Commonwealth, 265 Ky. 456, 97 S.W.2d 1; People v. Ortiz, 320 Ill. 205, 150 N.E. 708; State v. Chavez, 85 Mont. 544, 281 P. 352; Jackson v. State, 69 Ga.App. 707, 26 S.E.2d 485.

The argument is made that the evidence shows appellant to be guilty of second degree murder, if anything. In this regard, he cannot complain of evidence of

a higher degree of homicide than that of which he was convicted. The statute, § 41-13-1, 1953 Comp., is controlling.

A strenuous effort is made by appellant to escape the consequences of the confession. He contends that the discomfort of his wife while she was in custody induced his confession. This contention cannot be sustained. As previously stated, he and his wife were taken into custody about 5:00 P.M. They were placed in separate rooms and repeatedly questioned during the night. Not only did they maintain their innocence but disclaimed any actual knowledge of the killing. While Mrs. Griego complained of being hungry and cold on several occasions, there is evidence that the officers were quite considerate of her. Hot coffee was served at various times and when Mrs. Griego complained of being cold, she was furnished with wraps. We have given careful consideration to this claim of error and conclude that there is no evidence of coercion or duress. A serious offense had been committed and the peace officers were properly acting within the scope of their official duties in solving it. State v. Lindemuth, 56 N.M. 257, 243 P.2d 325.

It is asserted the court erred in admitting the confession in evidence because there was no independent proof of the corpus delicti. This claim of error must be rejected. In homicide cases the corpus delicti is established upon proof of the death of the person charged in the indictment or information, and that the death was caused by the criminal act or agency of another. State v. Lindemuth, supra; State v. Dena, 28 N.M. 479, 214 P. 583. The evidence is clear that Francisco Gonzales is dead; that there was quarreling and fighting in appellant's home in which he participated; that he engaged in a struggle in which Francisco Gonzales was seen to fall; that Gonzales died as a result of a fatal wound. And more, there is evidence that appellant's mother took a knife from him after the fight.

Appellant testified in his own behalf, and on cross-examination, he was asked if he had ever been convicted of a felony, to which he replied that he had. Over objection, he was then asked if that felony was not manslaughter. He again answered in the affirmative. The overruling of appellant's objection to the latter question is assigned as error. We think the examination was proper. Not only was the state entitled to establish by the accused the former conviction, but the name of the felony as well. State v. Conwell, 36 N.M. 253, 13 P.2d 554; State v. Roybal, 33 N.M. 540, 273 P. 919.

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

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

KIKER, J., not participating.

294 P.2d 284

STATE of New Mexico, Plaintiff and Appellee,

v.

Louis MARES, Defendant and Appellant.

No. 5998.

Supreme Court of New Mexico.

Feb. 28, 1956.

[redacted]

[redacted]

[redacted]

Donald A. Martinez, Las Vegas, for appellant.

Richard H. Robinson, Atty. Gen., Santiago E. Campos, Paul L. Billhymer, Asst. Attys. Gen., for appellee.

KIKER, Justice.

In the District Court of Quay County, New Mexico, there was filed in criminal cause No. 2962 on the docket, an information for and in the name and behalf of the State of New Mexico, which, except for formal statements, charged the defendant as follows: "That Louis Mares committed burglary of the dwelling of Loyd Larritson."

On the same day as the information was filed, the defendant, accompanied by his then attorneys, appeared before the court and entered a plea of not guilty to the said information. Thereafter, the attorneys who were with defendant at the time of his plea of not guilty withdrew from the case and, on the 1st day of June, 1955, defendant appeared in court with the attorney who thereafter represented him and still does. Defendant's attorney then moved to quash the said information on the ground that the same was not properly verified. The motion was overruled by the trial court and the case was set to be tried seven days later, on June 8, 1955.

On the 6th day of June, the District Attorney abandoned the original information and filed in the same case and under the same number a new information denominated "amended information."

On the 8th day of June, the defendant appeared before the court and was called for arraignment on the so-called amended information. This information was in exact form as the former information, except that it charged as follows: "That Louis Mares burglarized an out-house belonging to Loyd Larritson in the nighttime." It was properly verified.

At the arraignment, defendant's attorney stated that he understood the information was an amendment of the original infor-

mation and that he would renew his objection to the jurisdiction of the court on the ground that the original information was not properly verified and that there was nothing that could be amended. The court overruled the motion and the defendant entered a plea of not guilty. The defendant, by his attorney, remarked, "Subject to the motion, the defendant will plead not guilty." The court thereupon stated that a plea of not guilty would be entered and that the defendant would be held under bond of $1,000. Both parties then having stated that they were ready for trial, the jury was duly empaneled and sworn to try the case. After a recess of ten minutes, the jury was recalled and defendant's attorney stated that he wished to make a motion on the amended information. Whereupon the court stated that the record should show that the jury had been selected and sworn to try the issues raised by the plea to the amended information, which had been read to defendant in the presence of his attorney, and that the defendant had announced ready for trial. Defendant's attorney stated that he had understood that the so-called amended information went to the matter of verification only and in no way changed the offense charged, and that the plea had been entered immediately after he had received the amended information. The court called attention to the fact that a plea had been entered on a previous date and that then date for trial had been set. Defendant's attorney then said he wished the record to show that the charge upon which defendant was being tried was an entirely different crime from that charged in the original information and that he objected. The objection was overruled and the trial proceeded upon the new information.

The defendant has stated four assignments of error and has presented the matters complained of under four separate points.

In the first assignment, appellant says that the original information filed herein was verified upon information and belief by another than the District Attorney, who, only, under our rules, can so verify criminal informations. This contention, if worthy, of notice, is disposed of by Trial Court Rule appearing at Section 41-6-4(2). N.M.S.A.1953, which reads as follows:

> "(2) 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."

See also State v. Jones, 52 N.M. 118, 192 P. 2d 559, and cases therein cited.

Appellant's second attack upon the verdict is that the so-called amended information was filed without leave of court and was unauthorized and void, being an amendment as to substance. It seems that the State is willing to concede that the second information in the same cause in the District Court was an amendment to the first information. It is not just clear that this is the fact. The first of the informations charges the burglary of a dwelling

house belonging to a certain owner and the second charges that an outhouse belonging to the same owner was burglarized in the nighttime. It would seem that the information which was filed last was either one of two in the same case, or else it was a substitute for that first filed. The information filed first was of no importance whatever in the trial of the instant case. The defendant was tried for the burglary in the nighttime of an outhouse, the property of Loyd Larritson. No other consideration to the matter of filing the informations need be given, than to say that defendant, in the presence of his attorney, and after the information had been read in the hearing of both defendant and his attorney, entered a plea of not guilty and within a few minutes thereafter announced that defendant was ready for trial on the second information; and that the jury was then impaneled and sworn. The attack upon the information last filed was later made, during a recess. The attack not only came too late, but it must be said that the trial court gave its assent to the filing of the second information by having the defendant plead to it, knowing it was on file, and by having a jury empaneled and sworn to try the case.

The third proposition stated by appellant for the consideration of this court is, "The amended information was insufficient to invoke the jurisdiction of the court in that it did not charge a public offense."

The information upon which defendant was tried charges that "Louis Mares burglarized an outhouse belonging to Loyd Laritson in the nighttime."

Section 41-6-7, N.M.S.A.1953, provides that an information is valid and sufficient when the charge is made:

"(a) By using the name given to the offense by the common law or by a statute.

"(b) By stating so much of the definition of the offense, either in terms of the common law or of the statute defining the offense or in terms of substantially the same meaning, as is sufficient to give the court and the defendant notice of what offense is intended to be charged."

Burglary, as known to common law, is punishable under Section 40-9-1, N.M.S.A. 1953. Several sections following that have headnotes which make use of the term burglary, but the headnotes are no part of the legislative enactment. The offenses in each of these sections made punishable are statutory offenses. Section 40-9-7, N.M.S.A. 1953, provides:

"Every person who shall enter, in the night-time, with or without breaking, or shall break and enter in the day time, any dwelling-house, or any outhouse thereto adjoining, and occupied as such, or any office, shop, warehouse or mine with the intent to commit the crime of murder, rape, robbery, larceny, or any other felony, shall be punished by imprisonment in the state penitentiary nor more than three (3) years nor less than six (6) months."

A prosecution under the above section may properly be had on an information such as that last filed in this case. The charge is that an outhouse belonging to a certain individual was burglarized. The term burglarized implies the breaking and entering in the nighttime and that the breaking and entering was with intent to commit a felony within the building.

> "Burglary, at common law, is the breaking and entering, in the nighttime, of the dwelling house—or, as the old definition runs, the mansion house—of another, with intent to commit a felony therein." 9 Am.Jur. 239.

The information is not subject to the attack made upon it in the third proposition stated by appellant.

Appellant's fourth proposition, as basis for reversal, urges that the court erred in overruling appellant's motion to set aside the verdict of the jury because of the variance between the charge made and the proof offered in support thereof.

In argument under this proposition, appellant called attention to the section of the statutes, above quoted, which provides for punishment for breaking and entering an outhouse; and quotes many definitions as to outhouse, the gist of these being that an outhouse is a building near to a dwelling house, used in connection with such dwelling house, but not necessarily adjoining.

Appellant called attention to the fact that the man named in the information, Loyd Larritson, lived in the city of Tucumcari, where he was employed at a motor company, but was the owner of a farm located about 4½ miles distant from Tucumcari; that on the farmland there was a small building, erected for a garage, in which the owner stored his farming tools and his tractor; that, according to the testimony of Mr. Larritson, there was no dwelling on the farm property and there were no buildings except the garage and a cow shed, and that no one lived on the property. Appellant argues from these facts that the building in question was not an outhouse.

The point insisted upon by appellant was raised in the District Court for the first time by motion made after verdict had been returned, in the following language:

> "Your Honor, we should like to request to set aside the verdict because the State fails to prove that the building that was burglarized was an outhouse."

Appellant urges that there was a variance of such grievous nature that the case of State v. Salazar, 42 N.M. 308, 77 P.2d 633, is controlling in its consideration that such error was committed that there should be a reversal. In that case, the defendant appealed from a conviction of the burglary of a shop. The prosecution was upon an information which charged that the defendant "* * * did commit burglary of the shop of the Harvey Cleaners in Raton." The statute under which the prosecution was brought was section 35–1503, 1929 Comp.

This section is now 40-9-6, N.M.S.A.1953. It reads:

> "Every person who shall break and enter, in the night-time, any office, shop, or warehouse, not adjoining to nor occupied as a dwelling-house, with the intent to commit the crime of murder, rape, robbery, larceny, or any other felony, shall be punished by imprisonment in the state penitentiary not more than three (3) years nor less than one (1) year."

The proof in the Salazar case was that the defendant had broken and entered the shop of one Joe Howard. Harvey Cleaners did not enter into the proof at all. The variance there was as between owners of the shop burglarized, with claim that the shop was not properly identified.

In the Salazar case, the defendant, at the close of the state's case demurred to the evidence and moved for a dismissal of the case. Among other reasons given, he stated that the information alleged that the burglary was in the shop owned by Harvey Cleaners; but that the evidence attempted to show that the burglary was of a shop under the sole ownership of Joe Howard; and that it did not appear that Harvey Cleaners had anything to do with the shop. This demurrer and motion being overruled, the defendant, having offered no evidence, requested the court to instruct the jury to the effect that if no evidence should be found showing that a shop belonging to Harvey Cleaners was broken into by defendant, the verdict should be for defendant. The court denied the requested instruction, and after the jury brought in its verdict the defendant through his attorney moved in arrest of judgment on the ground that the information alleged that the defendant burglarized a shop belonging to Harvey Cleaners, whereas the evidence was all to the effect that it was the shop of Joe Howard.

The writer of the opinion called attention to the fact that there had been a demurrer to the evidence at the close of the state's case and that the defendant had requested an instruction and that both were offered for the same purpose as the motion in arrest of judgment after the verdict was returned. The writer also pointed out that error was assigned by appellant upon the theory that there was a fatal variance between the allegations in the information and the proof.

An examination of the briefs in the Salazar case clearly shows that error was assigned as to the overruling of the demurrer and motion, as to the refusal to give the requested instruction, and as to the motion in arrest of judgment made after verdict.

It would seem therefore that since the attention of the trial court in the Salazar case was repeatedly called to the variance between charge and proof, both before and after verdict, with exceptions, as then required, being properly saved, there could have been no holding, regardless of anything said in respect of a motion in arrest of judgment, except that there was error

in the proceedng of such nature that the judgment should be reversed.

In the case at bar, there was no motion made by appellant at the close of the state's case. At that time it was in no way called to the attention of the court that there was a variance between charge and proof. Defendant made no request of the court to give instructions to the jury as to any variance between the proof and the charge made in the information. In fact, nothing was said in the presence of the court as to variance except in the request made after verdict.

This request is considered in the brief of appellant as a motion to set aside the verdict and grant a new trial and it is considered in the brief of appellee as a motion in arrest of judgment. It is of no importance whether it is the one or the other.

The motion in arrest of judgment will not serve any purpose except as to calling the attention of the court to any proper complaint which may be made after verdict to the record proper or some part of it. A question of variance between charge and proof cannot be raised for the first time by motion in arrest of judgment. Territory v. Sevailles, 1 N.M. 119; Territory v. Miera, 1 N.M. 387; 23 C.J.S., Criminal Law, § 1537.

Just as motion in arrest of judgment will not serve the purpose of raising the question of variance, so it is also true that a variance between charge and proof cannot be raised for the first time after verdict by a motion for new trial. State v. Padilla, 18 N.M. 573, 139 P. 143; State v. Klasner, 19 N.M. 474, 479, 145 P. 679; State v. Rucker, 22 N.M. 275, 161 P. 337; State v. Russell, 37 N.M. 131, 19 P.2d 742; State v. Gilmore, 47 N.M. 59, 134 P.2d 741; 23 C.J.S., Criminal Law, § 1430.

Appellant, in his reply brief, states that at the close of the state's case he made a motion as to variance but, as the reporter evidently failed to take it down, it does not appear in the record and we cannot consider it.

The judgment must be affirmed. It is so ordered.

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

294 P.2d 625

Lewis Burnham SEWARD, Claimant-Appellant,

v.

COUNTY OF BERNALILLO (DISTRICT COURT), Employer,

Central Insurance and Surety Corporation, Insurer, Defendants-Appellees.

No. 6016.

Supreme Court of New Mexico.

March 5, 1956.

The learned trial judge said nay. So say we. Board of Commissioners of Eagle County v. Evans, 99 Colo. 83, 60 P.2d 225.

The judgment will be affirmed.

It is so ordered.

COMPTON, C. J., LUJAN and McGHEE, JJ., and E. T. HENSLEY, Jr., District Judge, concur.

294 P.2d 625

Edward J. KNOEBEL and Darlo Knoebel, Plaintiffs-Appellees,

v.

CHIEF PONTIAC, Inc., and General Motors Acceptance Corporation, Defendants-Appellants.

No. 6013.

Supreme Court of New Mexico.

Jan. 31, 1956.

Rehearing Denied March 20, 1956.

Joseph L. Smith, Henry A. Kiker, Jr., Albuquerque, Robert H. Sprecher, Roswell, for appellant.

Rodey, Dickason, Sloan, Mims & Akin, Charles Larrabee, Albuquerque, for appellees.

SADLER, Justice.

The question for decision: Is a juror who suffers an accidental injury while in the performance of his duties as such entitled to an award of compensation for his injury under the provisions of our Workmen's Compensation Law, 1953 Comp. § 59-10-1 et seq.?

Marron & McRae and Joseph Phil Click, Albuquerque, for Chief Pontiac, Inc.

Iden, Johnson & Mechem, and James T. Paulantis, Albuquerque, for General Motors Acceptance Corp.

McAtee & Toulouse, Albuquerque, for appellees.

HENSLEY, District Judge.

Edward J. Knoebel, and his wife, Darlo Knoebel, the plaintiffs and appellees, purchased an automobile from defendant, Chief Pontiac, Inc., one of the appellants. The transaction was evidenced by a conditional sale contract which was assigned by Chief Pontiac, Inc., to General Motors Acceptance Corporation, also a defendant and appellant. Appellees, being in default on the conditional sale contract, delivered the automobile to a representative of General Motors Acceptance Corporation on July 19, 1954 with the understanding that the appellees might secure return of the vehicle by paying the arrearages on the following 1st or 2nd of August. On July 26, 1954 the appellees sought a further extension to August 10, 1954 and were informed that the automobile had been returned to appellant Chief Pontiac, Inc., pursuant to the terms of the original assignment and that the

matter was beyond the control of appellant General Motors Acceptance Corporation. Appellee, Darlo Knoebel, then on the same day contacted appellant Chief Pontiac, Inc., and the record discloses the following conversation transpired:

"Q. As I understand it, you asked him if you could have until the 10th of August to pay off the car? A. Yes.

"Q. Was that the whole conversation? A. Well, he just said that if I could pay up the whole of what was delinquent he could hold the car until the 10th for me.

"Q. That was the whole conversation? A. Yes.

"Q. You never had any more conversation with him until the 7th? A. No."

On August 7, 1954, appellee Darlo Knoebel again went to the office of appellant Chief Pontiac, Inc., to pay the sums delinquent and secure the return of the automobile. Meanwhile, and subsequent to the last conference, the appellant Chief Pontiac, Inc., had sold the car for $495 which was $3.99 less than the amount owing by the appellees. Appellees, being unable to secure return of the automobile instituted suit to recover damages.

The conditional sale contract was received into evidence and contained, among others, the following provisions:

"4. In the event purchaser defaults on any payment due on this contract or fails to comply with any condition of this contract or a proceeding in bankruptcy, receivership or insolvency be instituted against the purchaser or his property, the seller shall have the right, at his or its election, to declare the unpaid balance, together with any other amount for which the purchaser shall have become obligated hereunder, to be immediately due and payable. Further upon such default or event, seller or any sheriff or other officer of the law may take immediate possession of said property without demand (possession after default being unlawful), including any equipment or accessories thereto; and for this purpose seller may enter upon the premises where said property may be and remove same. Such repossession shall not affect seller's right, hereby confirmed, to retain all payments made prior thereto by the purchaser hereunder. Seller may resell said property, so retaken, at public or private sale, without demand for performance, with or without notice to purchaser (if given, notice by mail to address below being sufficient), with or without having such property at place of sale, and upon such terms and in such manner as seller may determine; seller may bid at any public sale. From proceeds of any such sale, seller shall deduct all expenses for retaking, repairing and selling such property including a reasonable attorney's fee. The balance thereof shall be applied

to amount due; any surplus shall be paid over to purchaser; in case of deficiency purchaser shall pay the same with interest. Seller may take possession of any other property in the above described motor vehicle at time of repossession, wherever such other property may be therein, and hold same temporarily for purchaser without liability on the part of the seller."

At the conclusion of the trial, the appellants made timely request that the trial court conclude as a matter of law that paragraph numbered four, supra, gave the defendants (appellants) the legal right to take possession of the car upon default by the purchasers, and to sell the same at private sale, without notice to the plaintiffs. Also, at the conclusion of the trial, the appellants tendered a further requested conclusion of law as follows: "Any promises secured by plaintiffs that the car would be held and not sold were without consideration, since the plaintiffs did not agree to do anything they were not legally obligated to do and did not communicate to defendants any indication that they might have to suffer detriment, nor was any benefit received by defendants for any such promise."

Appellants here urge that the trial court's refusal to so find constitutes reversible error and thus they seek relief from the trial court's decision awarding plaintiffs a judgment against the defendants in the sum of $296.04 for breach of the oral agreement.

A provision for enforcing a conditional sale contract similar to the one quoted above has been before this court and was held enforceable. See General Motors Acceptance Corporation v. Ballard, 37 N.M. 61 at page 64, 17 P.2d 946, at page 947:

"* * * It will be seen that paragraph 6 of the contract, above quoted, specifically provides that, if the purchaser makes default in the payment, the vendor may take immediate possession of the property without demand, and resell the property so taken, at public or private sale with or without notice, and apply the proceeds arising from such sale to the expense of retaking, reselling, and repairing the property, together with a reasonable attorney's fee, and apply the balance arising from such sale on the amount due under the contract, and, if any surplus remains, it should be paid over to the purchaser, and, if the property at such sale does not bring a sufficient sum to pay the full amount contracted to be paid, the vendor may have his right of action to recover such deficiency.

"Without discussing the fairness or unfairness of this clause of the contract, it is clear as to its terms, and we know of no legal inhibition, preventing its enforcement."

In view of the foregoing, it was error for the trial court to refuse to adopt the conclusion of law requested by the defendants;

the contract gave them the legal right to take possession of the car upon default by the purchasers and to sell the same at private sale without notice to the plaintiffs.

Lastly, the appellants contend that the alleged promise of the appellants to postpone enforcement of their remedies under the conditional sale contract was without consideration and unenforceable.

The mere fortuitous presence of circumstances that might constitute consideration for an agreement is not enough, but consideration, like every other element in a contract must be bargained for by the parties, and their minds must meet upon the consideration which is to support a promise. See Gross, Kelly & Co. v. Bibo, 1914, 19 N.M. 495 at page 515, 145 P. 480; Yuma Nat. Bank v. Balsz, 1925, 28 Ariz. 336, 237 P. 198. Also see, Goodman Mfg. Co. v. Mammoth Vein Coal Co., 1918, 185 Iowa 253, 168 N.W. 912, wherein it was held that in order to constitute a consideration for an extension of time for the payment of a debt, there must be a benefit to the creditor or a detriment to the debtor. The creditor must secure, by reason of the extension, something which he could not otherwise demand, or the debtor must do or obligate himself to do something which he would not be bound to do in the absence of the agreement. The rule is succinctly stated in 17 C.J.S., Contracts, § 112, p. 465:

> "The promise of a person to carry out a subsisting contract with the promisee or the performance of such contractual duty is clearly no consideration, as he is doing no more than he was already obliged to do, and hence has sustained no detriment, nor has the other party to the contract obtained any benefit."

The factual situation in Lynch v. Sable-Oberteuffer-Peterson, 1927, 122 Or. 597, 260 P. 222, 55 A.L.R. 180, is strikingly similar to the case at hand and the conclusion there announced is compatible with ours. See, also, Assets Realization Co. v. Ganus, 25 Ala.App. 113, 141 So. 721; McLean v. Underdal, 73 N.D. 74, 11 N.W.2d 102; Annotations, 37 A.L.R. 91, supplemented in 83 A.L.R. 959, and 99 A.L.R. 1288.

The trial court erred in awarding damages for breach of the alleged oral agreement. The judgment will be reversed and remanded with directions to set aside the judgment against the appellants and enter a judgment dismissing the complaint, and it is so ordered.

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

McGHEE, J., having recused himself did not participate.

294 P.2d 628

ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO, Appellee,

v.

John GATLIN and J. J. Sadosuk (Raymond H. Hunter, joined here by revivor in name of J. J. Sadosuk, deceased), Appellants.

No. 5938.

Supreme Court of New Mexico.

Feb. 27, 1956.

Rehearing Denied March 22, 1956.

Paul F. Larrazolo, U. S. Dist. Atty., Albuquerque, William H. Veeder, U. S. Sp. Asst. Atty., J. Lee Rankin, U. S. Asst. Atty. Gen., for appellants.

Edwin Mechem, J. D. Weir, Las Cruces, for appellee.

LUJAN, Justice.

This case is before us on appeal by the defendants from the refusal of the trial court to dismiss plaintiff's action for lack of indispensable parties (the United States of America and the Secretary of the Interior) and from a judgment enjoining the defendants (subordinate officials of the United States Department of Interior) from diverting and using any of the waters of the Rio Grande upon the Bosque del Apache National Wildlife Refuge in Socorro County, New Mexico, which injunction has, upon bond, been stayed pending this appeal.

We are concerned solely with the jurisdictional question raised by defendants "that the injunction entered will expend itself upon the United States of America, its properties and its administration; that the United States of America has not consented to be sued; that it is an indispensable party and is not before the court."

To bring the contentions of the parties into focus it will be helpful to review as briefly as possible the pleadings and decision of the lower court.

The complaint alleges the water users of the plaintiff irrigation district are beneficial owners of valuable water rights in the waters of the Rio Grande and have the right to store large quantities of water in the Elephant Butte and Caballo Dams on said river and divert water from the river for irrigation of their lands; that all of the waters of the river in New Mexico have been appropriated; that defendants are unlawfully diverting water from the river above Elephant Butte Dam and applying it to irrigate land on the Bosque del Apache Grant, which land has no water rights of any character in the waters of the river; that the unlawful diversion of the waters operates to diminish and deplete the natural flow of the river into Elephant Butte Reservoir and diminishes the supply of water available to the water users of the plaintiff; that unless the defendants be restrained from making such unlawful diversion, plaintiff and its water users will suffer great and irreparable damage and that plaintiff is without a speedy and adequate remedy at law. A second cause of action is predicated upon alleged unlawful impounding of waters of the Rio Grande on the lands of the Bosque del Apache Grant by the defendants for the purpose of affording bird refuges and attempting to kill salt cedars and other growth upon the land.

The answer of the defendants alleges their status as officials of the Department of Interior; that the acts complained of were done in their official capacity; that they have no personal interest in the suit and claim, as individuals, no right, title or interest to the wildlife refuge established on the lands of the Bosque del Apache Grant. The principal allegations of the complaint are denied. The answer was followed by defendants' motion for summary judgment of dismissal upon the ground of lack of indispensable parties. Following denial of this motion trial was had upon the merits at the conclusion of which judgment was entered for the plaintiff enjoining diversion of water from the Rio Grande by the defendants. The lower court's findings of fact are extensive and are incorporated in following paragraphs.

History and Interest of Plaintiff District

The Elephant Butte Irrigation District of New Mexico was organized by water users on the Rio Grande Project for the purpose of providing irrigation of their lands in cooperation with the United States under the Federal Reclamation Laws. Pursuant to the Reclamation Act of 1902, 32 Stat. 388, construction of a dam on the Rio Grande was authorized. Thereafter, the Secretary of Interior formed the Rio Grande Reclamation Project, comprising part of what is known as the Elephant Butte Irrigation District and certain lands in Texas being part of the El Paso County Water Users' Association No. 1. The Secretary entered into contracts with the associations representing the Texas and New Mexico landowners, which contracts provided for repayment of construction costs, etc. The Bureau of Reclamation constructed Elephant Butte Dam near Engle, New Mexico, and other storage or diversion dams and irrigation works to be used for application of the water to beneficial use upon the lands within the project and for the delivery of 60,000 acre feet of water annually to Mexico under treaty with the United States proclaimed January 16, 1907, 34 Stat. 2953.

There are, at the present time, 90,476.61 acres of land within the plaintiff district receiving water from Elephant Butte Dam for irrigation purposes. The district landowners have repaid to the United States roughly three-fifths of the district's share of construction costs of the irrigation project.

To properly irrigate the lands of the district, the Texas association and to fulfil the Mexican treaty obligations, it is necessary to release annually from Elephant Butte Dam 790,000 acre feet of water. Beginning in 1951 and continuing to the time of trial drought conditions have resulted in a shortage of water in the dam. In 1953, when judgment was entered herein, there was available for use only 408,100 acre feet of water.

History and Interest of the United States in Bosque del Apache Refuge and Wildlife Preserve

The lands of the Bosque del Apache Grant, as well as the water rights appurtenant to some 6,780 acres thereof, were acquired by the United States pursuant to condemnation proceedings and are a part of or constitute that property of the United States known and established as the Bosque del Apache National Wildlife Refuge by Executive Order of November 22, 1939, to further effectuate the purposes of the Migratory Bird Conservation Act, 45 Stat. 1222, and in keeping with obligations of the United States under the Convention between the United States and Great Britain for the protection of migratory birds proclaimed December 8, 1916, 39 Stat. 1702, and a comparable Convention with the United Mexican States proclaimed March 15, 1937, 50 Stat. 1311, and national implementing legislation, such as the Migratory Bird Treaty Act of June 20, 1936, 49 Stat. 1555, the Migratory Bird Conservation Act of June 15, 1935, 49 Stat. 381, and Act of March 10, 1934, 48 Stat. 401.

The refuge is administered by the Secretary of Interior; defendants are officers under the direction of the Secretary, one being regional director of the Fish and Wildlife Service having jurisdiction over the refuge and the other being the refuge manager. They have no individual interest in the lands of the refuge or the waters used thereon; their actions with respect to the operation of the refuge and the use of water for it are supervised by the Central Office under the Secretary of Interior. The refuge manager purporting to act under authority of the Secretary of Interior is now and for several years has been engaged in diverting waters of the Rio Grande on the lands of the Bosque del Apache Grant for the purpose of creating and maintaining a wildlife refuge principally for water fowl.

The water used on the refuge comes by direct diversion from the Rio Grande into the Socorro Main Canal under agreement with the Middle Rio Grande Conservancy District, and by indirect diversion from the San Antonio Riverside Drain. The latter diversion appears to be the principal source of water for the refuge. Part of this water is permanently impounded on 82 acres of the refuge for a breeding place for wild fowl and stocking of fish. During the winter months, October to April, water is impounded on large areas of the refuge to provide resting and feeding grounds for wild fowl and water has been impounded to the first of 1953 on certain areas therein for the purposes of killing salt cedars and raising small grain to feed water fowl. Between 35 and 45 cubic feet of water per second is used on some 5,000 acres of developed lands within the refuge, the consumptive use of water being 3/5 acre feet per acre.

Between October 1939 and June 1952 the United States has constructed 67.52 miles of dikes and drains on the refuge and 87 water control structures; 4058 acres of land have been cleared, plus 425 acres re-

worked, with 5048 acres for farming. These works and other improvements made on the lands of the refuge represent a total expenditure by the United States of $1,-050,105.54, exclusive of administrative, supervisory and engineering expense.

Without the use of water, whether derived from and by present means or through any pumping operations, it appears quite clear that this refuge could not be operated and maintained for the purpose for which it was established.

History of Water Use on Bosque del Apache Grant by Prior Owners

In 1906 the Socorro Company, a predecessor in interest of the United States, applied for permit to appropriate 97 cubic feet of water per second from the Rio Grande to irrigate 6,780 acres of land in the Bosque del Apache Grant. Beginning in 1910 and continuing down to and including July 25, 1951, the owners of the Grant have made various applications to territorial and state engineers for extensions of time within which to complete work and apply the water to beneficial use, which applications for extensions have been granted.

In 1923 one Schoellkopf, predecessor in title of the United States, acquired title to the Grant and made numerous applications for extensions of time within which to complete the work and apply the water to beneficial use. In none of his applications was there any showing that work was being done or of diligence on his part to do the work, the applications consisting of excuses why he had not done anything. From 1929 to 1940 there was no evidence of cultivation or irrigation on the grant lands. The Fish and Wildlife Service contemplated completion of its works on or before June 1, 1955, and to be able to prove application of the water to beneficial use under the terms of the last extension of time granted by the state engineer.

Validity of Present Water Use on the Refuge

The use of the waters on the refuge constitutes an impairment of the rights of the landowners within the plaintiff district to the use of the waters of the Rio Grande and the acts of the defendants have deprived the landowners of the district of a part of the water to which they are entitled.

The use of the waters on the grant is not solely for the purpose of irrigation and constitutes change and manner of use for which no application has been made to or granted by the state engineer.

Conclusions of Law of Trial Court

The trial court concluded it had jurisdiction of the cause and the parties; that the diversion and use of water on the refuge is in violation of the laws of this state in that (a) the use of the waters made is not for beneficial purposes and is made without valid application and permit

from the state engineer; (b) that the state engineer has no authority, under the law, to make the numerous extensions of time granted by him upon application by various owners of the grant; (c) for more than four years there was an abandonment of the use of water upon the grant by the owners thereof prior to the time said grant was acquired by the United States; (d) any right which the landowners of the grant may have by virtue of application by the Socorro Company for the appropriation of water in 1906 has been lost by failure of the successive owners of the grant to prosecute diligently the construction work and apply the water to a beneficial use and by failure to beneficially use the water for a period of more than four years.

It further concluded the defendants are unlawfully engaged in diverting waters of the Rio Grande onto the refuge; that the unlawful use of the water constitutes a depletion of the water supply of the river which would otherwise flow into Elephant Butte Dam and become part of the usable water of the Rio Grande Reclamation Project; that the unlawful use of the water by defendants constitutes an invasion of the rights of the landowners of the plaintiff district, the beneficial owners of part of the water impounded in the dam; that the action of the defendants in using the water constitutes a taking of property without due process of law and without just compensation therefor in violation of the Fifth and Fourteenth Amendments of the United States Constitution; that plaintiff is without a speedy and adequate remedy at law and is entitled to an injunction enjoining and restraining defendants from using any of the waters of the Rio Grande on the Bosque del Apache Grant.

The contentions of the parties center primarily upon decisions of the United States Supreme Court. The position of the plaintiff is, in substance, that the taking of water from the Rio Grande by the defendant officers is a tortious act and specific relief may be had against them under the authority of United States v. Lee, 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171. In that case Lee brought action in ejectment against defendant military officers who, under orders of the President, took possession of land claimed by Lee, the Arlington estate, and created a military fort and cemetery thereon. Lee's claim was based upon a devise from his grandfathers; the defendants asserted title in the United States on the basis of a tax sale certificate, claiming immunity from suit thereby. It was held by the Virginia court that the defendants were wrongfully in possession. The United States Supreme Court held the trial court did not err in refusing to dismiss the action as one against the United States. The rationale of the opinion is that the land was the private property of Lee and was taken without any process of law and without compensation, which unconstitutional taking met the objection that the land was devoted to a proper public use by those having authority to establish a fort and cemetery

thereon, the decision recognizing such adjudication was not res judicata against the United States.

Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209, is another case relied upon by plaintiff. There a steamship company sued the individual members of the Maritime Commission to recover stock alleged to have been pledged to the Commission as collateral for a debt since paid by the steamship company. It was held the district court had jurisdiction to determine its jurisdiction by proceeding to a decision on the merits. The decision appears to rest upon one or both of these principles, depending upon which way the complaint be viewed: (a) that the Commission members acted in excess of their *statutory* authority in that they had no authority to purchase the shares of stock or acquire them outright, Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570; or (b) that although such statutory authority existed, the contract between the steamship company and the Commission was not an outright transfer, but merely a pledge—in other words the action of the Commission members in withholding the stock was tortious under general law, United States v. Lee, supra.

Although the court discusses and relies upon the Lee decision, it says this of it [330 U.S. 731, 67 S.Ct. 1012]:

> "We do not trace the principle of United States v. Lee, supra, in its various ramifications. Cases on which petitioners rely are distinguishable. This is not an indirect attempt to collect a debt from the United States by preventing action of government officials which would alter or terminate the contractual obligation of the United States to pay money. [Citing cases.] It is not an attempt to get specific performance of a contract to deliver property of the United States. [Citing cases.] It is not a case where the sovereign admittedly has title to property and is sued by those who seek to compel a conveyance or to enjoin disposition of the property, the adverse claims being based on an allegedly superior equity or on rights arising under Acts of Congress. [Citing, among other cases, State of Louisiana v. Garfield, 211 U.S. 70, 29 S.Ct. 31, 53 L.Ed. 92.]
>
> "We say the foregoing cases are distinguishable from the present one, though as a matter of logic it is not easy to reconcile all of them. But *the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration.* Ex parte State of New York, 256 U.S. 490, 500, 502, 41 S.Ct. 588, 590, 591, 65 L.Ed. 1057. *If so, the*

suit is one against the sovereign. Mine Safety [Appliances] Co. v. Forrestal, 326 U.S. [371] at page 374, 66 S.Ct. [219] at page 221, [90 L.Ed. 140]. * * *." (Emphasis ours.)

Both the Lee case and Land v. Dollar, supra, are the subject of discussion in Larson v. Domestic & Foreign Corp., 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628. In the Larson case the matter in controversy was a quantity of surplus coal which the corporation contended it had purchased. Suit was brought against the head officer of the War Assets Administration seeking an injunction prohibiting him from selling or delivering the coal to anyone but the plaintiff. It was contended on the one hand that title to the coal had already passed to the buyer, and on the other, that the contract had been breached by the buyer for his failure to deposit funds to pay for the coal in advance. The lower court dismissed the action as a suit against the United States, and its action was affirmed.

The decision reviews all instances where suit is permitted against officials, recognizing that suit will lie either where such official has exceeded the limits of his statutory authority or where the statutory authority is given but is unconstitutional, and, of course, instances where an officer has purported to act in his personal or individual capacity.

It is said that the Lee decision represents a specific application of the *constitutional* exception to the doctrine of sovereign immunity, and that the Lee case offers no support to the contention a claim of title to property held by an officer of the sovereign is, of itself, sufficient to demonstrate the officer holding the property is not validly empowered by the sovereign to do so. Only where claim is made that the holding constitutes an unconstitutional taking of property without just compensation does that conclusion follow; that with but one possible exception, the cases following the Lee case have granted specific relief against an officer only where there was a claim the taking of property or the injury to it was not the action of the sovereign because either unconstitutional or beyond the statutory powers of the officer. It is then said since the complaint in the Larson case did not charge the actions of the defendant were unconstitutional, but that they were merely "illegal" or "unlawful," the suit must fail.

The case of Land v. Dollar, supra, is apparently written off as being based solely upon principle (a) noted above, that the complaint alleged the defendants acted in excess of their statutory authority.

It is also notable that by footnote reference in the Larson case it is pointed out that the Lee case was decided at a time when there was clearly no remedy whereby Lee could obtain compensation for the taking of his lands—that the availability of a remedy today in similar cases in the Court of Claims may be relevant to the question of sovereign immunity in cases

where specific relief is sought, citing Hurley v. Kincaid, 285 U.S. 95, 52 S.Ct. 267, 76 L.Ed. 637. In this connection, see also: United States v. Gerlach Live Stock Co., 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231, and 28 U.S.C.A. Judiciary and Judicial Procedure § 1491.

We are of the opinion the instant case does fairly come within the rationale of the Lee case, in view of the finding and conclusion of the trial court that the lands of the refuge have no valid appropriative water rights, and that the diversion of water made from the Rio Grande by the defendants constitutes an unlawful taking in violation of the Constitution, which finding and conclusion are not attacked on this appeal. But we further believe the ruling of the Lee case has been so corseted by the decisions in Land v. Dollar and Larson v. Domestic & Foreign Corp., both supra, as to be inapplicable in any instance where the relief sought will not stop with affecting the specific property in the hands of the officer claimed to be privately owned.

As already noted, the statement is made in Land v. Dollar, supra: "* * * the rule is based on practical considerations reflected in the policy which forbids suits against the sovereign without its consent. The 'essential nature and effect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration. * * * If so, the suit is one against the sovereign."

The trial court found that without the continued application of water to the lands of the refuge, whether from present sources or otherwise, the operation of the refuge for the purposes for which it was established will be impossible. The United States unquestionably owns the lands of the refuge and the works thereon; the refuge was lawfully established in furtherance of the purposes and objectives of treaties between the United States and Great Britain and the United Mexico States, and Congressional Acts. Large sums of money have been expended by the United States upon the development of the site.

It seems patent that the granting of the specific relief sought will reach beyond the right to the waters claimed and found to be owned by the plaintiff and affect the public domain and treasury and interfere with public administration.

It is true that the Lee decision approved specific relief which operated not only on the land of Arlington estate, but upon the cemetery and military installations there as well; but there are, so far as we are aware, no later cases where specific relief of so sweeping a nature has been similarly approved. In Land v. Dollar, supra, the relief was apparently complete in its effect solely upon the stock held by the Commission. In Larson v. Domestic & Foreign Corp., supra, specific relief was denied un-

der the doctrine of the Lee case upon the tight distinction that the complaint did not allege the unconstitutionality of the official's actions. Further, the Larson case approved the holding in Land v. Dollar, supra, upon the single ground mentioned above, that the actions of the Commission members were alleged to exceed their statutory authority.

These cases exemplify the limitation of the Lee doctrine to the narrow area where the granting of specific relief stops with the official sued, with the strong suggestion noted above in the Larson case that future claimants even within the precise area of the Lee holding may be relegated to the Court of Claims for recovery of money under theory of inverse condemnation.

Before concluding this discussion it is well to refer to the case of State of New Mexico v. Backer, 10 Cir., 199 F.2d 426, 428. There action was instituted to enjoin an official in charge of Elephant Butte Dam and Reservoir from reducing the water level therein to a point which would destroy the fish in the reservoir and create a health menace. It was held the action was in essence a suit against the United States which must be dismissed.

It was not contended that the suit was founded upon either the theory that the officer had exceeded his statutory authority or that his statutory authority was unconstitutional. It was contended that "the compulsory powers of the courts may be exercised against a governmental officer when his acts are tortious or in violation of a state law."

The court held the contention must be rejected under the authority of the Larson case—that before the action could be enjoined it must be illegal in the sense that the official is acting beyond his lawful authority and that his acts are not the acts of the sovereign.

The opinion, while it does not pass upon the precise contention raised by the plaintiff in the present case, does contain this realistically pertinent language:

> "* * * Pursuant to the reclamation laws, the Secretary of the Interior appropriated all the unappropriated waters in the Rio Grande River and entered into contracts with irrigation districts in New Mexico and Texas which comprised the project lands. These contracts required delivery of the water as specified in the contracts. Thereafter the United States constructed plants on the project for the generation of electric power and the districts, in consideration of a reduction of project costs chargeable to them, conveyed to the United States all their right, title and interest in the use of the dam and other project works including the project water supply for the development of electricity. The United States had entered into numerous contracts for the sale of electric power which was developed

on the project. The entire irrigation works, together with the power installations and transmission lines, were owned and operated by the United States. Backer was an officer of the United States in charge of all of the installations. There is no suggestion in the pleadings or the evidence that his duties were not those prescribed by the United States in conformity with valid statutes. Part of his duties was the release of water, from the reservoir to meet the obligations of the United States for the supply of irrigation water and electricity, and to meet the treaty obligations of the United States with the Republic of Mexico. We have no doubt but that the enjoining of government officials in this case interferes with the management and control of property of the United States and raises questions of law and fact upon which the United States would have to be heard."

In this regard see also: State of Louisiana v. Garfield, 211 U.S. 70, 29 S.Ct. 31, 53 L.Ed. 92; and State of New Mexico v. Lane, 243 U.S. 52, 37 S.Ct. 348, 61 L.Ed. 588.

We are of the opinion the judgment entered below will expend itself upon the United States, its properties and administration; that the United States is an indispensable party not before the court and that it has not consented to be sued. Accordingly, the judgment appealed from must be reversed with direction to enter judgment dismissing the action.

It is so ordered.

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

SADLER, J., not participating.

294 P.2d 636

Deane F. STAHMANN, Trustee, W. Silver, and B. M. Mayfield, Plaintiffs-Appellants,

v.

ELEPHANT BUTTE IRRIGATION DISTRICT, Defendant-Appellee.

No. 6028.

Supreme Court of New Mexico.

March 6, 1956.

Whatley & Oman, Las Cruces, for appellants.

Edwin Mechem, J. D. Weir, Las Cruces, for appellee.

SADLER, Justice.

The plaintiffs as appellants here complain of a judgment of the district court of Dona Ana County in consolidated suits of a declaratory nature against Elephant Butte Irrigation District in which the court denied the right of each plaintiff to the refund of certain amounts paid for so called excess waters for the irrigation of their lands for the years 1948 and 1949. The parties will be designated in the opinion as they were in the court below.

The defendant, Elephant Butte Irrigation District, is duly incorporated under the laws of the state of New Mexico and was formed for the purpose of cooperating with the United States under the federal reclamation laws. The district's dam is located in Sierra County, New Mexico, where it impounds waters of the Rio Grande and supplies it for irrigation of classified lands below the dam, large areas of which are located in Dona Ana County. During the years 1948 and 1949, the plaintiff, B. M. Mayfield, was the owner of a net classified area of 99.18 acres of agricultural land within the district, subject to irrigation and entitled to water for that purpose. Likewise, in 1948 and 1949, the plaintiff, Deane F. Stahmann, as Trustee, owned certain agricultural lands within the district consisting of net area of 2,743.27 acres of classified lands, also subject to irrigation and entitled to water for such purpose.

Throughout the two years mentioned the defendant irrigation district, pursuant to its rules and regulations, denominated as "excess water," all waters delivered to the lands of its users, including plaintiffs, in excess of one acre foot, which quantity of wa-

ter was referred to as the minimum. All of the facts recited above are within the findings of the trial court, and incorporated in its decision. In addition, the court found the following pertinent facts, to wit:

"VII. That during the year 1948, the Defendant denominated as 'excess water', all waters delivered to the lands of its users, including Plaintiffs, in excess of 1 acre foot, which said first acre foot was referred to as the 'minimum'.

"VIII. That during the year 1948, the Defendant delivered to the lands of Plaintiff, B. M. Mayfield, 'Excess water' in the amount of 439 acre feet, for which it imposed upon said Plaintiff a charge of $771.10.

"IX. That during the year 1948, the Defendant delivered to the lands of Plaintiff Deane F. Stahmann, Trustee, 'excess water' in the amount of 15,700 acre feet, for which it imposed upon said plaintiff the charge of $26,270.00.

* * * * * *

"XI. That during the year 1949, the Defendant levied a charge of $1.00 for the first acre foot of 'excess water'; $1.15 for the second acre foot of 'excess water'; $1.55 for the third acre foot of 'excess water'; $1.80 for the fourth acre foot of 'excess water'; and $1.80 per acre foot for all waters in excess of the fourth acre foot of 'excess water'.

"XII. That during the year 1949, the Defendant delivered to the lands of Plaintiff B. M. Mayfield, 'excess water' in the amount of 374 acre feet, for which it imposed upon the Plaintiff a charge of $332.20.

"XIII. That during the year, 1949, the Defendant delivered to the lands of plaintiff Deane F. Stahmann, Trustee, 'excess water' in the amount of 16,590 acre feet, for which it imposed upon said Plaintiff a charge of $16,726.00.

* * * * * *

"XV. That the Plaintiffs, in February of the year 1949, paid under protest the 1948 charges and in February of 1950, paid under protest the charges for the year 1949.

"XVI. That on March 6, 1950, the Plaintiff, B. M. Mayfield, filed his complaint herein, for recovery of charges paid.

"XVII. That on March 21, 1952, Plaintiffs Deane F. Stahmann, Trustee, and W. Silver, filed their Complaint for recovery of charges paid.

"XVIII. That in the year 1949, Plaintiff B. M. Mayfield was not delivered nor charged with any water in excess of three acre feet.

"XIX. That the measuring technique used by the Defendant for measuring water delivered to the lands of the Plaintiffs during the years 1948 and 1949 was the best available, and was accurate.

"XX. That the amounts of water charged to the Plaintiffs by the District for the years 1948 and 1949 were delivered to the lands of the Plaintiffs by the Bureau of Reclamation.

"XXI. That the water was delivered to the lands of the Plaintiffs in the years in question under written application and contract between the District and the Plaintiffs.

"XXII. That the Plaintiffs had notice on November 1st of each year, of the amounts of water for which they were charged during the current year, which became due and payable on February 1 of the succeeding year, and during the irrigation season of each year received monthly statements of the amount of water delivered to their lands.

"XXIII. That in the year 1948, the stored water for irrigation of lands within the district were considerable below normal, and the landowners in the district were faced with serious shortage of water.

"XXIV. That the average consumption and use of irrigation water on lands within the District for normal crop production is three acre feet per acre.

"XXV. That in said District, the irrigation season usually begins about March 1 of each year.

"XXVI. That under the contract between the Elephant Butte Irrigation District and the Department of the Interior, made and entered into in the year 1937, the Secretary of the Interior notified the District on or before September 1 of each year the estimated operation and maintenance costs of the succeeding year. Thereafter, if, in the opinion of the Secretary of the Interior, the estimate for the operation and maintenance cost appears to be insufficient to meet the actual cost, he shall give notice of such threatened deficiency, and his estimate of the amount due therefor, and the District's share thereof, and the District is required to pay said deficiency within 15 days from date of notice, and should the District fail to make payment of any operation and maintenance charges at the time and in the manner so provided, the United States is under no further obligation to deliver water to any lands in the District beyond the funds available therefor."

Counsel for the plaintiff argue their appeal under two points, the first of which is that the district courts of New Mexico have jurisdiction over irrigation districts organized under the laws of this state and formed for the purpose of cooperating with the United States under federal reclamation laws. Counsel for the defendant do not contest the plaintiffs on this matter as a general proposition. Of course, say defendant's counsel, the district courts of this state have general jurisdiction to hear and

determine controversies in proper cases as between the plaintiffs and the defendant. Since our decision in Sperry v. Elephant Butte Irrigation District of New Mexico, 33 N.M. 482, 270 P. 889, the jurisdiction of our district courts over irrigation districts so organized would not seem open to question.

What counsel for defendant do contend with much vigor, however, is that for reasons set forth in its motion to dismiss, as to each complaint seeking refunds as not timely filed, and as not stating a cause of action for the relief claimed, the district court was without authority or jurisdiction to grant the relief prayed for in those particular suits.

It is under their second point that the plaintiffs expend themselves in an effort to convince us of error in the judgment rendered against them. Counsel for the defendant make a fair statement of the argument of plaintiffs under this point in saying it involves a claim that defendant has no lawful authority to assess and collect tolls and charges from water users on a graduated scale for waters delivered in excess of the minimum one acre foot assessment, where the purpose of such tolls and charges is to raise revenues, has no relationship to the cost to appellee of delivery thereof or to benefits conferred on the users, and does not have as its object the conservation of water.

The pertinent sections of the enabling statute governing irrigation districts such as the defendant follow. 1953 Comp. § 75-24-28, provides:

> "For the purpose of defraying the expenses of the organization of the district, and the care, operation, management, repair and improvement of all canals, ditches, reservoirs and works, including salaries of officers and employees, or for payment of charges to the United States for the temporary rental of water, the board may either fix rates of tolls and charges and collect the same of all persons using said canal and water for irrigation, or other purposes, and in addition thereto may provide, in whole or in part, for the payment of such expenditures by levy of assessments therefor, as heretofore provided, or by both tolls and assessments; Provided, that if any contract be made with the United States the charge for operation and maintenance of the district and for temporary rental of water may be fixed in accordance with the federal laws, notices, rules and regulations and the contract with the district."

1953 Comp. § 75-24-29, as it existed prior to amendment by L.1953, c. 23, § 1 provided:

> "Every person desiring to receive water during the course of the year, at the time he applies for water shall furnish the secretary of the board of directors of the said irrigation district, a statement in writing of the number of acres intended by him to be irrigated,

and a statement, as near as may be, of the crops planted or intended to be planted.

"The board of directors, on a date to be fixed by a standing order of the board, which shall not be later than July first, of each year, shall estimate and determine the amount of funds required to meet the obligations and needs of the district for the ensuing year, together with such additional amount as may be necessary to meet any deficiency in the payment of expenses or obligations previously incurred by the district and remaining unpaid, for such of the following purposes as may be required by the activities of the district, to-wit:

* * * * * *

"Item Three. The portion of the expenses of operation and maintenance of the irrigation and drainage systems to be collected by tax assessment and levy, including funds required to meet obligations as provided in section 5 hereof. This portion shall not be less than one-fourth, nor more than two-thirds of the estimate for such operation and maintenance costs for the ensuing year, and shall be determined by the board of directors of said district from year to year, and the said portion of said operation and maintenance expenses so collected by tax assessment and levy, shall be collected from all lands of the district, whether irrigated or not except such lands as may be exempted from taxation by the terms of this Act, and the same, when collected, shall be applied to the cost of operating and maintaining of the irrigation and drainage systems. The remainder of said estimated amount shall be paid by the parties actually using said systems and water for irrigation or other purposes, in accordance with the terms of their contract for water; * * *."

It will be seen from a reading of the foregoing provisions of the applicable law that the board of directors of defendant irrigation district is given authority to fix rates and charges and collect the same of all persons using the canals and water for irrigation and may provide, in whole or in part, for the payment of expenditures for care, operation, management, repair and improvements, of all canals, ditches, reservoirs and works, or for charges to the United States for temporary rental of water, and may levy assessments therefor to cover both such tolls and assessments.

The governing statute goes on to provide that every person desiring to receive water during the course of the year, at the time of applying therefor must furnish the secretary of the board of directors a statement in writing of the number of acres intended by him to be irrigated, describing as near as may be, the crops planted or intended to be planted. It is made the duty of the board, on a date to be fixed by a standing order of the board, which must be not later than July 1st of each year, to

estimate and determine the amount of funds required to meet the obligations and needs of the district for the ensuing year, together with such additional amount as may be necessary to meet any deficiency in the payment of expenses or obligations previously incurred by the district and remaining unpaid for certain specified purposes, not material to this decision, but an expense so embraced is Item 3, mentioned in next succeeding paragraph hereof.

It is the portion of the expenses of operation and maintenance of the irrigation and drainage systems, embracing funds required to meet obligations in section 5 of the act. 1953 Comp. § 75-24-48. This portion was to be not less than one-fourth nor more than two-thirds of the estimate for such operation and maintenance costs for the ensuing years, and shall be determined by the board of directors of the district from year to year, to be collected from all lands in the district, whether irrigated or not, except such lands as may be exempted from taxation by terms of the act. The remainder of the estimated amount was to be paid by the parties actually using the systems and water for irrigation or other purposes in accordance with the terms of their contract for water.

On or before the 1st day of September of each year the federal government furnishes the district a statement, or rather an estimate of what it will charge the district for operation and management for the ensuing year. This estimate is payable forthwith. Thereafter, if, in the opinion of the Secretary of the Interior, the foregoing estimate appears to be insufficient to meet the actual cost, he shall give notice of any threatened deficiency, and his estimate of the amount due therefor and the district's share thereof, and the district is required to pay such deficiency within 15 days from date of notice, in default whereof, the United States is under no further obligation to deliver water to any lands in the district beyond the funds available therefor.

So it is that the plaintiffs contend unless the district is able to relate any assessment to produce revenues, made in excess of the minimum one acre foot assessment, to the cost of making delivery of the water, or to benefits conferred, or to conservation of water, the district is wholly without authority to levy such assessment, thereby establishing the plaintiffs' right to a refund of the moneys paid for water in excess of the charge for the minimum one acre foot of water. The plaintiffs are forced to admit there is nothing in the applicable statutes requiring charges for excess waters to be based on cost of delivery. We quote a passage from their brief in chief, reading:

> "Our statutes do not expressly charge the defendant District with fixing tolls and charges on the basis of cost of delivering water, or on a basis of benefits conferred, but what could be a fairer basis for such?"

Moreover, they concede measurable discretion to defendant's board of directors in fix-

ing the charges for excess waters but say that discretion has been abused in the instant case. They do not claim any discrimination nor could they, since it is undisputed that all water users in the district were treated exactly alike and paid the same charges. Neither do they charge fraud, actual or constructive, in the levying of the challenged assessments. Oliver v. Board of Trustees of Town of Alamogordo, infra.

A review of the entire record is convincing that the learned trial judge correctly ruled that the district court lacked authority to interfere in the internal management and administration of the defendant as being conducted by its duly elected and functioning board of directors. Accordingly, his action in dismissing the complaints was entirely proper. We need not go beyond decisions of this Court, one of them dealing with the powers of the board of directors of this very defendant, to find authority supporting the trial judge in the view he took of the matter at issue before him in this case. See, Sperry v. Elephant Butte Irrigation District, supra, and Wiggs v. City of Albuquerque, 57 N.M. 770, 263 P.2d 963. While the factual situation involved in the Sperry case was not identical with that presented here, in its overall aspects it did involve the district court's power to interfere in the board's administration of the internal affairs of the district, with special reference to assessments, and what was there held has a persuasive bearing on the question now presented for decision Among other things, we said [33 N.M. 482, 270 P. 890]:

"Appellants rely particularly upon two statutory expressions. The one is found in section 21 as amended, and requires that the board meet annually and 'estimate and determine the amount of funds required to meet the obligations and needs of the district for the ensuing year.' The other is found in section 13, as amended, and makes it 'the duty of the board of directors to include as part of any levy or assessment now provided for by law, an amount sufficient to meet each year all payments accruing under the terms of any such contract.' Both are of general application to all estimates and tax levies.

"As we understand appellants' contention, it is that these expressions are so restrictive as to exclude from the board's estimates and from the resulting tax levies any amount, unless the board is prepared to show that it will actually and surely be required for disbursement during that year. In view of the court's finding, appellants are also driven to the position that the opinion of the board that such disbursement will probably be required is not a sufficient showing. If such was the intention of the Legislature, it results that, whenever owners of lands within the district see fit to challenge estimates of the board by injunction suit, the burden will rest upon the board to show

each item as a positive 'need' or an unescapable 'obligation.' We do not think that this district could operate practically or successfully under any such land owner surveillance or court dictation, and we therefore greatly doubt, at the outset, the intention of the Legislature to impose it.

"In construing this statute, in view of the large discretionary powers conferred upon the board (Laws 1921, c. 39, § 2) and without which the corporation could not successfully operate, we do not think we are bound to that strictness which applies when determining the powers of municipal corporations. See Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 253 P. 726."

In the later case of Wiggs v. City of Albuquerque, supra, we applied the general doctrine of non-interference by the courts in matters committed to the discretion of municipal and quasi-municipal bodies, citing with approval 13 McQuillin, Municipal Corporations, 3rd Ed., § 37.25, to which may be added Oliver v. Board of Trustees of Town of Alamogordo, 35 N.M. 477, 1 P.2d 116; Nohl v. Board of Education, 27 N.M. 232, 199 P. 373, 16 A.L. R. 1085.

The defendant cites certain authorities from other states which lend strong support to the correctness of the trial court's conclusion in the case before us. Among them are Wores v. Imperial Irr. Dist., 193 Cal. 609, 227 P. 181; Willard v. Glenn-Colusa Irr. Dist., 201 Cal. 726, 258 P. 959, and Lundy v. Pioneer Irr. Dist., 52 Idaho 683, 19 P.2d 624. In the Willard case the Supreme Court of California, in an able and exhaustive opinion, deals with some of the questions presented here, especially one in which we are interested, namely, the levy of an assessment based upon an ascending or increasing scale of rates for water used by land owners. Its decision is epitomized in paragraph 5 of the syllabus as it appears in the Pacific Reporter, reading [201 Cal. 726, 258 P. 959]:

"Rules of board of directors of irrigation district organized under Irrigation District Act providing for ascending or increasing scale of rates for water used by landowners, *held* not unreasonable or unwarranted, even though there was ample water in district to meet all requirements of users in district."

In the Lundy case [52 Idaho 683, 19 P.2d 626], the Supreme Court of Idaho in the course of its opinion, dealing with the legality of assessments, among other things had this to say:

"The action of the board of correction in reviewing assessments for maintenance and operation is final and conclusive, unless there is proof of fraud, or that intentional, systematic discrimination which is the equivalent of fraud, which is not shown here."

The court went on to hold that the appellants were not entitled to recover excess

payments claimed to be invalid. Such was the holding of the district court with reference to the claim for refund of moneys paid for excess waters in the case at bar. It was not essential to validity of assessments levied for excess waters used that any specific reason therefor, such as cost of furnishing same, benefits conferred, or conservation of water, be declared the purpose of the levy. Other reasons for imposing it may very well have existed in the minds of the members of the board of directors.

For instance, the existence of a surplus to meet a deficiency in the estimate of the charge by the federal government may have been the controlling consideration. This had occurred on some prior occasions. At any rate, we think the broad powers conferred on the board in handling the fiscal policy of the district support the action of the trial court as against the challenge here made to the assessment.

The defendant maintains that, for still another reason, the plaintiffs may not have a refund of the moneys paid out for excess waters, namely, that the claims were not seasonably filed. The defendant interposes this defense without admitting the statute under which plaintiffs claim the refund may be invoked by them. The conclusion we have reached renders it unnecessary to determine this ground of defense against the plaintiffs' claims.

It follows from what has been said that the judgment of the trial court should be affirmed.

It will be so ordered.

COMPTON, C. J., and LUJAN and McGHEE, JJ., and EDWIN L. SWOPE, District Judge, concur.

294 P.2d 1102

Mary TUSO, Plaintiff-Appellant,

v.

Michael P. MARKEY and Mildred S. Markey, d/b/a El Jardin Lodge & Cafe, Defendants-Appellees.

No. 5969.

Supreme Court of New Mexico.

Feb. 17, 1956.

Rehearing Denied April 4, 1956.

cause is withdrawn and the following substituted therefor.

COMPTON, Chief Justice.

Appellant appeals from an adverse judgment in an action for damages for personal injuries, allegedly due to the negligence of appellees.

Appellees operate a restaurant at 8100 Central Avenue S. E. in the City of Albuquerque. On September 1, 1953, appellant, accompanied by relatives, went to appellees' restaurant for dinner. They were directed to a table where they were later served. She was at the table for a considerable time, perhaps an hour. After finishing her meal, she went to the cashier's desk and paid the fare for the group. She then returned to the table where she intended to remain until others in the group had finished eating. Suddenly, the chair in which she was sitting collapsed, throwing her to the floor, causing the alleged injuries.

The complaint alleges:

"That the said fall by plaintiff to the floor, and the said injuries, was and were occassioned by the unsafe and defective condition of said chair; that plaintiff did not know of the dangerous and defective condition of the chair; that the chair was under the sole and exclusive control and management of the defendants; that this accident would not have occurred if the defendants had exercised due care; that

Edward L. Yudin, J. L. Leftow, Lewis R. Sutin, Albuquerque, for appellant.

Gilbert, White & Gilbert, Santa Fe, for appellees.

PER CURIAM.

Upon consideration of motion for rehearing the opinion heretofore filed in said

defendants were negligent in failing to maintain safe equipment which the public was invited to use; and that defendants were negligent in failing to inspect said equipment."

The answer asserts three defenses, (a) a general denial, (b) contributory negligence, and (c) unavoidable accident. Issue being thus joined, the cause was tried to a jury, which returned its verdict in favor of appellees. Accordingly, judgment was entered from which the appeal is taken.

Appellant sought to invoke the doctrine of res ipsa loquitur. She made no effort to explain the cause of the accident, the proof being limited to the occurrence and the resultant injuries. She tendered an instruction applying the rule, the refusal of which is assigned as error.

We think appellant was entitled to rely on the doctrine. The complaint, without attempting to point out the specific acts of negligence responsible for the accident, charges generally that the chair was in an unsafe condition and that the accident would not have happened had appellees exercised due care. Such general allegations of negligence, accompanied by an allegation and proof that the instrumentality causing the accident was under the exclusive control of appellees, warranted its application. Leet v. Union Pac. R. Co., 25 Cal.2d 605, 155 P.2d 42, 158 A.L.R. 1008; Rose v. Melody Lane of Wilshire, 39 Cal.2d 481, 247 P.2d 335. When the doctrine applies, an inference of a defendant's negligence may be drawn which, if drawn by the jury, and not neutralized by countervailing evidence or satisfactorily rebutted by the defendant, would support a verdict for the plaintiff. Rose v. Melody Lane of Wilshire, supra; Schueler v. Good Friend North Carolina Corp., 231 N.C. 416, 57 S.E.2d 324, 21 A.L.R.2d 417; Benedict v. Eppley Hotel Co., 159 Neb. 23, 65 N.W. 2d 224.

Of course had appellant, by proof of specific acts of negligence, established all the facts as to how the accident happened, thereby dispelling any inference drawn by force of the rule, the doctrine would not be available to her, notwithstanding such general allegations of negligence. In such circumstances, she would be limited solely to inferences, if any, which might arise from proof of specific acts. Hepp v. Quickel Auto & Supply Co., 37 N.M. 525, 25 P.2d 197; Rose v. Melody Lane of Wilshire, supra. But, as previously stated, she neither alleged nor offered proof as to any specific act of negligence.

Appellees offered evidence of an exculpatory nature. Michael P. Markey testified that he inspected the chairs weekly for defects; that two or three days prior to the accident he inspected the chair in question and it was then in safe condition, with no apparent defects. The witness Nettleton, a salesman for a large distributor of furniture of the type and kind used by appellees, testified that he had never known of

a chair of the kind collapsing. Various employees testified to making periodical inspection of the equipment, particularly the chairs and found them in safe condition. This evidence, no doubt, was offered to rebut any inference of negligence the jury might draw from the occurrence of the accident. But, it is obvious, there was no inference to rebut, since the jury did not have an opportunity to consider the force of any inference arising from an application of the doctrine.

It is argued that the introduction of evidence to prove specific acts of negligence, denies its application. We are relieved of the necessity of determining this question as we have just held that no attempt was made to prove specific acts of negligence. Nevertheless, there is strong authority supporting this argument, but we think the better reasoned cases support a different view. Hepp v. Quickel Auto & Supply Co., supra; Rose v. Melody Lane of Wilshire, supra; Freitas v. Peerless Stages, Inc., 108 Cal.App.2d 749, 239 P.2d 671, 33 A.L.R.2d 778; Dallas Ry. & Terminal Co. v. Clayton, Tex.Civ.App., 274 S.W.2d 422, 424. In the latter case, the court said:

> "* * * We think that in cases in which a plaintiff is entitled to rely on the doctrine of res ipsa loquitur, he ought not to be penalized by the loss of the presumption because he has been willing to go forward and do the best he can to prove specific acts of negligence. On the contrary he ought to be encouraged to give the court, the jury, and even the defendant the benefit of whatever facts, if any, his effort may develop toward revealing the specific causes of the mishap. And of course if a plaintiff should not be penalized for making the effort, he ought not to be later penalized for succeeding. * * *"

It is contended also that the tendered instruction was erroneous because it made use of the word "inference" instead of "presumption". This contention is without merit. Obviously, the words are used interchangeably. Hepp v. Quickel Auto & Supply Co., supra; Tafoya v. Las Cruces Coca-Cola Bottling Co., 59 N.M. 43, 278 P.2d 575; Gritsch v. Pickwick Stages System, 131 Cal.App. 774, 22 P.2d 554; Sweeney v. Erving, 228 U.S. 233, 33 S.Ct. 416, 57 L.Ed. 815.

An examination of the requested instruction in the light of other objections made to it, persuades us to say something in clarification. It says, speaking of certain conditions to application of the rule mentioned:

> "Where all these conditions are found to have existed, an inference *arises*, etc. (Emphasis ours.)

Instead of saying "an inference arises" the requested instruction might the better have said "you are *permitted to infer* that the proximate cause of the occurrence was some negligent conduct on the part of the

defendants." Black v. Partridge, 115 Cal. App.2d 639, 252 P.2d 760; Sweeney v. Erving, supra.

The instruction as requested goes on to say:

> "It is necessary for the defendants to rebut this inference by showing that they did in fact exercise ordinary care * * *. If the defendants fail to *overcome* the inference of their negligence, or if the inference preponderates over the contrary evidence, it warrants a verdict for the plaintiff * * *." (Emphasis ours.)

The vice in this portion of the instruction appears in the use of the italicized word "overcome." See Williams v. City of Long Beach, 42 Cal.2d 716, 268 P.2d 1061.

The simplest statement of the doctrine of *res ipsa loquitur* coming to our attention is that of Dean Wm. L. Prosser in an article in 37 Cal.Law Review 183, in which among other things he said:

> "In the ordinary case res ipsa loquitur merely permits the jury to choose the inference of the defendant's negligence in preference to other permissible inferences. It avoids a nonsuit and gets the plaintiff to the jury; but a verdict for the defendant will be affirmed even though he offers no evidence."

Note how nearly this statement of the rule accords with the closing language of our opinion in Hepp v. Quickel Auto & Supply Co., supra [37 N.M. 525, 25 P.2d 203], where we said:

> "What we have said touching the evidence has been solely for the purposes of this decision. It is not to be taken and is not intended as a suggestion upon the weight to be given plaintiff's testimony when the matter shall again come before a jury. The defendant, if the evidence be the same on another trial, may completely overcome the prima facie effect of such evidence. The jury upon the evidence, as it stands, may decline to draw the inference of negligence. But that plaintiff was entitled to have the jury pass on it, and that unexplained it would support an inference of negligence, we entertain no doubt."

True enough, in that case we were not applying the doctrine of res ipsa loquitur, though we discussed it at length. Nevertheless, what we said in dealing with a case where the prima facie case rested on circumstantial evidence is as true of the case where it arises from an application of the doctrine of res ipsa loquitur.

Thus it is that in remanding for a new trial we are not to be taken as approving the correctness of the requested instruction even though it did serve to call the trial court's attention to the importance of instructing on the doctrine of res ipsa loquitur. State v. Williams, 39 N.M. 165, 42 P.

2d 1111; State v. Jones, 51 N.M. 141, 179 P.2d 1001.

The judgment should be reversed with direction to grant appellant a new trial, and it is so ordered.

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

294 P.2d 1105

CITY OF CLOVIS, Plaintiff-Appellee,

v.

Kenneth KINSOLVING, Defendant-Appellant.

No. 5984.

Supreme Court of New Mexico.

March 19, 1956.

Morgan & Morgan, Portales, Smith & Smith, George M. Murphy, Clovis, for appellant.

James A. Hall, Clovis, for appellee.

HARRIS, District Judge.

This is an appeal from the District Court of Curry County where the appellant was convicted on a charge of driving a motor vehicle while under the influence of intoxicants in violation of Ordinance No. 249 of the City of Clovis, appellant having been previously convicted in the police court of the City and appeal taken therefrom. The pertinent portions of said Ordinance contain the following provisions:

Section 1. "That the driving of cars or other motor vehicles on the streets of the City of Clovis by persons intoxicated is hereby prohibited."

Section 2. "Any person violating the provisions of this ordinance shall be fined in a sum of not less than $100.00 nor more than $200.00, or be imprisoned in the City Jail for a period of not less than ten days nor more than sixty days."

The appellant, on the morning of February 17, 1955, was engaged as a driver in transporting a truck load of cattle from Crossroads in Northern Lea County to a point in or near the City of Clovis in Curry County. Very early on that morning appellant drove the loaded truck from the point of origin to State Highway 18 at Crossroads and proceeded North toward his destination.

The evidence adduced by the City discloses that the appellant was observed just South of the City driving his truck in a reckless, weaving manner. He drove his vehicle very close to a pickup truck parked off the paved portion of the highway and then proceeded across the pavement to its opposite lane. The occupant of the pickup gave pursuit, and managed to stop the vehicle in front of a service station within the City and to persuade the appellant to desist from further driving. An attendant of the service station drove the truck the remainder of the distance to the Cattle Commission Company, with the appellant riding with him until the police arrived on the scene. When the appellant got out of the truck cab at the service station, he was unsteady on his feet and fell; but got up on his own power. The officer smelled liquor on his breath at the time of his arrest and found a fifth bottle of Old Crow Whiskey in the glove compartment of the truck cab with a substantial quantity of the bottle's contents gone. The Chief of Police testified that when appellant was placed in jail, shortly after the arrest, he was very drunk.

Appellant contended that his conduct and actions were due to an injury he had sustained on the morning of the incident, while loading cattle on the truck. He testified, and was corroborated by another witness, that during the course of the loading, an obstreperous steer knocked him down and ran over him. Appellant further testified that after his injury he continued to participate in the loading operation until completion, and drove the truck to Clovis. According to his story he became quite sick shortly after leaving Crossroads. He stopped the truck, got out of the cab and forced himself to vomit by sticking his finger down his throat. This relieved his stomach condition some; but his head and neck continued to hurt him. Continuing appellant stated he had no recollection of passing through Portales but did remember stopping at a point North of that City to take a drink and wash his eyes from the bottle of whiskey in the glove compartment, having seen the bottle when he was previously out of the truck. Three medical doctors testified in behalf of the defendant. One had examined him within an hour after dark on the day of the incident and stated the patient had a contused spot just above his right eye. The diagnosis was possible mild brain concussion, but was not considered serious enough to warrant immediate x-rays. The second doctor was the appellant's family physician who made x-rays of the patient's head several days later. It is not clear from the doctor's testimony whether his examination of the patient and the taking of the

x-rays was on February 22, five days after the incident, or on March 22. He testified there was "conclusive evidence of a fracture in the x-rays"; that the fracture was what he would call a fresh one; and that loss of memory by and a dazed condition of the patient would be consistent with his x-ray findings. The third doctor was less positive as to the x-ray reading than was the family physician. In answer to a direct question as to his interpretation of the x-ray he stated:

"Oh, I see a lot of various marks that are normally present in every patient's skull. In addition I see a very thin and very slight irregular line of decreasing density in this neighborhood of the x-ray film which I thought was highly suggestive of a fracture."

Later, and on cross examination, this witness stated further:

"I never make official reports, written reports signed, on any film that are taken outside my supervision, and these were taken in Dr. Leman's office; therefore, they were not taken with the technique I like to take skull films with, so therefore I cannot be certain as if we took them in my hospital under my supervision."

At the conclusion of the testimony and after argument had been waived, the trial court rendered his decision in this language:

The Court: "The testimony is undisputed that the defendant was driving a motor vehicle upon a public highway. The testimony is uncontradicted that the driving occurred in the City of Clovis. It is admitted by the defendant that he had had a drink of intoxicating liquor. It is contended by the defendant that he had sustained that morning a skull fracture which accounted for his inability or instability of equilibrium. This Court is asked to determine whether or not the drinking that had been done placed the defendant under the influence of intoxicating liquors so that it effected him in any degree in his driving, a question that is most difficult to determine since the expert testimony shows that there was a physical injury. Without going into the testimony of all the witnesses the Court will only make this observation in viewing this testimony that when a person is injured and that injury is troubling him to such an extent that they are unable to properly drive a loaded truck on the highway that it would be the better part of discretion to stop that truck instead of applying medication such as was applied here both externally and internally knowing the risk that it would incur to the traveling public. Now, when viewed from that situation, viewing the testimony here of the witness who overtook the defendant the testimony of the police officer, the court finds that the defendant is guilty as charged, that the penalty imposed in municipal court is again put into effect."

The one assignment of error, argued under a single point is as follows:

"The court erred in finding the defendant guilty when the language of the trial court's decision showed the appellant had established his affirmative defense."

It will be noted that the defendant treated his defense as an affirmative one. Under the facts of this case, it is immaterial whether the defense be treated as affirmative, one of general denial or not guilty. He had the right, duly exercised, to fully present all the evidence available to him that would enable the court to determine the issue. The defendant was either guilty of violating the ordinance as charged, or he was not.

It is urged by appellant that this case occupies the status of a criminal prosecution, and as such the degree of proof necessary for conviction is that prescribed by the "reasonable doubt" rule applicable to jury trials of criminal cases, as distinguished from the "preponderance of the evidence" rule in civil cases. Reliance is placed upon the holding by this court in the City of Clovis v. Curry, 33 N.M. 222, 264 P. 956. There it was held the City had no right of appeal from the trial court's action in discharging the defendant and holding the municipal ordinance invalid, upon which the charge was based. We said that the ordinance being criminal in character, appeal from the court's action was not available to the City without statutory authority therefor.

Appellee concedes the prosecution to be at least quasi-criminal in nature. However, we neither approve nor disapprove appellant's theory as to the necessary degree of proof for conviction of a petty offense triable, under our statutes and decisions, to the court only and without a jury. The reason will appear obvious from the disposition we made of the case.

Had this case been triable and actually tried to a jury upon the record evidence before us and under a proper instruction that the jury must be satisfied of guilt "beyond a reasonable doubt" before returning a verdict of guilty, a conclusion of guilt by the jury, under such instruction, would have been amply supported.

The language of the trial court clearly indicates that he fully considered all the defense evidence, but that he was reluctant to believe all of it. That the defendant had sustained an injury was recognized as an established fact. That the effect of the injury was as serious as contended was not believed. The conclusions reached by the court are amply supported by the record, under either theory as to the required degree of proof. The judgment of the trial court should be affirmed.

It is so ordered.

LUJAN, SADLER and McGHEE, JJ., concur.

COMPTON, C. J., having recused himself, did not participate.

295 P.2d 209

Jose Maria MARTINEZ, Jose Remigio Martinez, Onesimo Trujillo, Daniel Trujillo, Manuel Gallegos, and Santiago Gonzales, Appellants,

v.

W. H. MUNDY, Sr., and W. H. Mundy, Jr., Appellees.

No. 5928.

Supreme Court of New Mexico.

March 20, 1956.

Harry L. Bigbee, Donnan Stephenson, Santa Fe, Quincy D. Adams, Albuquerque, for appellants.

Gilbert, White & Gilbert, Seth & Montgomery, Santa Fe, for appellees.

McMANUS, District Judge.

This action began by the filing of the first pleading in the district court of Rio Arriba County on August 4, 1951. The complaint was one in ejectment alleging generally that the plaintiffs were entitled to possession of a tract of land described therein (referred

to herein as the Mundy Tract); that the defendants have unlawfully withheld and do now withhold from plaintiffs the possession of said land, praying damages therefor. For their answer, the defendants deny the material allegations of the complaint and by separate defenses raise the contention that defendants, appellees, and their predecessors in interest obtained title by adverse possession by virtue of actual, visible and notorious possession in good faith under color of title, claiming further that taxes were paid and that no suit had been effectively prosecuted during said period of time. The defendants, (appellees) further alleged that they, the defendants, and their predecessors in interest, had held possession of the property by virtue of deeds of conveyance purporting to convey an interest in fee simple. The defendants also asserted in their counter-claim a statutory form of quiet title suit wherein they prayed that their title be quieted. A demurrer was filed to the counter-claim by the appellants raising questions to the effect that the Rules of Civil Procedure did not apply to an action in ejectment, and that a counter-claim is not a proper pleading and other matters which will be discussed hereinafter. There appears in appellants' brief, references to their objections to a change of venue obtained in this suit but there is nothing in the record or in either of the briefs to indicate that such a change was improper at the time it was granted. The pleadings also indicate a motion for separate and prior trial of certain issues before the trial court made by the appellees. This motion was granted by the trial court and the case was tried on the issues raised by defendants' counter-claim and plaintiffs' reply thereto, without jury.

A motion for an advisory jury was further overruled by the trial court. A final decree was entered decreeing that the defendants and counter-claimants, the appellees here, were the owners in fee simple of the land described in the complaint and further ordered the title quieted in their behalf.

Upon appeal of the decree of the lower court, this cause comes to this court on fifty-eight assignments of error. All of said assignments of error are argued in six points which we will take up in sequence.

The first point raised by the appellants, alleges that the appellees' basic title is defective in that it can be traced only to Francisco Martinez, who was merely one of the heirs of Manuel Martinez, whose title was confirmed by the Act of Congress of June 21, 1860, 12 Stat. 71. The matters contained in appellants' first point constitute a collateral attack on the patent granted by the United States to Francisco Martinez. It is fundamental that a patent is the highest evidence of title, and with it passes all control of the executive department of the government over the title and as a general rule it is impeachable only for fraud or mistake and is presumptive evidence of the true performance of every prerequisite to its issuance. It is also well

settled that a patent is, on collateral attack, deemed to be conclusive that the government has passed its title to the lands granted and that all prerequisites existed and were complied with so as to render it a complete and lawful act.

Further, the question of this very patent to Francisco Martinez was discussed in the case entitled H. N. D. Land Co. v. Suazo, 44 N.M. 547, 105 P.2d 744, 749, wherein the court discussed the lands involved within the Tierra Amarilla Grant, the lands involved in the instant case being within said grant.

In H. N. D. Land Co. case, this court referred to the history leading up to the patent issued to Francisco Martinez. In concluding their opinion said:

> "So, if this were a private grant, the act of confirmation merely carried out the treaty obligation; if it were a community grant, the common lands were merely government domain and the confirmation constituted a grant de novo to the grantee, Francisco Martinez. Under either view the absolute title was vested, by the act of confirmation in the said grantee."

The above indicates that the validity of the patent to Francisco Martinez has been decided. Therefore, the commencement of the title, for all practical purposes, begins with Francisco Martinez and thereby the appellants have failed to sustain their arguments contained in Point One.

The appellants, for their second point offer that there are fatal defects in appellees' chain of title subsequent to the patent from the United States to Francisco Martinez. This chain of title referred to runs from the United States of America to Francisco Martinez by patent. The next conveyance runs from Francisco Martinez and wife to F. A. Manzanares, dated June 1, 1871. The next conveyance is from Manzanares to Thomas B. Catron dated December 31, 1878. The appellants have no strenuous objection to the validity of the conveyances between the holding of title by Catron down the line to the last conveyance to the defendants and appellees herein.

The appellants do not question that the above referred to instruments were executed, but argue that the language contained on the face of said deed is peculiar.

It is the appellants' assertion that the face of the document shows no intention to convey the entire Tierra Amarilla Grant to Manzanares and state that the deed is conflicting and ambiguous in its terms. To this end we will first look at the Martinez to Manzanares deed, and the entire granting clause of said deed reads as follows:

> "* * * we have granted, bargained, sold, transferred, conveyed and confirmed, and by these presents do grant, bargain, sell, transfer and confirm to the said party of the second part and to his heirs, successors and assigns, forever, all of the right, title and in-

terest which as heirs and original grantees appertains to us, or could appertain to us at any time and by any inheritance or by whatever other manner in the entire property, and possession and grant known as the Tierra Amarilla in the County of Rio Arriba, Territory of New Mexico."

Following the granting clause is a reference to 150 varas of tillable land which is quoted as follows:

"Giving notice also that the party of the second part will take possession of 150 varas of tillable land situated in the Lugar de los Ojos, within the said Grant;"

We can see from the above that the granting clause on its face conveys all of the grantors' interest in the entire property, the grant known as the Tierra Amarilla, in the County of Rio Arriba, Territory of New Mexico.

It is fundamental that a deed must be read as a whole and while there may be some unexplained verbiage in part of the deed, it is well established that the granting clause is the main source for determining the estate or interest to be conveyed and to that end we quote Thompson on Real Property, Permanent Edition, Volume 6, § 3188 at page 347, where it is stated:

"When the recitals agree with the operative part of a deed they have no legal effect; and, if the operative part of a deed is clear and unambiguous, recitals at variance with it are of no effect. The operative clause, when clear, always controls the recitals. * * *"

To the same effect is the language contained in III American Law of Property, § 12.94, which reads as follows:

"* * * The granting clause is the main source for determining the estate or interest conveyed. Although resort may be had to other parts to ascertain its meaning or to supply information lacking therein, the omission of anything on the subject elsewhere in the deed is immaterial, and in the case of other clauses being inconsistent and irreconcilable, the granting clause will control. * * *"

These principles are further found in Porter v. Henderson, 203 Ala. 312, 82 So. 668; in re Brolasky's Estate, 309 Pa. 30, 163 A. 292, and in 26 C.J.S., Deeds, § 128, p. 429. In further support of the foregoing the appellees cite in their brief the following cases: Campbell v. Wells, 278 Ky. 209, 128 S.W.2d 592; Ontelaunee Orchards v. Rothermel, 139 Pa.Super. 44, 11 A.2d 543; Houghtaling v. Stoothoff, 170 Misc. 773, 12 N.Y.S.2d 207; Peterson v. City of New York, 235 App.Div. 41, 256 N.Y.S. 139; Baumert v. Malkin, 235 N.Y. 115, 139 N.E. 210; Armijo v. Town of Atrisco, 56 N.M. 2, 239 P.2d 535; Dunn v. Stratton, 160 Miss. 1, 133 So. 140; Murphy v. Jamison, Tex.Civ.App., 117 S.W.2d 127; Hartwick v. Heberling, 364 Ill. 523, 4 N.E.2d 965.

While this court will not speculate as to the reference to the 150 varas, we are convinced that the deed from Martinez to Manzanares conveyed the entire grant by such conveyance.

Coming now to the deed from Francisco A. Manzanares and wife to Thomas B. Catron, we find the following language in the deed:

> "Witnesseth: that the said parties of the first part * * * have remised, released, sold, conveyed * * * by these presents do remise, release, sell, convey and quitclaim unto the said party of the second part, and to his heirs and assigns forever, all the right, title, interest, claim and demand whatsoever of the said parties of the first part of, in and to the following described real estate and property situate partly in the Counties of Rio Arriba and Taos in the Territory of New Mexico, and partly in the State of Colorado, bounded on the north by the Navajo River, on the east by the top of the range of mountains, on the south by the Nutrias River, and on the west by a north and south line passing through and including the mouth of the Laguna de los Caballos (Horse Lake), including said lake therein, being the same property and land granted to Manuel Martinez and others, confirmed by an Act of Congress dated June 21st, 1860 as Private Land Claim No. 3 and commonly known as the Tierra Amarilla Grant."

The above quotations would indicate that Manzanares, beyond any question intended to deed to Catron the entire Tierra Amarilla Land Grant. Inasmuch as we find no ambiguity on the face of the Manzanares to Catron deed and, in line with our opinion that the Martinez to Manzanares deed was a conveyance of the entire grant, suffice to say, at this point the title to the entire grant rests in Catron.

The transcript further reflects a deed, in 1881, from a number of people describing themselves as all of the legal heirs and representatives of Francisco Manzanares, deceased, to Thomas B. Catron, by which they convey the tract known as Tierra Amarilla Grant, and if there were such a gap in the chain of title from Francisco Manzanares to Catron, said gap would be completely eliminated. However, we hold that there is no such gap and that the title at this point rests in Thomas B. Catron. The appellants do not question the chain of title from this point on, therefore, we feel that this disposes of the second point of appellants.

For their next point, the appellants, under their various assignments of error argue that the appellees have not obtained any rights by adverse possession in and to the grazing lands involved in this action.

To illustrate the land involved in this action, and its shape, it can be best described as being in the shape of a standing cowboy boot, with the toe facing toward

the west. The extreme north end of the tract at the top of the leg of the boot, is extremely rough country, bounded by an impassable gorge dropping into a creek. The farming land and living quarters are on the toe of the boot near the Chama highway.

The testimony discloses that gentlemen by the names of Hall, Nossaman and Dudrow, obtained the property which is the subject of this suit in 1917 and that in 1918 a fence was commenced at the northwest corner of the toe of the boot and easterly around the sole of the boot to the southwest corner of the adjacent tract of land. There was a fence around this adjacent tract which filled in the arch of the boot. Testimony further reflects that this fencing continued across the heel of the boot and thence north along the back of the heel to a high hill, through approximately the eastern boundary ridge. It is further reflected that the land was occupied and farmed continuously until it was sold in 1930. From 1930 to 1950 a tenant of the owners lived upon the land, engaged in limited farming activities with the pasture lands grazing rights being leased, subleased, and used by various tenants. Considering the situation and the uses to which the various parts of the land were suited, this property was as thoroughly under adverse possession by appellees' predecessors as any range of its kind could be. This court has heretofore enumerated the requirements for an effective adverse possession and it would serve no useful purpose to go into great detail concerning them. See Thurmond v. Espalin, 50 N.M. 109, 171 P.2d 325; Tietzel v. Southwestern Const. Co., 48 N.M. 567, 154 P.2d 238; Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719; Montoya v. Unknown Heirs of Vigil, 16 N.M. 349, 120 P. 676; Johnston v. City of Albuquerque, 12 N.M. 20, 79 P. 9; Gentile v. Kennedy, 8 N.M. 347, 45 P. 879.

Considering the lack of evidence as to occupation of the tract of land under discussion here and sometimes called the Mundy Tract, to the effect that appellants have actually ever occupied the Mundy Tract or have paid taxes thereon and considering the evidence of the appellees concerning their status as to this tract, we are constrained to say that there were no errors in the court's findings and conclusions with respect to adverse possession.

The trial court's findings of fact pertinent hereto are as follows:

"14. Defendants and their predecessors in title have had actual, open, uninterrupted, peacable, notorious, exclusive, and adverse possession of the land and real estate herein involved under a claim and color of fee simple title and right to all thereof, continuing over a period of more than ten years prior to the filing of this action, and all with the actual or imputed knowledge of the plaintiffs and each of the plaintiffs.

"18. None of the plaintiffs, jointly or severally, now have nor at any ma-

terial time have they had, either actual or open or uninterrupted or peaceable or notorious or exclusive or adverse possession or use of any of the land and real estate herein involved or of any interest therein or of any right thereon or thereto for any period of ten years or more, nor any right, title or interest therein or thereto at any time.

"27. That at the time of the filing of this action, at the time of the filing of the counterclaim herein, at the time of trial and at all material times, defendants and counterclaimants have been in actual and exclusive possession of the land and real estate herein involved."

The next point brought before this court by appellants is to the effect that appellees failed to establish a fee simple title because the undisputed evidence shows that appellants had acquired, either by grant or by prescription, rights to pasture and water livestock, cut wood and use roads on and over appellees' property and cite a number of assignments of error in support of this point, particularly, their assignments of error numbers 20, 21 and 25, which read as follows:

"No. 20. The Court erred in failing and refusing to adopt Plaintiffs' (appellants') Conclusion of Law No. 3, as follows, to-wit:

" '3. The right to pasture livestock and to cut wood on the lands of another is in the nature of a profit a prendre which may be acquired either through a grant or by prescription.'

"No. 21. The Court erred in failing and refusing to adopt Plaintiffs' (appellants') Conclusion of Law No. 4, as follows, to-wit:

" '4. Plaintiffs have acquired by grant or by prescription the right to pasture and water livestock, to cut wood and to use the roads on the premises described in the counterclaim.'

"No. 25. The Court erred in failing and refusing to adopt Plaintiffs' (appellants') Conclusion of Law No. 8, as follows, to-wit:

" '8. The hijuelas (Plaintiffs' Ex. 1, 2, 7, 9, 12 and 15 and numerous similar instruments) grant to the respective grantees therein the right to pasture and water livestock, to cut wood and to use the roads upon all the lands, suitable for such purposes, of the entire Tierra Amarilla Land Grant.' "

The testimony at the trial of this cause reflected that the use of the Mundy Tract for pasturage and livestock watering by appellants was not continuously but spasmodically, and access was gained through unfenced portions or through fenced portions at times when the fences were down or in a state of neglect, therefore, any such use would be permissive and not adverse to the title of the record owner. The above would also apply to the cutting of wood and use of the roads by appellants.

This court in Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 651, 112 A.L.R. 536, said:

> "A prescriptive right cannot grow out of a strictly permissive use, no matter how long the use. 1 Thompson on Real Property § 471."

and further in the same case through Justice Brice we find

> "The use necessary to acquire title by prescription must be open, uninterrupted, peaceable, notorious, adverse, under a claim of right, and continue for a period of ten years with the knowledge or imputed knowledge of the owner."

In Tiffany on Real Property, 3d Ed. pages 414–415, "Adverse Possession of Land", the author states:

> "* * * On the other hand, a merely occasional and sporadic use of the land, an occasional entry to cut timber or grass, or to appropriate other products or profits of the land, does not usually constitute actual possession. * * *"

Coupled with the facts of this case, the above would indicate the use made of the Mundy grant by appellants was not adverse. The claim by the appellants that they have acquired by grant or prescription, the right to cut wood, water livestock, pasturage and the use of roads was not shown to have been exclusive to the appellants but on the contrary was claimed by many others. The claim being in common with and similar to that of the general public in this area, the appellants certainly could not acquire a private easement unto themselves. All circumstances must be considered in determining the acts that would lead to a prescriptive right and we do not find such acts present in such force as to refer to a prescription.

The appellants, among other things, rely on certain "hijuelas" to establish a grant of certain rights in appellees' property. These "hijuelas" are of ancient origin. They originated in Spain many, many years ago and were described as papers or documents commonly given to parties entitled to distribution of an estate of a person deceased, containing an exact account of their distributive share. (See Velazquez's Spanish Dictionary, Chicago-New York, 1948)

It appears that the custom of the use of hijuelas evolved into New Mexico in the early years of our state's history and purported to grant to certain individuals small tracts of land for their use. In the instant case, these hijuelas do not purport to grant any of the lands in the Mundy Tract and do not mention them directly or indirectly. The other verbiage contained in these hijuelas do not, in our opinion, constitute a grant of any right to pasture, wood and water in the Mundy Tract. Further, there is a serious question concerning the acknowledgments on the hijuelas. Suffice to say, we do not feel constrained to find error in the findings of fact offered by the trial court in this regard.

The fifth point raised was to the effect that the appellants were entitled to a jury trial in connection with the questions of fact raised by the pleadings and in this proceeding, as a matter of right. Later in this opinion we have held there was no misjoinder, eliminating the jury trial question on that possibility. We have, in effect, held by this opinion, that the plaintiffs (appellants) were not in possession of the land involved herein and further that the appellees were in actual and exclusive possession of the land. This leads to the conclusion that the trial court had jurisdiction in equity to try the case without a jury. The findings of the trial court concerning the right of appellants to a trial by jury, and the findings eliminating such right are, in our opinion, founded on substantial evidence.

For the last point relied on by appellants, they offer that the counterclaim filed by the appellees constituted a misjoinder of causes of action and said counterclaim should have been dismissed or stricken and it should have proceeded as a suit in ejectment and not as a quiet title proceeding.

It is true that there are statutory provisions covering suits in ejectment. Since the advent of the Rules of Civil Procedure for District Courts of the State of New Mexico, we have been aware that the rules govern the procedure in said District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, except in special statutory and summary proceedings where existing rules are inconsistent herewith.

Inasmuch as under our Code of Civil Procedure, L.1897, c. 73, carried forward into our present Rules of Civil Procedure, both legal and equitable remedies are administered by a single court as two complementary departments of our system of jurisprudence, Young v. Vail, 29 N.M. 324, 222 P. 912, 34 A.L.R. 980, we do not see that there has been any error in the instant case by a joinder of the causes of action referred to above, which in effect do not constitute a misjoinder.

We feel that the objection of appellants is more technical than substantial. Quintana v. Vigil, 46 N.M. 200, 125 P.2d 711.

The plaintiff had the right to bring this suit in ejectment and to request a prayer for relief and the defendant had the right to come in with the counterclaim for remedy in the nature of a suit to quiet title. This is in accordance with the familiar rule that when a court of chancery obtains jurisdiction of a cause, it will retain it to administer full relief. Young v. Vail, supra.

It will be noticed that the trial court in his memorandum of opinion concerning this matter was anxious to cut away the underbrush and get down to the basic issues of the case and indicated that if the rulings on the equitable issues were determined adversely to the defendants that a date

would be promptly set for trial for the remaining matters.

In the light of the foregoing, we find no substantial error and the judgment of the trial court will be affirmed.

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

295 P.2d 216

Paul MUSSLEWHITE, Plaintiff-Appellee,

v.

The STATE CORPORATION COMMISSION of the State of New Mexico, James F. Lamb, Ingram B. Pickett, and John Block, Jr., as Members of and Constituting the State Corporation Commission of the State of New Mexico, Defendants-Appellants.

No. 5995.

Supreme Court of New Mexico.
Feb. 15, 1956.

Rehearing Denied April 12, 1956.

Richard H. Robinson, Atty. Gen., J. A. Smith, Asst. Atty. Gen., for appellants.

David Chavez, Jr., Santa Fe, Alvin R. Allison, Levelland, Tex., for appellee.

SCARBOROUGH, District Judge.

On July 9, 1951, the appellee Musslewhite became the holder of a Certificate of Public Convenience and Necessity issued by the State Corporation Commission authorizing transportation of certain specified equipment and supplies in intra-state commerce "over irregular routes, under non-scheduled service." On May 5, 1953, the appellant State Corporation Commission issued an "Order and Citation to Appear" which directed Musslewhite to show cause why his certificate should not be cancelled:

> "for failure to render service to the public as provided under Certificate of Public Convenience and Necessity No. 950."

Pursuant to the notice, the appellee appeared before the Commission at the appointed time. Without any evidence having been presented or offered by or on behalf of the Commission, the appellee offered himself as a witness, was sworn and testified upon direct and cross examination. The substance of his testimony was that he had adequate equipment for large scale operations; that he maintained sufficient repair shops and facilities; that he was operating extensively in the State of Texas; that he maintained his headquarters at Levelland, Texas, which is shown as his office and place of business in the Certificate issued to him; that he is ready, willing and able, at any time, to operate under his Certificate in New Mexico and will at any time accept employment in New Mexico operations from anyone desiring and requesting such service from him. His testimony further shows that at present he has only one truck registered in New Mexico; that he has performed no transportation service in New Mexico since the issuance of the Certificate to him because no customer has requested such service from him; that he does not maintain any shop or terminal in New Mexico and has done no advertising in New Mexico; that he has never been ordered or instructed by the Commission to maintain a shop or terminal in this State or to advertise or solicit business therein and that there has never been any complaint filed against him. Without further evidence, except possibly the consideration of certain tax records, which do not appear in the transcript of the hearing, the Corporation Commission or-

dered that Musslewhite's certificate be revoked. Suit in the District Court followed. The District Court held that the order of the Corporation Commission was unlawful and unreasonable and that it should not be enforced.

These questions arise:

Does non-user by the holder of certificate of public convenience and necessity, "over irregular routes", under "non-scheduled service", amount to abandonment or discontinuance of said service.

Was the Corporation Commission's Order revoking appellee's Certificate because of non-user lawful and reasonable?

Section 64–27–12, New Mexico Statutes 1953, Annotated, provides:

> "No common motor carrier authorized by this act to operate shall abandon or discontinue any service established under the provisions of this act without an order of the commission."

Section 64–27–36, New Mexico Statutes 1953, Annotated, provides in part:

> "* * * no motor carrier shall abandon all or any portion of its service to the public, except for causes beyond its control, unless it has filed a notice with the corporation commission at least 30 days prior to the discontinuance of such service that it intends to discontinue the same * *. Upon the discontinuance of service * * * the certificate of public convenience and necessity issued to such carrier shall be canceled * * *."

To abandon means to give up with the intent of never again claiming one's right or interest. To discontinue means to interrupt the continuance of; stop; to give up; to abandon or terminate by a discontinuance. The two words "abandon" and "discontinue" appear to be used synonymously in § 64–27–36, supra, and apparently are meant to refer to an intentional, complete and final surrender of right or interest. No other statute and no rule or regulation of the Corporation Commission referring to a temporary interruption of service, whether intentional or not, has been called to our attention. The two statutes referred to, instead of prescribing grounds for which a revocation may be ordered, seem, upon close examination, absolutely to enjoin and prohibit an abandonment except with the Commission's formal permission, § 64–27–12, or in accordance with procedure prescribed by the Statutes, § 64–27–36. The appellee has neither sought permission to abandon under the statute first referred to, nor proceeded to give notice of an abandonment or discontinuance as required by the statute last referred to.

He obviously has no present intention of giving up his Certificate or his rights or interest thereunder. His testimony clearly and positively established this fact. Indeed, his employing two attorneys to represent him before the Commission, before the

District Court and in this Court speaks eloquently of his intention and determination to retain his certificate, if he is able to do so. He is willing even, according to his testimony, to establish termini and shops in New Mexico and to advertise and solicit business in this State if the Corporation Commission orders him to do so pursuant to its right to make such an order after investigation and hearing as provided for by § 64–27–38 and § 64–27–46, New Mexico Statutes 1953, Annotated.

To support its position on the point above discussed, the appellant Corporation Commission cites and relies on Schmunk v. West Nebraska Exp., Inc., 159 Neb. 134, 65 N.W.2d 386. The facts in that case clearly distinguish it from the case under consideration by this Court. The certificate holder Schmunk had sold his one remaining trailer prior to cancellation of his certificate and was thereafter without a unit to operate; went into the used car business; permitted his public liability and property damage insurance to expire; and applied for and obtained an order suspending his certificate. Thereafter he undertook to assign his certificate and to obtain an approval of assignment by the Railway Commission, the Nebraska agency vested with jurisdiction. Further, a general order of the Railway Commission provided that the holder of an irregular route certificate "must continuously hold out his certificated service so as to be able to answer calls and demands for his service in a reasonably adequate manner". We have no such order promulgated by our Corporation Commission, or, if we do, no showing to that effect has been made. Even if we had such an order upon which to predicate and justify the Corporation Commission's order issued in this case, the facts established here would not support a finding that Musslewhite did not "hold out his certificated service so as to be able to answer calls and demands for his service in a reasonably adequate manner." The exact opposite appears conclusively from all of the evidence. Thus we do not feel persuaded by the Nebraska case.

We hold that mere non-user by the holder of a certificate authorizing non-scheduled service over irregular routes does not constitute either abandonment or discontinuance of service by a certificate holder shown to be at all times fully equipped, ready, able and willing to operate. Non-user, plus inability to operate, or refusal to accept business, or non-compliance with proper order made by the Corporation Commission might in any given case amount to abandonment or discontinuance of service. It is to be borne in mind that no order of the Commission had ever been issued requiring the appellee to do more than he was doing and that he stands ready to comply with any order that the Commission may make concerning the establishment of termini or shops, the solicitation of business, etc. In this connection see: Dan Buhr, etc., Interstate Commerce Commis-

sion Reports, 62 M.C.C. 774; Florence Lane—Revocation of Permit, Interstate Commerce Commission Reports, 52 M.C.C. 427. See also Gibbons v. Arizona Corporation Commission, 75 Ariz. 214, 254 P.2d 1024, in which case the Court declared that non-use, though shown by the certificate holder's having moved permanently from Arizona to California, leaving no business representative or agent in Arizona, did not *automatically* constitute an abandonment.

Further, we are of opinion that failure to begin immediate operation of services over an irregular route and non-scheduled services, does not, ipso facto, amount to abandonment under § 64–27–12, 1953 Comp., which would authorize the commission to revoke outright the certificate in view of the provisions of § 64–27–65, 1953 Comp., that: "Whenever * * *, the corporation commission shall be of the opinion that *any* provision or requirement of this act, * * * is being, *has been* or is about to be violated, it may make and enter of record an order in the premises, *specifying the actual* or proposed acts or *omissions* to acts which constitute such real or proposed violation and *requiring* that such violation be *discontinued or rectified,* or both, or that it be prevented."

Possibly the court had this section of the act in mind in holding that the acts of the commission were unreasonable and unlawful.

In expressing the views stated above, we do not desire to be understood as holding that a certificate obtained by fraud, or misrepresentation, or one issued in error by the commission, may not be revoked or amended under § 64–27–13, 1953 Compilation.

The judgment should be affirmed.

It is so ordered.

COMPTON, C. J., and LUJAN, J., concur.

SADLER and McGHEE, JJ., dissenting.

SADLER and McGHEE, Justices (dissenting).

We think the majority opinion is wrong. The very language of the two statutes first quoted in it affirms what the issuance of a certificate of public convenience and necessity so manifestly proclaims as a state policy, namely, that the holder must proceed within a reasonable time to establish and maintain the service, the showing of a need for which was an indispensable condition to his procural of the certificate. Note this language from 1953 Comp. § 64–27–12, to-wit:

> "No common motor carrier authorized by this act to operate shall *abandon or discontinue any service* established under the provisions of this act without an order of the commission." (Emphasis ours.)

1953 Comp. § 64–27–36 provides:

"* * * no motor carrier *shall abandon all or any portion of its service* to the public, except for causes beyond its control, unless it has filed a notice with the corporation commission at least 30 days prior to the *discontinuance of such service* that it intends to *discontinue the same* * * *." (Emphasis ours.)

How, may we inquire, can the holder of a certificate "abandon or discontinue" a service that he has never established? Of course, he can not do so. Yet, the italicized portions of the statutes quoted manifest unmistakably a legislative purpose that immediately, certainly, within a reasonable time, he shall establish service under the certificate issued him.

We have here a case where a non-resident certificate holder for nearly two years after issuance of his certificate made not a single move, nor performed a single act, to indicate that he ever intended to establish service under the certificate issued him. He maintained no depot or representative within the state, no office or local telephone number, solicited no business within the state, possessed neither trucks nor equipment, either licensed or maintained here, capable of hauling the type of freight he was licensed to transport. In fact, admittedly so, he did absolutely nothing under the certificate to indicate a purpose of ever establishing service under it and this condition continued for a period of approximately two years.

Finally, despairing of any action on his part under the certificate, and in order to clear its docket of "dead timber" appearing on its records, the Commission availed itself of the remedy for doing so prescribed by 1953 Comp. § 64–27–13, reading as follows:

"The commission may at any time, for good cause suspend, and upon not less than five (5) days' notice to the grantee of any certificate or permit and an opportunity to be heard, *revoke* or amend any certificate or permit." (Emphasis ours.)

Provoked into action from the Rip Van Winkle slumber he had been enjoying for the preceding biennium, the certificate holder suddenly springs into life and comes before the Commission with a multitude of promises to establish service and as recited in the majority opinion:

"He is willing even, according to his testimony, to establish termini and shops in New Mexico and to advertise and solicit business in this State if the Corporation Commission orders him to do so pursuant to its right to make such an order after investigation and hearing as provided for by § 64–27–38 and § 64–27–46, New Mexico Statutes 1953, Annotated."

In other words, if the Commission will hold a hearing pursuant to § 64–27–38 and succeeding sections and enter an order pursuant to § 64–27–46, he will do certain acts looking to establishment of service,—things the performance of which are already called for by his certificate and which for two long years he has been delinquent in doing and which, even after service on him of the order to show cause, he has made no move to do.

The majority seem to put some reliance in affirming the trial court on 1953 Comp. § 64–27–65 which they quote on last page of their opinion. Presumably, they think the Commission's failure to give the appellee a fixed time within which to establish service under his certificate, or suffer an automatic cancellation thereof, rendered the order unlawful or unreasonable and, therefore, void. See In re Florence Lane Case, 52 M.C.C. 427, and In re Dan Buhr and Laura Buhr, doing business as Buhr Truck Lines, 62 M.C.C. 774. The section mentioned was a part of the original act, L.1929, c. 129, § 20. The 1933 amendment, L.1933, c. 154, § 13, which is quoted, supra, as 1953 Comp. § 64–27–13, gives the Commission authority on five days' notice in an order to show cause, following a hearing, to *revoke* or amend *any certificate.* (Emphasis ours.) It expressly repealed "such parts of chapter 129, Laws of New Mexico of 1929 * * * and all other laws * * * as are in conflict herewith." § 64–27–1 note.

Accordingly, if under § 64–27–65, as originally enacted, the Commission was not authorized to revoke without giving a certificate holder an opportunity to cure his default, if the default were of sufficient gravity to warrant such action, it certainly was given that authority by virtue of the 1933 amendment, 1953 Comp. § 64–27–13. This section was further amended by L.1937, c. 224, § 5, in a minor respect by substituting the word "permit" for the word "license," wherever it occurred in the 1933 act.

The case before us is as simple as this:

(a) Respondent asked for a certificate whose issuance and acceptance constituted a promise to render service under it.

(b) Respondent never initiated service under the certificate over a two year period and resides outside the state, maintaining no agent or depot within the State.

(c) Under express authority of § 64–27–13 quoted above his certificate is subject to cancellation.

What the majority opinion says about no evidence having been introduced or offered is misleading. The Commission's own records disclosed the appellee here (respondent before the Commission) had never established service under his certificate. For two years, he had not transported a pound of freight, nor had he ever solicited the carriage of any. Neither did he maintain any place or person within the

state to whom or where anyone desiring his services might contact him. All this is admitted, so why talk about the Commission offering no evidence? If appellee's own testimony and what the Commission's records disclosed do not constitute evidence, we should not know in what category to place them.

Instead of finding a sympathetic reception here in its efforts to clear its docket of dead and dormant certificates, the Commission is met with a technical and unrealistic construction of the governing statutes which, undoubtedly, will render it impossible for it to keep this phase of its business current and abreast of the times. Should it again go to the legislature for authority to handle a situation such as this, the legislature might very well say to the Commission that by the 1933 amendment, 1953 Comp. § 64–27–13, it had already given the authority requested in language so plain that he who runs may read and, now, could do no more than to reaffirm that language. We think this Court by the decision announced has practically tied the hands of the Commission in this salutary effort to compel the removal of dead and dormant certificates from its records.

Because the majority decline to hold two years' failure to establish service under a certificate of public convenience and necessity, whether over a fixed route or otherwise, does not warrant revocation under 1953 Comp. § 64–27–13.

We dissent.

295 P.2d 858

D. E. EDWARDS, d/b/a D. E. Edwards Construction Company, Plaintiff-Appellant,

v.

D. C. PETERSON and Mrs. D. C. Peterson, Defendants-Appellees.

No. 6027.

Supreme Court of New Mexico.

March 26, 1956.

J. B. Newell, Edward E. Triviz, Las Cruces, for appellant.

J. D. Weir, L. J. Maveety, Las Cruces, for appellees.

EDWIN L. SWOPE, District Judge.

In this case, plaintiff (appellant) sued defendants (appellees) in quantum meruit for the reasonable value of labor and materials

furnished by him in remodeling defendants' home located near Las Cruces, New Mexico. In their answer, defendants claimed that plaintiff was not entitled to recover in quantum meruit for the reason that the parties had entered into a contract whereby plaintiff agreed to do the remodeling work for a stipulated sum of money. They also filed a counterclaim in which they asked for damages allegedly resulting from plaintiff wrongfully leaving the job prior to its completion. The trial court, after hearing the evidence, made the following findings of fact and conclusions of law:

"Findings of Fact

"I.

"The parties entered into a verbal contract whereby plaintiff agreed to remodel defendants' house in certain particulars, furnishing the materials and performing the labor contemplated for the sum of $4,188.

"II.

"After plaintiff commenced work on the job, material changes from and additions to the original plan were made by mutual agreement and, in consideration therefor, plaintiff was to be paid an additional sum of $750 plus $285 for five windows to be furnished.

"III.

"Under the original agreement, plaintiff was to be paid the contract price of $4,188 on completion of the work, but the changes and additions required a longer period of time and caused plaintiff to expend more funds in the performance than originally contemplated by the parties and relieved plaintiff of the obligations of waiting until the completion of the work before being entitled to payment.

"IV.

"After the work had progressed for sometime, plaintiff demanded payment on his account, and defendants without justification refused to pay any sum, whereupon, plaintiff stopped work and abandoned the contract.

"V.

"That when plaintiff stopped work, defendants completed the job in substantial compliance with the contract, as modified, and necessarily expended the sum of $1,644.04 in so doing, and became thereby entitled to credit against plaintiff for such expenditure.

"VI.

"That had plaintiff completed the work he would have been required to expend at least $1,644.04 in so doing and would be unjustly enriched in such amount unless charged therewith.

"VII.

"Because of the vagueness and uncertainty of the testimony adduced by plaintiff, it is not possible to ascertain the cost to plaintiff of the materials and labor which he furnished in doing the work on the house.

"VIII.

"The plaintiff's claim based on quantum meruit is not tenable, his remedy being on the contract as modified.

"IX.

"Defendants' counterclaim should be denied for the reason that there is no sufficient and competent evidence to support any claim for damages asserted therein.

"X.

"That plaintiff should have judgment against defendants for the sum of $4,188, $750 and $285, less the sum of $1,644.04 or a difference of $3,578.96, with interest thereon at 6% per annum from May 1, 1953 until paid and for his costs.

"The Court adopts the following

"Conclusions of Law

"I.

"Judgment will enter for plaintiff and against defendants for $3,578.96, with interest and costs as stated above.

* * * * * *

"All requested Findings of Fact and Conclusions of Law submitted by the parties at variance with this Decision are hereby denied."

Judgment was entered for plaintiff in the amount of $3,578.96, plus interest and costs, and being dissatisfied with the amount of the judgment, plaintiff appealed to this Court.

No cross appeal is taken by defendants questioning the fact that plaintiff sued in quantum meruit and recovered in contract, and we will not notice the question. Compare, Harbison v. Clark, 59 N.M. 332, 284 P.2d 219.

The plaintiff assigns numerous errors principally on account of the trial court's action in adopting the contract instead of the quantum meruit theory of the case and findings which were adverse to those submitted by him. An examination of the record reveals that some of the testimony was conflicting, however, there was substantial evidence to support the trial court's findings. It is well settled that this Court will not reverse the decision of a trial court if there is substantial evidence to support its findings, and in reviewing the record, the evidence must be considered in the light most favorable to the appellee. Mobley v. Garcia, 54 N.M. 175, 217 P.2d 256, 19 A.L.R.2d 553. Furthermore, the trial court's action in refusing to adopt the plaintiff's theory of the case and his requested findings of fact, which it had covered by adverse findings, was not error. Libby v. De Baca, 51 N.M. 95, 179 P.2d 263.

The plaintiff argues that in this case the trial court's findings should not be given the usual weight because they are inconsistent with a statement made by the court in overruling a motion to dismiss made by defendants when plaintiff rested his case and in a memorandum opinion fur-

nished to the parties at the end of the case wherein the trial court indicated that he would adopt the quantum meruit theory in his final decision. Plaintiff also argues that the trial court committed error in refusing to make his informal memorandum opinion a part of the record and in not granting him a new trial because of the inconsistencies and for the purpose of taking additional testimony. There is no merit in this argument. It is the trial court's final findings of fact and conclusions of law, and not its informal statements and opinions made during the course of the trial, that are controlling. Mosley v. Magnolia Petroleum Co., 45 N.M. 230, 114 P.2d 740. Furthermore, a motion for a new trial is addressed to the discretion of the trial court and, in the present case, the court's refusal to grant a new trial was not an abuse of discretion. Cienfuegos v. Pacheco, 56 N.M. 667, 248 P. 2d 664.

Section 52(b) (5) of the Rules of Civil Procedure requires that all requested findings of fact and conclusions of law not included in the court's findings and conclusions shall be by the court marked "Refused" and shall be filed as a part of the record. In the present case, the court did not mark each requested finding and conclusion not included in his findings and conclusions "Refused", but instead stated in his Conclusions of Law, which were filed as a part of the record, that "All requested Findings of Fact and Conclusions of Law submitted by the parties at variance with this Decision are hereby denied". Inasmuch as the record shows that portions of some of the Findings and Conclusions submitted by both parties were refused while other portions were adopted, and that the wording of all of the Findings and Conclusions is different, we believe that, under the circumstances, the trial court's method of handling the matter was proper. See, Sandoval County Board of Education v. Young, 43 N.M. 397, 94 P.2d 508. It would have been confusing to all concerned if the court had studied each phrase and sentence of each Finding and Conclusion and then marked each one that he was unable to adopt in its entirety, "Refused". Moreover, it is obvious that the court's action did not in any way work to plaintiff's disadvantage or prejudice in perfecting and presenting his appeal. This Court will not correct alleged errors which are obviously not prejudicial. In re Englehart's Estate, 17 N.M. 299, 128 P. 67, 45 L.R.A.,N.S., 237; Trauer v. Meyers, 19 N.M. 490, 147 P. 458.

Other questions are urged by plaintiff as grounds for reversal. We have considered them and find them without merit.

Finding no error in the record, the judgment of the lower court is affirmed. It is so ordered.

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

295 P.2d 1019

STATE of New Mexico, Plaintiff-Appellee,

v.

Allen WHITE, Defendant-Appellant.

No. 5986.

Supreme Court of New Mexico.

March 21, 1956.

Rehearing Denied April 24, 1956.

See also, 58 N.M. 324, 270 P.2d 727.

Harry L. Bigbee, Joseph M. Montoya, Matias A. Zamora, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., Fred M. Standley, Asst. Atty. Gen., Walter R. Kegel, Asst. Atty. Gen., for appellee.

CARMODY, District Judge.

The defendant appeals from a judgment and sentence of the District Court of Bernalillo County, pursuant to a verdict of a jury finding him guilty of murder in the second degree.

The factual details are of very little consequence insofar as this appeal is concerned, and let it suffice to say that the defendant was convicted of killing his wife by gunshot wound on the 26th of January, 1953, in Albuquerque; that he was thereafter tried and convicted in Bernalillo County of murder in the second degree, which cause was reversed by this Court, resulting in a mandate upon which the present cause was tried.

The defendant on his second appeal to this Court raises several objections to what occurred at the time of trial and in the proceedings before the Court, which can basically be considered under six points.

The first two of these relate to matters which were raised prior to the actual trial, one being a motion for a change of venue, and the second being a motion to quash the Information as supplemented by the Bill of Particulars.

To take these points in the order just mentioned, the defendant filed a motion seeking a change of venue, bolstered by his own affidavit, to which a response was filed by the State, having affidavits attached thereto. The Trial Judge heard testimony on the venue question and denied the motion, apparently feeling that the mere attaching to the motion of the defendant's

affidavit that he did not feel a fair trial could be obtained did not take the matter from the discretion of the Court.

Basically, the testimony presented on the motion for change of venue had to do with the widespread newspaper publicity, and we believe, along with the Trial-Judge, that the showing made did not constitute a sufficient showing of a well-grounded fear that the defendant could not obtain a fair trial in Bernalillo County. Certainly, there was no palpable abuse of discretion on the part of the Trial Court in denying the motion. See State v. Alaniz, 55 N.M. 312, 232 P.2d 982; State v. Fernandez, 56 N.M. 689, 248 P.2d 679; and State v. Chavez, 58 N.M. 802, 277 P.2d 302.

Further, with respect to this matter, it might be pointed out that the obtaining of a jury proved relatively easy for a murder case, and it certainly does not appear that the prospective jurors had any prejudice against the defendant and that, actually, basically, the only reason that many of them were subsequently excused for cause was their lack of understanding of the question as to why this defendant should be retried, having been convicted once.

On the morning of the trial, there was filed by the defendant a Motion for a Bill of Particulars to which the District Attorney filed a response and thereafter the defendant moved to quash the Information as supplemented by the Bill of Particulars, on the technical ground that the District Attorney in his Bill of Particulars stated that "the means" of the death of the deceased was "by reason of gunshot wound", whereas the defendant wished to know what the "legal means" was.

It should be pointed out that the defendant did not seek an additional Bill of Particulars and did not, insofar as the record discloses, point out to the Court the ground of his technical objection. It must be borne in mind that this was the second trial of this case; the defendant had available a transcript of all of the evidence. There is some doubt as to whether the defendant was actually entitled to a Bill of Particulars, and certainly the granting of the defendant's contention in this instance would, in effect, take the pleading of criminal cases back to the days of the old type Information and Indictment, and would almost completely wipe out the advantages gained by the modern type of pleading.

With reference to this particular point raised by the defendant, it is believed that it is completely answered in State v. Roy, 40 N.M. 397, 60 P.2d 646, 657, 110 A.L.R. 1, wherein this Court stated:

> "The defendant here complains of the deficiency of the bill of particulars. He failed to call for a supplemental bill of particulars. This was a voluntary failure on his part and we cannot hear his complaint."

So much for the points raised by the defendant prior to trial; we feel that they are without merit.

The defendant claims error by reason of two different statements made by the District Attorney who prosecuted the case. The first occurred in the District Attorney's opening statement, and the other occurred in closing argument wherein the District Attorney commented on the defendant not taking the stand.

With reference to the question raised as to the comment in the opening statement, which was to the effect that the defendant entered into a "purported" marriage with the deceased on the 6th of January, 1947, at which time he was legally married to another woman, objection was made to this by counsel for the defendant in which a mistrial was asked by reason of the injection of a false issue, or in the alternative, that the jury be instructed to disregard the statements. The Trial Judge instructed the Jury in accordance with this request, that the previous marital condition of the defendant was not an issue in the case and the motion for mistrial was denied.

It should also be mentioned that the District Attorney in his closing argument again used the phrase "purported wife" but no objection was raised, and apparently the matter was not brought to the attention of the Trial Court and has only been raised now for the first time. A careful examination of the record in this case discloses that the trial court exercised extreme care in protecting the rights of this defendant, and we fail to be convinced that use of the above mentioned language by the District Attorney had any effect on the jury's verdict, particularly where the Trial Judge acted so promptly to rectify any possible damage that might have been done, in the instance which was called to the Trial Judge's attention. The defendant's motion was in the alternative, that is, either for a mistrial or the admonition to the jury. The Court adopted the latter alternative, as we believe it should have.

It would appear that the action of the Trial Court in this case is analogous to that which occurred in State v. Garcia, 57 N.M. 665, 262 P.2d 233, 235, and we feel that the statement made therein is applicable to the instant cause:

> "* * * In view of the prompt action of the trial court when objection was made we do not believe there was prejudicial error so as to justify a reversal of the conviction. * * *"

Also, in his closing argument, the District Attorney commented on the fact that the defendant did not take the stand. His exact words were as follows:

> "Exactly what did occur, no one knows. There is only one person who would know what happened at that time, that would be the defendant himself. The defendant did not have to take the witness stand in his own behalf. Had he taken the stand any statements made by him would have been self-serving declarations and only self-serving declarations. Why didn't the

defendant take the stand? We wonder."

We believe that from this Court's standpoint, this question is disposed of entirely by the ruling in the case of State v. Sandoval, 59 N.M. 85, 279 P.2d 850. Insofar as the defendant's contention that this statement was violative of the Fifth Amendment of the Constitution of the United States, it is apparent without quoting at length therefrom, that the Supreme Court of the United States has answered this contention in the case of Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903, 171 A.L.R. 1223, and it is not believed that long quotations from the above case would be helpful in this opinion. In the above case, the prosecuting attorney argued "that the jury should infer guilt solely from the defendant's silence." The Supreme Court of the United States held that it would not interfere with the conviction by the California Court. The decision, written by Mr. Justice Reed, together with the concurring opinion by Mr. Justice Frankfurter, answers every contention made by the defendant in this cause, wherein the statement is certainly not anywhere near as strong as that made by the prosecuting attorney in the California case.

We now come to matters which occurred at the trial itself as to the admissibility of certain evidence. One of the State's witnesses by the name of Porterfield was questioned with reference to the defendant purchasing a gun in Santa Fe and giving a false name at the time. This occurred almost immediately prior to the shooting. The defendant contends that this was evidence of deliberation, and that inasmuch as all that the defendant was being tried for was second degree murder, that evidence of deliberation should not have been allowed. It should be pointed out that when this case was originally tried, the defendant was charged with first degree murder. He, of course, was convicted of second degree, and thereby the State was limited to second degree on a second trial.

This same identical testimony was adduced at the first trial and for the defendant to now claim that its only purpose was to show deliberation is stretching a point considerably. It would occur to the Court that this testimony also shows premeditation, which is a necessary element in the proof of murder in the second degree. The testimony was also pertinent to show malice, and the identity of the gun. For the defendant to contend that it was merely for the purpose of showing deliberation, and thereby to inflame the jury, is ingenious, but is not in accordance with the law. The State still had the burden of proving its case beyond a reasonable doubt, and this evidence was a necessary part of the State's case, even to the proof of murder in the second degree.

We now come to the defendant's sixth and last contention, which relates to the Trial Judge having allowed the testimony of a witness in the first trial to be read to

the jury in the instant case. At the time of the first trial, with other counsel representing the defendant, a witness was called by the State—Dr. Miller, who is a neuro-surgeon in Albuquerque. Dr. Miller testified to giving defendant an electroencephalogram; he was not qualified as a psychiatrist, but his testimony was to the effect that from a total of his examination of the defendant, the defendant impressed the Doctor as being sane.

No objection was made to the testimony at the first trial, but very serious objection was made to the same at the time of the reading of Dr. Miller's testimony to the jury, inasmuch as he was unavailable at the time of the trial of the instant case. We are of the opinion that the testimony of Dr. Miller was admissible, even though he was not qualified as an expert, under the authority of Territory v. McNabb, 16 N.M. 625, 120 P. 907. Actually, the objection to Dr. Miller's testimony should only go to the weight thereof, and not to its admissibility. The jury as reasonable men, having heard his testimony read and knowing the extent of his contact with the defendant, were able to reasonably judge what weight to give to the testimony, and we fail to see where the defendant was prejudiced in anywise.

Of course, actually, the principal question involved in this phase of the case relates to what can be done as to the reading of testimony at a former trial, and whether it must be taken exactly as it was given, or whether objections and deletions may be made therefrom. As to this, the matter is discussed in various texts, and we believe that the better rule is that which is given in 1 Wigmore on Evidence, 3d Ed. § 18, p. 330, as follows:

> "A failure to object at one trial precludes the opponent at any subsequent trial from any further objection, for the reason and to the extent that a failure to object before (at) the first trial would have precluded him. * * *" (Parenthetical word added by us)

It should be pointed out that unless such a rule is adopted in this State, that the right to use testimony given at former trials could become, to all intents and purposes, a useless thing. Even in cases where the same counsel is participating in a second trial, he can always think of a great many objections which he did not voice at the time of the first trial. To allow him to now conjure objections to questions at his leisure, could cause sufficient changes to destroy the entire effect of testimony theretofore given.

Even at best, the use of testimony given at a former trial is not too impressive to a jury, and to allow it to become interspersed with new objections, deletions, possible new rulings by the Court, would reduce its value manyfold. Therefore, it is felt that the rule above announced is infinitely superior to the rule in force in some other jurisdictions, wherein objections as to competency, relevancy or materiality are allowed, but no objections are allowed as to the form in

which testimony is elicited or given. Such a rule, in effect, requires the Court to reconsider each case on its own merits, and it is felt that the broad rule such as that above announced is superior.

It follows from what has been said that the judgment should be affirmed.

It is so ordered.

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

295 P.2d 1023

Solomon S. PADILLA, Plaintiff-Appellee,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a Corporation, Defendant-Appellant.

No. 6017.

Supreme Court of New Mexico.

March 12, 1956.

Rehearing Denied April 24, 1956.

B. G. Johnson, James T. Paulantis, Albuquerque, for appellant.

Lorenzo A. Chavez, Arturo G. Ortega, Albuquerque, for appellee.

McGHEE, Justice.

The defendant has appealed from a judgment rendered upon a jury verdict which awarded to plaintiff the sum of $23,750 (the full amount asked) in damages for injuries incurred by him in discharge of his duties as a sheet metal worker in the Albuquerque shops of the defendant. The action was based upon an alleged violation of the Federal Employers' Liability Act, as amended 45 U.S.C.A. § 51 et seq. Specifically, the plaintiff claimed the defendant failed to furnish him a reasonably safe

place to work and as a result a steel block used by him at times to aid in repairing metal jackets removed from steam locomotives fell from the bench where he was working, hitting one of his big toes with a resulting deterioration of his foot and partial loss of use thereof, in addition to pain and suffering; that he is no longer able to work at his trade of sheet metal worker and has had to accept such employment as he could obtain and hold as a laborer unable to stand while working.

The defendant denied any negligence on its part and pleaded contributory negligence on the part of the plaintiff.

Under the statute under which this action was brought the defense of contributory negligence does not defeat a recovery but only reduces the damages in the proportion such negligence contributes to the injury and the defense of assumed risk has been abolished. There is no dispute here that the federal decisions are controlling; in passing upon cases brought under the Act federal decisional law is binding upon us.

The first point made by defendant is that the plaintiff failed to sustain the burden of proof that defendant was negligent, but, on the contrary, that the accident was caused by the sole negligence of the plaintiff; that, therefore, the trial court erred in refusing to sustain defendant's motion for a directed verdict first made at the close of plaintiff's case and later renewed at the close of all of the evidence.

On February 1, 1954, the date of the injury, plaintiff's principal duty as a sheet metal worker was to repair metal jackets which had been removed from steam locomotives and brought into the sheet metal shop. In repairing these jackets plaintiff worked on a table constructed of wood with a half-inch steel plate on top. The table was 34¾ inches high and measured 81x96 inches on top, being ¼ inch low at one corner. It had been in the sheet metal shop since 1925 and the plaintiff first used it in connection with his work in 1928. He had assigned to him a mallet, steel hammer, chisel, screw driver, two pair of snips and electric shears, all of which he would place in the tool box behind him. In addition to these tools plaintiff used two metal blocks, one of steel and the other of lead. The steel block was approximately 5x3x2½ inches and weighed between 8 and 10 pounds. The plaintiff stated that as he would pound on the jackets which he placed on top of the table the piece of steel would move along the table and sometimes fall as he was hammering away.

At the time of his injury, while plaintiff was pounding on a jacket with a hammer, the steel block fell off the table, striking him on the right foot.

It seems agreed the tool box was not a suitable place for the storage of the steel block when it was not in use, but there was a small shelf on the tool box (smaller than the block) on which it could have been placed. The excuse given by the plaintiff

for leaving it on the table where he was pounding was that he was required to keep such tool handy and in front of him on the table, and also, that he would have been reprimanded by the foreman had he not kept it there; that he realized the danger of keeping the block on the table and had asked the foreman for a railing around the table so the block would not fall off, or for a peg on which he could put the block and tie it with a string. He also testified he had reported the dangerous condition of the place where he worked at a safety meeting at which the foreman was present. In this testimony he was corroborated by several fellow workers. The foreman testified he did not remember the matter being reported at a safety meeting or any such complaint by the plaintiff. When asked by the plaintiff for the minutes or record of the safety meeting, the foreman answered he had been transferred to California some four or five weeks before the trial and had been unable to find the record since his return. No attempt was made by the defendant to account for the loss of the record.

The plaintiff testified that shortly before his injury he had placed the steel block at the corner of the table about five inches from the edge; that because of the vibration resulting from his pounding it fell from the table and struck his foot.

The foreman testified it was not practical to make the change on the table the plaintiff said should have been made—that often a workman had a jacket to repair which was as large as the table so that a guard or railing was not practical. He also said he would be against the use of a peg mentioned above.

In view of the testimony of the plaintiff and others that the steel block had fallen from the table several times as the result of vibration, we think the definition of negligence by Mr. Justice Holmes in Schlemmer v. Buffalo, R. & P. R. Co., 1907, 205 U.S. 1, 27 S.Ct. 407, 409, 51 L.Ed. 681, is applicable here:

> "* * * Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen. * * *"

The defendant showed the plaintiff had used the identical bench on which he was working when injured since 1928, arguing it should not be held liable when he was finally hurt by the falling block. This has the sound of a plea of assumption of risk which is not allowable since the 1939 amendment, Act August 11, 1939, 45 U.S. C.A. § 54. In Tiller v. Atlantic Coast Line R. Co., 1943, 318 U.S. 54, 63 S.Ct. 444, 446, 87 L.Ed. 610, it was stated:

> "* * * We hold that every vestige of the doctrine of assumption of risk was obliterated from the law by the

1939 amendment, and that Congress, by abolishing the defense of assumption of risk in that statute, did not mean to leave open the identical defense for the master by changing its name to 'non-negligence'. * * *"

A like long use without accident was interposed in Margevich v. Chicago & N. W. Ry. Co., 1953, 1 Ill.App.2d 162, 116 N.E.2d 914, 917, which that court disposed of in the following language:

"Defendant, to sustain its contention that the equipment was reasonably safe, argues that plaintiff had used this same kind of scaffold for twenty-eight years and had never seen an accident result therefrom. The question is not what equipment defendant furnished, and plaintiff used, customarily, but whether there was evidence that the equipment and method were not reasonably safe. Chicago, R. I. & Pac. Ry. Co. v. Daugaard, 118 Ill.App. 67; Midland Valley R. Co. v. Bell, 8 Cir., 242 F. 803; Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 23 S.Ct. 622, 47 L.Ed. 905. This conclusion disposes of the argument with respect to the long use, without accident, of the method employed in straightening the grab iron."

It seems if there is any evidence in the case to sustain a finding of negligence by a jury, whether it be established by direct evidence or reasonable inference, the United States Supreme Court will not allow an appellate court to overturn such verdict. See Bailey v. Central Vermont Ry., 1943, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444; Blair v. Baltimore & O. R. Co., 1945, 323 U.S. 600, 65 S.Ct. 545, 89 L.Ed. 490; Tennant v. Peoria & P. U. Ry. Co., 1944, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; Wilkerson v. McCarthy, 1949, 336 U.S. 53, 69 S. Ct. 413, 93 L.Ed. 497.

After a careful study of the record and the authorities we hold there was sufficient evidence of negligence calling for the submission of the case to the jury and the trial court did not err in declining to sustain the motion of the defendant for a directed verdict in its behalf.

Error is assigned because the plaintiff was allowed to introduce in evidence a mortality table showing his life expectancy. The defendant objected to its introduction on the ground there was no competent evidence showing permanent disability of the plaintiff.

The testimony of the medical experts was in conflict as to whether the injury was permanent, hence the trial court did not err in admitting such table. Thayer v. Denver & Rio Grande R. Co., 1916, 21 N.M. 330, 365, 154 P. 691, and the authority therein cited.

The third point relied upon for reversal is that the trial court erred in not granting the defendant a new trial because the damages allowed were excessive.

The members of this Court participating in the opinion agree the damages are excessive, but, like the members of the Third Circuit Court of Appeals in Scott v. Baltimore & O. R. Co., 1945, 151 F.2d 61, 64, 65, there is nothing we can do about it, in view of the federal decisional law on the subject and the lack of anything in the record indicating the verdict was the result of passion or prejudice. We quote all that was said in the above cited case on the subject:

"The third point urged by the defendant is that the damages fixed by the jury at $35,000 are excessive. The members of the Court think the verdict is too high. But they also feel very clear that there is nothing the Court can do about it.

"In the first place, this plaintiff's claim is based on an accident in which he suffered physical injury with claimed mental repercussions. Insofar as the award of damages to him consists of compensation for pain and suffering it is, obviously, nothing that an appellate court can, or a trial court for that matter, measure by a yardstick as to whether the jury has given too much or too little. In the second place there was, as might well have been expected, very sharply conflicting medical testimony as to how badly the plaintiff was hurt. Some of the testimony went so far as to indicate that the plaintiff was merely malingering but there was other testimony, if the jury cared to accept it, which showed him to be very badly off. It indicated that treatment would have to continue, that the plaintiff could only have a light schedule of work for the rest of his life, and that he would have to change his occupation to carry on any useful activity. Which of these medical experts was to be believed is not something for an appellate court to decide, and nobody would seriously contend that it was. In the third place, the defendant is in a federal appellate court. The damages were fixed by the jury and the verdict was reviewed, so far as the judge has control over the jury's action, by the District Court upon the motion for a new trial. Judicial control of the jury's verdict in this kind of case is primarily for the trial court. Dubrock v. Interstate Motor Freight System, 3 Cir., 1944, 143 F.2d 304. A long list of cases in the federal courts demonstrates clearly that the federal appellate courts, including the Supreme Court, will not review a judgment for excessiveness of damages even in cases where the amount of damage is capable of much more precise ascertainment than it is in a personal injury case. There is no complaint here that the jury were improperly instructed as to the law or that any statutory limit of recoverable amount of damages has been exceeded. We have, instead, a case where no precise rule of translating injury into money can be formulated, where the medical testimony is

confusing and contradictory and where the trial judge has thought the verdict sufficiently within bounds of reason to refuse a new trial. While as triers of fact we should be inclined, if we agreed with the plaintiff's testimony, to award a smaller sum, we think to do so here would be to pass the point which we, with propriety, may reach."

We also quote from an opinion in the Seventh Circuit on the subject in the case of Larsen v. Chicago & N. W. R. Co., 1948, 171 F.2d 841, 845:

"The Supreme Court has repeatedly said that we may not review the action of a federal trial court in denying a motion for a new trial on the ground that the damages awarded by the jury were excessive. See cases cited in Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481, 485, 53 S.Ct. 252, 77 L.Ed. 439. True it is, that a verdict obtained by appeals to passion and prejudice cannot stand. Minneapolis, St. P. & S. S. M. Ry. Co. v. Moquin, 283 U.S. 520, 51 S.Ct. 501, 75 L.Ed. 1243. But that is not our case. Here there was no misconduct of plaintiff's counsel in making appeals to passion and prejudice, hence we have no authority to tamper with the jury's verdict, or as Mr. Justice Holmes said in Texas & Pacific Ry. Co. v. Behymer, 189 U.S. 468, 469, 23 S.Ct. 622, 47 L.Ed. 905, 'we have nothing to do with that.' Moreover, it is now well settled that the fixing of the amount of damages in an action for personal injuries is peculiarly within the province of the jury, there being no regular standard by which to measure. Mueth v. Jaska, 302 Ill.App. 289, 23 N.E.2d 805. See also Princell v. Pickwick Greyhound Lines, Inc., 262 Ill.App. 298, and Ford v. Friel, 330 Ill.App. 136, 70 N.E.2d 626. There is the additional reason that setting aside the verdict was within the discretion of the trial judge, and in this case we will not presume to substitute our reason and experience for his."

The action of the jury in awarding damages for the full amount asked necessarily included a finding the plaintiff was not guilty of contributory negligence, else it would have followed the instructions on the subject and reduced the damages in proportion to the degree the negligence of the plaintiff contributed to his injury.

We are unable to say as a matter of law the plaintiff was guilty of contributory negligence, so the case might be sent back for a new trial on the question of damages. In Tiller v. Atlantic Coast Line R. Co., supra, it is stated:

"No case is to be withheld from a jury on any theory of assumption of risk and questions of negligence should under proper charge from the court be submitted to the jury for their determination. Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury sys-

tem is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. East Tennessee, V. & G. R. Co., 128 U.S. 443, 445, 9 S.Ct. 118, 32 L.Ed. 478. Or as we have put it on another occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences', the case should go to the jury."

The trial judges have a heavy responsibility in these Federal Employer Liability cases to see the damages are kept within reasonable bounds. They apparently have considerable discretion in passing on motions for a new trial based on claimed excessive verdicts. They sense the atmosphere of the trial, have the feel of the case and have opportunity to observe whether bias, passion or prejudice are present. Without intending the slightest intimation the trial court did not discharge its full duty in this regard, we admonish the trial judges of future cases under the Federal Employers' Liability Act of their responsibilities in this regard.

The judgment will be affirmed.

It is so ordered.

COMPTON, C. J., and LUJAN, J., concur.

KIKER, J., not participating.

SADLER, Justice (specially concurring).

The verdict in this case comes very close to furnishing something "in the record" which, alone and unaided, and in and of itself, reflects the verdict was "the result of passion or prejudice." The complaint first prayed damages in the sum of $13,750. It was later amended to ask for $23,750. The jury gave plaintiff all he asked for. If he had prayed for $50,000 and the jury had continued the generosity of its award by keeping pace with the prayer, is there nothing we could do about it?

I do not interpret the federal decisions as going so far as to say so. In my opinion, when the size of the verdict exceeds all bounds of fairness and reason that fact, in and of itself, affords proof of passion and prejudice. If mere approval of the verdict by the trial judge, in denying motion for new trial, ties our hands in the matter of awarding relief against an obviously excessive verdict under the Federal Employer's Liability Act; then, it is my view we should, in each and every instance, let the United States Supreme Court so declare. I do not think, nor do I interpret what is said in the prevailing opinion as holding, that our hands are so tied. If I believed our present opinion embraced such a holding, I would dissent, instead of specially concurring, as I do.

DAVID W. CARMODY, District Judge, concurs.

295 P.2d 1028

Edgar D. OTTO, Patrick H. Hill, Thomas Morris, John Augustine, W. E. Kistler, and Peter Brooks, Petitioners,

v.

Natalie Smith BUCK, Secretary of State of the State of New Mexico, and Richard H. Robinson, Attorney General of the State of New Mexico, Respondents.

No. 6005.

Supreme Court of New Mexico.

April 3, 1956.

Hannett, Hannett & Cornish, Albuquerque, for petitioners.

Richard H. Robinson, Atty. Gen., Fred M. Standley and Walter R. Kegel, Asst. Attys. Gen., for respondents.

LUJAN, Justice.

The petitioners seek a writ of mandamus from this Court directing the respondents, the Secretary of State and the Attorney General, to approve, accept and file a petition signed and sponsored by petitioners for the calling of a referendum election upon Chapter 37, Laws of 1955, under the provisions of Art. IV, § 1 of our Constitution, which sets forth, among other things:

> "The people reserve the power to disapprove, suspend and annul any law enacted by the legislature, except general appropriation laws; laws providing for the preservation of the public peace, health or safety; for the payment of the public debt or interest thereon, or the creation or funding of the same, except as in this Constitution otherwise provided; for the maintenance of the public schools or state institutions, and local or special laws."

Chapter 37, Laws of 1955, is an act regulating the size and weight of vehicles upon the highways of this state which repealed earlier enactments, § 64–23–1 to § 64–23–11, inclusive, N.M.S.A.1953, and, in addition to other matters, liberalized in certain particulars the permissive size and allowable weight limits of vehicles, length of load and permissive vehicle combinations, providing violations of the act shall be misdemeanors punishable by fine of not less than $25 nor more than $100, which sums under Art. XII, § 4 of the Constitution become part of the current school fund.

By opinion No. 6268, August 31, 1955, the Attorney General advised the Secretary of State that the enactment in question was not subject to referendum upon the grounds that it is a law providing for the preservation of the public peace, health or safety and one, as well, for the maintenance of the public schools or state institutions. Acting thereunder, the Secretary of State refused to refer the act or to approve or originate a popular name therefor and the Attorney General refused to approve the instructions to canvassers and petition signers.

Petitioners and respondents entered into a stipulation providing the following are the only pertinent points of law involved in this litigation:

A. That Chapter 37 of the Laws of 1955 is a law providing for the preservation of the public peace, health, or safety, being an enactment under the police power of the State of New Mexico.

B. That said law is for the maintenance of public schools.

C. That said law is for the maintenance of state institutions, to-wit: the public roads of the State of New Mexico and the Highway Department of the State of New Mexico.

D. That for the purpose of the briefs on the legal defenses, no question of fact is material nor should any be offered but questions purely of law are submitted in the briefs. Respondents reserve, subject to the order of the Court, the right to contest the facts presented by Petitioners' Petition for Writ.

The case is so submitted to us, with petitioners arguing the negative of these propositions and respondents the affirmative.

We will first consider the proposition whether Ch. 37, Laws of 1955, is a measure providing for the preservation of the public peace, health or safety and thereby excepted from the reserved power of referendum. However, before entering upon a discussion of the act itself and the conflicting contentions of the parties, it seems necessary to clarify the character of the question involved in determining whether the act is referable and to set forth the matters at which this Court will look in ar-

riving at its decision, for, as noted in paragraph "D" of the stipulation of parties set out above, these considerations are the subject of some dispute.

In this connection petitioners assert whether the act provides for the preservation of public peace, health or safety under Art. IV, § 1, of the New Mexico Constitution, is a question of fact and that this Court should take and consider all pertinent evidence offered. In support of this assertion they point to our decision in State ex rel. Hughes v. Cleveland, 47 N.M. 230, 235, 141 P.2d 192, 195, saying it is there held that this Court could and would take judicial notice of facts establishing an emergency in the matter of providing revenues for old age assistance. The language of the opinion on that point, which passed upon the referable character of an act imposing a tax on cigars and cigarettes and allocating the proceeds therefrom to old age assistance funds, is as follows:

> "We may and should assume that the Legislature in enacting the questioned measure was moved, in part, by an anticipated large decrease in revenues available for this type of assistance, as pointed out by the State's Chief Executive, the Honorable John J. Dempsey, in a message read personally before a joint meeting of the House and Senate on February 4, 1943, while the bill was under consideration by the Legislature. * * *
>
> "That the conditions pointed out in the message of the Chief Executive as well as in the report of the special legislative committee form the background of the legislative finding of urgent need appearing in the preamble, we entertain no doubt. Presumably the Legislature through appropriate committees or otherwise, satisfied itself of the accuracy of the conditions brought to its attention by the Governor. It was its duty so to do and we may assume it did. State ex rel. Short v. Hinkle, 116 Wash. 1, 198 P. 535. Our right, if not our duty, to notice judicially the message of the Governor before the joint session of both houses of the Legislature convened to receive the same cannot be considered doubtful in view of the governing rule to be found in 1941 Comp., § 19–101, Rule 44(d) (3) [Our present § 21–1–1(44) (d) (3), NMSA, 1953]. See also 20 Am.Jur. 67, § 44 'Evidence'. Likewise the right to notice judicially the report of the legislative committee appears supported by reason as well as authority. 20 Am. Jur. 64, § 41 'Evidence'; State [ex rel. Garrett] v. Torbert, 200 Ala. 663, 77 So. 37; State [ex rel. Tolerton] v. Gordon, 236 Mo. 142, 139 S.W. 403." (Reference to NMSA, 1953, supplied.)

It is at once apparent that in the Cleveland case we took judicial notice not of the facts establishing the emergency, as petitioners contend, but of the Governor's

message and the report of the special legislative committee. This distinction is significant because it indicates the limitations upon the inquiry to be made by us in such matters. We did not there go behind the message and report and take testimony to determine whether or not an emergency existed. The opinion states, and correctly so, that such inquiry is the duty of the legislature and this Court would assume the duty had been discharged. We said the question to be determined was whether the act reasonably provided for the preservation of the public peace, health or safety and that the consideration was complete upon the determination whether a valid relationship existed between the enactment and the preservation of either the public peace, health or safety.

It is generally agreed that these questions are factual in the sense that a legislature may not, by declaring that a given act is for the preservation of these public goods, foreclose a determination by the courts whether in fact it is such. Annotation 146 A.L.R. 285, at page 288, citing State ex rel. Goodman v. Stewart, 1920, 57 Mont. 144, 187 P. 641; State ex rel. Veeder v. State Board of Education, 1934, 97 Mont. 121, 33 P.2d 516; see also, 28 Am.Jur. "Initiative, Referendum, and Recall" (Cum.Pocket Part) § 10, p. 65. But, by this is it meant that the question is one of "raw" fact? We think not, and we do not believe the authorities relied upon so hold. Instead, the question should be termed one of "judicial" fact, in the sense that this forum examines the enactment of the legislature in the light of the history of the provision, including therein previous extant or repealed legislation on the subject; contemporaneous declarations of the legislature; the condition sought to be remedied by the act, as reflected by the enactment and in other matters of which we may properly take judicial notice; and the consequences of any particular interpretation to be given the enactment. Stated most tersely, our work begins where that of the legislature left off.

Within this sphere we proceed to the merits of petitioners' contention that Ch. 37, Laws of 1955, is not a measure providing for the preservation of the public peace, health or safety and is subject to referendum.

The main argument of petitioners may be said to be that the act does not make provision for the *preservation* of public peace, health or safety, in that earlier statutes which it repealed met the regulatory need more adequately than does the present act. Under this argument are made the supporting contentions that the word "preservation" presupposes a real or existing danger or threat to public peace, health or safety against which protection is sought; that when the legislature has already spoken in the field, a subsequent statute which merely revises the existing regulatory measures cannot be said to be an act for the preservation of public peace,

health or safety; and, lastly, that provisions reserving to the people the power of referendum should be given a liberal construction with any doubts resolved in favor of the referral of the enactment.

Petitioners set forth numerous changes made under Ch. 37, Laws of 1955, the new act, from the old act contained in §§ 64–23–1 to 64–23–11, inclusive, N.M.S.A.1953. Summarized, these changes are:

(1) Increasing permissive vehicle width from eight feet to eight feet, six inches, measured from the outside of one wheel and tire to the outside of the opposite wheel and tire, regardless of the width or condition of the highway.

(2) Increasing allowable height of vehicles from twelve feet, six inches, to thirteen feet, six inches.

(3) Permitting load extension three feet beyond the vehicle front and still retaining the old permissive rear load extension of seven feet.

(4) Increasing permissive vehicle combinations from two to three, i. e., a truck-tractor may pull a semi-trailer and a full trailer, although the old length limitation of 65 feet is retained.

(5) Extension of twenty percent increase in load limits to vehicles not granted such additional load tolerance under the old law.

(6) Provision permitting the Highway Commission to issue permits for a fee of $10.00 allowing vehicles or vehicle combinations to operate for one year with heights, weights and widths in excess of the maximum allowance, without the requirement that an emergency exist or that the permits specify routes and loads allowable as under the old law.

(7) Removing from the jurisdiction of the Highway Commission authority to post load limits restricting traffic over bridges and other structures on rural roads, without granting this authority to any other agency.

(8) Failure to require an increase in braking or power equipment on vehicles.

We need not, and should not, rule in this case that petitioners have correctly appraised the legal meaning of the changes wrought by the new act, for these matters might themselves become the subject of dispute in future cases. But, for the purposes of the present determination, we accept petitioners' assessment of such changes.

The argument of respondents is grounded upon our holding in State ex rel. Hughes v. Cleveland, supra. They first point out the studied omission by the framers of our Constitution of the words "necessary" and "immediate" in the language of the exemption clause: "except * * * laws providing for the preservation of the public peace, health or safety", the result of which omission is to allow the people of this state a much narrower right of referendum than is allowed in any other

state in which the right is reserved. See discussion in State ex rel. Hughes v. Cleveland, 47 N.M. at pp. 236, 237, 141 P.2d 192. On the basis of this difference in our Constitution, and as declared in the Cleveland case, cases from other jurisdictions declaring the referable character of acts challenged under this type of exemption can be of little aid here, "For, it must be obvious to all that many laws could reasonably provide for the preservation of the public peace, health or safety, without being deemed *necessary* for their *immediate* preservation."

Respondents' argument then proceeds to another ruling in the Cleveland case, that no crisis or emergency need exist before the non-referable character of the act is found, but that "All that is required to bring the questioned law within the proper sphere for an exercise of the police power is that it bear a valid relationship, as we have expressed it, to some permissible object for the exercise of that power."

The correctness of these holdings is unassailable as is the further holding in that case, here paraphrased, "The fact that a measure does not affect all or even a major portion of the people of the States does not deny it character as [a measure providing for preservation of public peace, health or safety]."

The Cleveland decision also declared that if the constitutional validity of legislation be sustained as a reasonable exercise of police power involved in the referendum clause of the Constitution, its non-referable character is automatically established under the provision exempting from popular referendum measures providing for the preservation of public peace, health or safety. While it was doubtless never intended that this declaration be lifted from its context and applied as a rule of thumb, still the persuasiveness of the comparison made and the conclusion reached are as strong today as then, although perhaps it should be pointed out that this Court is not insensitive to the difference in the canons of construction to be applied in each instance, foremost of which is the strong presumption in favor of constitutional validity which attaches to legislative enactments, whereas provisions for referendum are to be liberally construed in favor thereof. Albuquerque Bus Co. v. Everly, 53 N.M. 460, 211 P.2d 127.

Within the proper area of comparison, that is, scrutinizing the act more closely than would be the case if its constitutionality were challenged, and viewing the referendum provision as liberally as we may do, we still are unable to declare the act does not come within the legislative power removed from referendum by the Constitution.

"Preservation" is said in Webster's New International Dictionary, 2d Ed., Unabridged, to be synonymous with "safekeeping, conservation, saving." "Preservation" and its synonyms do not necessarily

connote a keeping against threatened disaster, nor do they necessarily carry the implication of immediacy. When we know that the words "necessary" and "immediate" were wittingly rejected from the exception clause of our Constitution, we must recognize we have no freedom to put them in the exception by judicial construction. It is true that by the omission of these words a massive field of legislative power is carved out of the reserved referendum rights. But of this we said in the Cleveland case:

> "If it seem desirable that a larger reservation of power be lodged in the people under which the popular veto of legislation may be exercised, the remedy is not through the courts, whose only function is to construe the language actually employed, but rather through an amendment to the Constitution using language of similar import to that urged upon, but rejected by, the constitution makers in 1910. * * *"

To state that the subject of regulation of vehicular traffic upon public highways properly comes within exercise of the police power is but to announce a commonplace, against which no one would seriously contend. As already noted, though, petitioners do argue that once the legislature has enacted a regulatory measure thereunder, the field of exception to referendum is preempted thereby, unless subsequent legislation in repeal imposes more stringent regulations to effect the general ends of public peace, health or safety.

We are unable to agree with the contention. If initial legislation setting allowable width of vehicles at eight feet may be said to be a measure within the exception, as we think it unquestionably can, then it cannot be said that a subsequent enactment increasing the allowable width by six inches is automatically outside the exception, for that would be to say the power given the legislature may have only a "one-way" operation. If that were the rule, it would be difficult, if not impossible to conceive of any limitation or restriction in the field of highway regulation which could ever be liberalized under this power, regardless of the demands of our people and our economy for the free flow of commerce. We perceive the true rule to be that if the legislation bears a valid, reasonable relationship to the preservation of public peace, health or safety, its enactment is within the excepted legislative power, which includes a necessary discretion to either restrict or liberalize requirements.

While the legislative changes made may result in a raising of highway hazards in some proportion, we cannot say that a six-inch increase in vehicular width, a one-foot increase in height, the extension to all vehicles of the load tolerance formerly granted to many, and the other changes described, will increase our road hazards to an unreasonable extent.

Furthermore, throughout this litigation petitioners have approached the question of exemption from referendum from only one standpoint—safety. The Constitution, however, does not except from referendum solely those matters having to do with public safety. Also excepted are measures for the preservation of public peace and health. Surely these latter interests may be said to be preserved by legislation providing for the accommodation of trucks and other vehicular traffic so vital in modern living. There is a valid and reasonable equation between the present enactment and the constitutional exception.

It follows, and we hold, that the legislature has spoken upon a subject within the police powers excepted from referendum by our Constitution; it has exercised its discretion to speak one way or the other; and there is apparent a valid and reasonable relationship between the enactment and the preservation of the public peace, health or safety.

What we have said renders it unnecessary to pass upon whether the enactment is one for the maintenance of public schools or for the maintenance of state institutions.

The alternative writ of mandamus heretofore granted in the case was improvidently issued and the same is hereby quashed.

It is so ordered.

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

296 P.2d 302

J. C. GAUVEY, Plaintiff-Appellee,

v.

W. HAWKINS, Defendant-Appellant.

No. 6039.

Supreme Court of New Mexico.

April 10, 1956.

Cornell & Clayburgh, Albuquerque, for appellant.

Neal & Girand, J. W. Neal, Hobbs, for appellee.

McGHEE, Justice.

The lower court rendered judgment for plaintiff upon action to recover the balance due, with interest and attorney's fees, on a promissory note executed by defendant for the purchase of certain second-hand trucks and equipment from plaintiff. From that judgment defendant prosecutes this appeal, arguing the trial court erred in refusing to find there was a breach of implied warranty of fitness for a specific purpose as to the trucks purchased and, further, that it was error for the trial court not to find that plaintiff had falsely represented the trucks and equipment were suitable for use in moving oil drilling equipment in mountainous country.

These arguments go to the evidence in support of the findings of fact made by the trial court. As we have so often said on appeals of this character, we will not go further than to determine whether the findings upon which judgment is based are supported by substantial evidence.

The controlling findings, if so supported, are that the promissory note was executed for a good and valuable consideration; that there was no false representation made by the plaintiff to the defendant to induce the defendant to execute the note; and that defendant failed to sustain the allegations of his answer. The answer pleaded false representation and perhaps set forth sufficient further allegations of fact to raise the issue of failure of consideration for breach of warranty.

The history of the controversy, stated in narrative fashion, and based upon the evidence most favorable to plaintiff-appellee, is set out in following paragraphs.

The defendant, a drilling contractor, entered into a contract with Skelly Oil Company to drill a well in southern Utah at a location 140 miles distant from the then location of his drilling rig at Dove Creek, Colorado, which he agreed to move to the

site. He did not have trucks with which to move the rig and on June 27, 1951, he entered into negotiations with the plaintiff, a trucking contractor, in Eunice, New Mexico, hoping initially to obtain the services of the plaintiff in transporting the rig. The plaintiff, however, did not have a permit from the Interstate Commerce Commission enabling him to go into Utah with his trucks and the transaction culminated with defendant purchasing from plaintiff two small auto trucks, a large tandem truck and three trailers, all second-hand, for an agreed price of $23,000, of which $12,000 was to be paid within sixty days and the balance on or before December 1, 1951, the defendant giving his promissory note therefor. The note provided for an additional ten percent liability for attorney fees if given to an attorney for collection and the plaintiff took back a chattel mortgage on the trucks and equipment sold as security for the note.

It is admitted that when the contract was entered into the defendant advised the plaintiff he would have to move his rig in rough, rugged mountain country and when the defendant asked whether the trucks would do the job in question the plaintiff said they would. The plaintiff testified the trucks were fully usable when sold and one of his witnesses testified that immediately preceding the time they were purchased by the defendant he had used the trucks in moving drilling equipment and had never had any trouble with them.

After the purchase defendant engaged truck drivers to take the trucks to Dove Creek, Colorado. While on the trip and shortly after leaving Vaughn, New Mexico, the tandem truck threw its drive shaft and universal joint and had to be pulled into Albuquerque, New Mexico, for repairs. The remaining trucks were driven on to Colorado as was the tandem truck after its repair.

All of the trucks had difficulty of one type or another, but defendant kept them and used them to haul part of his rig, stating, however, that they were never able to haul the entire rig and that he had to expend $3,000 in their repair.

The defendant returned to New Mexico after the rig had been moved and went to see the plaintiff asking for reimbursement for the repairs made, which the plaintiff refused, whereupon the defendant stated he was bringing the trucks back. Following this occurrence, and apparently about the middle of September, 1951, nearly two months after the contract of purchase had been made, the trucks arrived in Eunice and defendant again came to plaintiff's place of business, asking where the trucks should be taken. The plaintiff told the defendant not to put them in his (plaintiff's) yard, but to put them at "Watson's or any place you want to." At about the same time the trucks were returned the defendant deposited $9,000 in a bank for partial payment on his note.

The plaintiff testified that at the time of the return of the trucks he did not think the defendant made any complaint that the trucks were not in good condition at the time they were purchased, but that the defendant did state the trucks had been torn up in Utah.

One of plaintiff's witnesses, a truck salesman for a concern not involved in this litigation on whose grounds the trucks were apparently placed, testified he had examined the trucks after their return and that they were not in a usable condition. The truck cabs were badly shaken up and dented, the tires were bad and when the trucks were sought to be moved after standing on the lot a few days they could not be started. Plaintiff testified the tires had no rubber on them to speak of, that one truck had no axles, that another did not have a head on it and that they were completely torn up and not usable. He credited the condition the trucks were in to bad handling.

The trucks were later sold at public auction. Although other bidders were present, they made no offers for purchase and the plaintiff bid the trucks in for $3,000, with which sum defendant was credited on his note. Plaintiff still retains the trucks and they are not fit for any use without extensive repair.

There is ample evidence here that the trucks were in usable condition when the defendant bought them and were being used for the transport of drilling equipment. Whether they were in fact capable of successful operation in the rough terrain over which defendant was moving his rig was a disputed question with evidence being offered by plaintiff to the effect they were capable of it, but had been mishandled, and plaintiff testified defendant told him the trucks had been torn up while in Utah. The fact that defendant made the $9,000 payment on the note after full knowledge of all the claimed defects certainly indicates either he had waived them or they resulted from some intermediate condition for which he knew plaintiff was not responsible.

We think the lower court was justified in ruling this was not a case of false and fraudulent representation and its finding that none was made to induce the sale is supported by substantial evidence.

As already noted, defendant makes a point that this was a case of breach of implied warranty of fitness for a specific purpose. He points to certain of his requested findings of fact in an effort to show this was an issue in the case and relies upon the same testimony to show breach of warranty as has already been set out with regard to the issue of false representation.

Viewing the pleadings, testimony and requested findings liberally in favor of the defendant, the most that can be said is that the facts in dispute perhaps raised the legal question, but it is obvious from the record that defendant's case was really tried upon the theory of the defense of false represen-

tation. Even if defendant be permitted to avail himself of this theory on appeal, it is still of no benefit to him, for, as already demonstrated, the evidence of breach of warranty was controverted by plaintiff's testimony, the trial court heard the witnesses, viewed their demeanor and decided in favor of the plaintiff that the note in question was executed for a good and valuable consideration upon evidence we consider to be substantial. Its judgment should be affirmed and it is so ordered.

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

296 P.2d 474

Earl STULL and Bessie C. Stull, Plaintiffs-Appellees,

v.

The BOARD OF TRUSTEES OF THE DONA ANA BEND COLONY COMMUNITY GRANT, et al., Defendants-Appellants.

No. 6036.

Supreme Court of New Mexico.

April 9, 1956.

Rehearing Denied May 10, 1956.

Edwin Mechem, Las Cruces, for appellants.

T. K. Campbell, Las Cruces, for appellees.

COMPTON, Chief Justice.

This is a quiet title action. Appellees filed their complaint alleging fee simple ownership of the premises involved. The answer denied allegations of substance. Further answering, appellants made claim to an undivided interest in the premises, and from an adverse judgment, they appeal.

Appellees' predecessors in title, Oscar Lohman and Vincent B. May, acquired 173 acres of land by patent from the United States Government. Subsequently, Lohman conveyed an undivided one-half interest therein to one Mary J. Cuniffe, who held the same as tenant in common with the patentee, Vincent B. May, until the date of her death in 1931. She left a last will and testament, devising her interest to three sisters, Nora Bennett, Clara Peacock and Alice Lohman. In 1931, the sisters, Nora Bennett, Clara Peacock and the heirs of Alice Lohman, then deceased, conveyed the north half of the tract to the Town of Las Cruces, describing the same by metes and bounds. Co-tenant, Vincent B. May, did not join therein. Subsequently, the Town of Las Cruces conveyed that tract to appellee, Earl Stull.

Later, in 1941, Vincent B. May died intestate, leaving his widow as his only heir. On July 20, 1942, she conveyed the south half of the tract, the premises involved on appeal, to appellee, Earl Stull, describing the same by metes and bounds. Neither the beneficiaries of Mary J. Cuniffe nor the heirs of Alice Lohman joined therein; however they now claim an undivided one-half interest therein.

The trial court found that appellees had established their title by adverse possession; hence, were fee simple owners thereof. The pertinent finding was that appellees had been in actual, visible, exclusive, hostile and continuous possession, under color of title, for a period of more than 10 years prior to bringing the action, and that during this time they had timely paid all taxes levied against the premises.

A review of the record convinces us the finding is amply supported by substantial evidence. Generally the controlling factor in determining whether the acts of dominion exercised, constitute open, hostile and exclusive possession, is the character and use to which the premises

are adapted. In this respect, the premises were covered with brush, greasewood and sand dunes. Appellees immediately, after acquiring the premises, established corners by placing concrete markers or monuments. They cut (brushed) a path 2 or 3 feet wide around the exterior boundaries where any one going on the premises would very likely notice it. This path has been kept opened at all times. Later, iron pipes were placed at the corners. Various witnesses testified as to having gone upon the premises and observing the boundaries and corners. Some testified that the boundaries were as noticeable as a fence. There is evidence that appellees posted "no dump", "dumpers will be prosecuted", and "please don't dump" signs, on the premises in 1942, which were maintained to date of trial. Also, appellees blocked some old roads across the premises. Further, they paid all taxes when due. We think these acts of dominion were sufficient to give notice to appellants that the property was claimed adversely to them.

In Baker v. Trujillo De Armijo, 17 N.M. 383, 128 P. 73, 75, the court said:

> "* * * to constitute an adverse possession there need not be a fence, building, or other improvement made; it sufficing, for this purpose, that visible and notorious acts of ownership be exercised, for the statutory period, after an entry under claim and color of title. * * *
>
> "The uses to which the property can be applied, or to which the owner, or claimant, may choose to apply it, the nature of the property, and its situation are largely controlling factors in determining what acts of ownership might be considered requisite to the assertion of an adverse claim. * * *
>
> "'All the law requires therefore, is that the possession, or rather acts of dominion by which it is sought to be proved, shall be of such a character as may be reasonably expected to inform the true owner of the fact of possession and an adverse claim of title.'"

Also see Lummus v. Brackin, 59 N.M. 216, 281 P.2d 928; G O S Cattle Co. v. Bragaw's Heirs, 38 N.M. 105, 28 P.2d 529; Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719.

Appellees' possession, under color of title, was not only sufficient to convert the possession of the grantees into adverse possession but it operated as an ouster and disseizin of all co-tenants. Witherspoon v. Brummett, 50 N.M. 303, 176 P.2d 187; Baker v. Trujillo De Armijo, supra.

Error is assigned for failure to comply with Rule 52(b) (5), our Rules of Civil Procedure, which reads:

> "All requested findings of fact and conclusions of law not included in the court's decision as herein provided, shall be by the court marked "Re-

fused", and shall be filed as a part of the record proper."

Appellants tendered many findings of fact supporting their theory of the case which were refused. The court did not separately mark each finding "refused", but entered an order as a part of the decision refusing all requested findings and conclusions submitted by the parties in conflict with those made by the court. We think the formal order satisfied the requirements of the rule. Its effect was to deny all of appellants' requested findings. Edwards v. Peterson, N.M., 295 P.2d 858; Sandoval County Board of Education v. Young, 43 N.M. 397, 94 P.2d 508. The findings made by the court having substantial support in the evidence, the refusal to find to the contrary was not error. Guzman v. Avila, 58 N.M. 43, 265 P.2d 363.

The judgment rests on both adverse possession and equitable partition. In view of the announced conclusion, however, we need not discuss the latter question. But see Earle v. Delaware L. & W. R. Co., 270 Pa. 152, 113 A. 196; Young v. Edwards, 33 S.C. 404, 11 S.E. 1066, 10 L.R.A. 55; Highland Park Mfg. Co. v. Steele, 4 Cir., 235 F. 465; Starr v. Brooks, Tex.Civ.App., 222 S.W. 660, 661. Also compare Madrid v. Borrego, 54 N.M. 276, 221 P.2d 1058.

The judgment will be affirmed, and It Is So Ordered.

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

296 P.2d 476

J. Hampton HOGE, Leo V. Killion, Michael R. Panelli, and the State Compensation Insurance Fund, Appellants,

v.

FARMERS MARKET AND SUPPLY COMPANY OF LAS CRUCES, Inc., Defendant-Appellee,

and

Farmers Market Trucking Company, Inc., Defendant.

No. 5967.

Supreme Court of New Mexico.

April 18, 1956.

Garland & Sanders, James T. Martin, Jr., Las Cruces, for appellants.

J. D. Weir, L. J. Maveety, Las Cruces, for appellee.

KIKER, Justice.

This suit is upon a promissory note executed and delivered to plaintiffs by Farmers Market Trucking Company, Inc., hereinafter called Trucking Co. J. W. Taylor was secretary-treasurer of Trucking Co. and held the same office in Farmers Market and Supply Company of Las Cruces, Inc. M. D. Bostick was president of both corporations.

The time came when Taylor desired to dispose of his stock in Trucking Co. and Bostick desired to dispose of his stock in Market Co. In consequence, there was executed and delivered an agreement over the signatures of both individuals and both corporations.

The agreement became a part of the record proper by being attached, in full, to defendant's answer. By this agreement, Market Co. assumed and promised to pay three certain promissory notes owing by Trucking Co. to designated creditors; also to discharge open accounts owing by Trucking Co. to Market Co. totalling $21,672. There is attached to the contract an "Exhibit A" showing accounts totalling $30,278.49. The only reference in the agreement to this exhibit is found in paragraph 2(e) thereof which reads:

> "To assume, pay off and discharge any *further* or *additional* obligations and indebtedness owing by Farmers Market Trucking Co. as of Aug. 1, 1952 other than appears on or is specified in itemized list of accounts payable of said Farmers Market Trucking Co., marked Exhibit A, attached hereto and made a part hereof." (Emphasis ours.)

Upon final consummation of the agreement, Bostick was to receive $3,000 and take over Taylor's stock in Trucking Co. and then Taylor was to have Bostick's stock in Market Co.

As between Taylor and Bostick the agreement seems to have been kept and performed fully. Trucking Co. apparently moved its operations to El Paso, Texas.

After plaintiffs' note was due, suit was filed. Trucking Co. entered no appearance in the court below and does not appear here. Plaintiffs pleaded the substance of the paragraph above quoted from the agreement; and that their note was owing, though not due, when the agreement was made, so claiming the right to recover from Market Co. Defendant, Market Co., by answer, joined issue, pleading among other things that it was never the intention of the parties that Market Co. should assume, pay off and discharge the note in suit.

Plaintiffs offered the note and contract in evidence and, after both were admitted, rested. Thereupon, defendant offered proof of the intention of the parties when contracting. Plaintiffs strenuously objected, urging that defendant's attempt was to change, vary and modify, by parol evidence, the clear and unambiguous terms of a written agreement.

In support of the proposition that, where the terms of an agreement are plainly stated, without ambiguity, the intention of the parties must be ascertained from the language used, and that parol evidence is, in that situation, wholly inadmissible, plaintiff cites the following cases: Fuller v. Crocker, 44 N.M. 499, 105 P.2d 472; E. I. DuPont De Nemours & Co. v. Claiborne-

Reno Co., 8 Cir., 64 F.2d 224, 89 A.L.R. 238; Franciscan Hotel Co. v. Albuquerque Hotel Co., 37 N.M. 456, 24 P.2d 718; Pople v. Orekar, 22 N.M. 307, 161 P. 1110; Alford v. Rowell, 44 N.M. 392, 103 P.2d 119; and others, but we consider the point so well established as a legal principle that citation of authority is not really necessary.

Market Co., appellee, argues that consideration of this contract must take in the entire contract as a whole and not a mere sentence or isolated paragraph and cites Colorado Telephone Co. v. Fields, 15 N.M. 431, 110 P. 571, 30 L.R.A.,N.S., 1088, in support of that proposition; also Franciscan Hotel Co. v. Albuquerque Hotel Co., supra.

As we have indicated previously, we agree with appellant as to the requirement of the law that the meaning of the contract, if it can be done, must be ascertained from a consideration of the contract itself; that parol evidence will never be taken as to the intent of the parties unless there is uncertainty and ambiguity in the contract. We now agree with appellee that a single sentence or paragraph may not be selected as the entire dependence for the determination that a contract is clear and plain as to its meaning, or that it is uncertain, indefinite and ambiguous.

Considering the contract involved in this case as a whole, and not depending upon paragraph 2(e) solely, the following questions seem to arise: Did Trucking Co. have outstanding more than three promissory notes? If it did have, why was it that only three promissory notes were mentioned for payment by Market Co., as shown by paragraphs 2(a), 2(b), and 2(c)? If Trucking Co. owed other promissory notes, by whom was it intended by the parties that they were to be paid? Who was to pay and discharge the open accounts mentioned in Exhibit A to the contract? What was to become of these accounts?

There is no direct answer in the contract to any of the questions just stated.

Paragraph 2(e) is, in its language, to say the least, confusing. It binds Market Co. to pay off and discharge any further or additional obligations and indebtedness of Trucking Co. other than the open accounts mentioned in Exhibit A. As we view the matter, that language might have been intended, by its own terms and considering nothing else, to bind Market Co. to pay off and discharge all accounts listed on Exhibit A and any further and additional obligations. The language might also mean that, considering the contract only, Market Co. would not pay the accounts shown on Exhibit A and would pay any other accounts outstanding and owing by Trucking Co.

The contract is peculiar in that, as to certain promissory notes and discharge of the account owing to Market Co., the contract is definite and certain on the subject of what Market Co. agrees and assumes to pay and discharge but is not definite and certain as to any open accounts.

If the contract is to be interpreted as appellants have contended throughout, the

obligations thereof could have been well stated in a single paragraph providing that Market Co. would assume, pay and discharge all promissory notes and all debts and accounts of every kind and character except, perhaps, the open accounts listed on Exhibit A. This is the meaning which appellants give to the contract. Appellee contends to the contrary that it was the intention of the parties, by the use of the language found in the agreement, that Market Co. would assume, pay and discharge three promissory notes and no more; that Market Co. would remit and discharge open accounts owing by Trucking Co. to Market Co.; that Market Co. was not bound to pay the open accounts listed on Exhibit A, but was bound to pay any open accounts owing by Trucking Co. that might later come to the knowledge of the parties; and that, at the full consummation of the agreement, Market Co. would pay to Bostick $3,000 and take over his stock. It is not clear to us from a consideration of the contract itself that either party is entirely correct in its appraisal of the agreement.

We think the contract is ambiguous and requires explanation. Curiosity would compel us to inquire why the contract places a positive burden upon Market Co. as to three notes and certain accounts owing to itself and why, in paragraph 2(e), it places an unknown burden, if it does, upon Market Co. If that is its meaning, the same curiosity would compel us to inquire why, if Market Co. was to take over all obligations of Trucking Co., or even all except those listed on Exhibit A, it was necessary to write the contract in its present form.

While we do not wish to appear critical, we cannot speak in highly complimentary terms of the form of this particular contract.

We hold that the trial judge was correct in taking testimony to show the true intent of the parties to the contract as to the indebtedness to be assumed and paid by Market Co.

The third proposition relied upon by appellants, holders of the note in suit, for reversal is that one would be bound by an agreement supported by consideration to assume and pay the debts of another and this obligation is enforceable by third party beneficiaries under such contracts.

Appellants submit in support of this proposition the following cases: Johnson v. Armstrong & Armstrong, 41 N.M. 206, 66 P.2d 992; Lawrence Coal Company v. Shanklin, 25 N.M. 404, 183 P. 435; Fuqua v. Trego, 47 N.M. 34, 133 P.2d 344; Rankin v. Ridge, 53 N.M. 33, 201 P.2d 359, 7 A.L.R.2d 510; Concrete Steel Co. v. Illinois Surety Co., 163 Wis. 41, 157 N.W. 543; Note to 81 A.L.R. 1279; 17 C.J.S., Contracts, § 582, p. 1220; 12 Am.Jur. 825.

Appellee, Market Co., admits the legal proposition stated by appellants but urges that appellants, creditors, are not shown in any way to be third parties included within

the terms of the agreement or intended by the parties to the agreement when it was written so to be.

Appellee urges that one claiming to be a third party beneficiary of an agreement made by others has the burden of proving that he was intended by the makers of the agreement to be such beneficiary, either individually or as a member of a class of beneficiaries; and that neither the agreement nor the evidence shows that appellants were intended as beneficiaries of the agreement. Appellee cites the following authorities in support of this proposition: Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290; Phez Co. v. Salem Fruit Union, 113 Or. 398, 233 P. 547; 12 Am.Jur. 812; Wasson v. O'Gara Coal Co., 7 Cir., 199 F. 770; Mercantile National Bank at Dallas v. McCullough Tool Co., Tex.Civ.App., 250 S.W.2d 870; In re Conay's Estate, Sur., 121 N.Y.S.2d 481.

We think that each of the parties has correctly stated a proposition of law under the point submitted by appellants. It is undoubtedly true that a contract may be made by two or more people so that a third party or third parties will be beneficiaries of the agreement. It is likewise true that one who claims to be such beneficiary must show, either from the contract itself or from evidence, that he is the beneficiary intended by the parties or is a member of a class of beneficiaries intended by the parties. This proposition of law is not only supported by the authorities cited by appellee in this connection, but it is also an established doctrine in the State of New Mexico, declared in McDonald v. Mazon, 23 N.M. 439, 168 P. 1069. In that case the appellee claimed to be a beneficiary under a resolution of a corporation to assume certain debts of another with whom it was dealing. We quote therefrom at page 447 of 23 N.M., at page 1072 of 168 P.:

> "If it be assumed that the language used in the resolution was simply ambiguous and might have been explained by parol evidence, nevertheless the evidence offered by appellees failed to give meaning to the language or to explain away the ambiguity. The burden was upon the appellee to establish the fact that the corporation had assumed the payment of this particular debt. This burden he failed to meet, and for this reason the trial court was in error in awarding judgment against the Mazon Estate, Incorporated. There was no error in giving appellee judgment against appellant Leopoldo Mazon, as the facts clearly establish his individual liability on the note."

We have stated above that the court did not commit error in admitting testimony as to the intention of the parties at the time of making the contract and in the use of the language actually employed in the agreement. We have not spoken of error and do not do so now as to the admissibility of any particular question. The appellants

have made no point on this appeal of the admissibility of any particular question. They merely contended that no evidence was admissible in the case and that, no evidence being admissible, the court erroneously made certain findings.

If objections to some of the questions asked should have been sustained there was still sufficient testimony in the record to support the findings and conclusions of the court. Both Mr. Taylor and Mr. Bostick testified, as did others to whose testimony we do not ascribe any great importance. Both Mr. Bostick and Mr. Taylor, the makers of the contract for the corporations, testified in substance that it was the intention of the parties by the language used in the contract that Market Co. would pay and discharge the three promissory notes mentioned in the agreement and no other notes owing by Trucking Co.; that it would forgive the indebtedness of Trucking Co. on open accounts then owing to itself; that Trucking Co. would pay the accounts listed on Exhibit A; and that, inasmuch as drivers for Trucking Co. were compelled, here and there to incur indebtedness in behalf of Trucking Co., Market Co. would assume and pay, other than the accounts listed on Exhibit A, any open accounts owing by Trucking Co. which were not determinable at the time of the contract.

The evidence properly admitted in the case is sufficient to support the findings of fact made by the trial court, and the conclusions of law made by the trial court naturally, properly and correctly follow from the findings of fact made.

The judgment of the lower court should be and is hereby affirmed.

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

296 P.2d 751

STATE of New Mexico, ex rel. Mrs. V. F. ADAIR and G. T. Rea, Petitioners,

v.

The Honorable Edwin L. SWOPE, Judge of Division Three of the District Court of the Second Judicial District of the State of New Mexico, Respondent.

No. 6054.

Supreme Court of New Mexico.

April 24, 1956.

This is an original proceeding in prohibition to restrain respondent from proceeding further in a Valencia County case, wherein State of New Mexico, ex rel. The Attorney General of New Mexico is plaintiff and Otis Q. Criswell, William H. De Parcq, I. L. Furlow, Sydney J. Hayter and the Atchison, Topeka and Santa Fe Railway Company are defendants, and to compel respondent to rescind an order previously entered by him directing the taking of relators' depositions.

The decision turns on whether respondent has jurisdiction of the Valencia County case, and we readily conclude that he has. The history of the case is illuminating. The complaint, by its first cause of action, alleges that the defendant Criswell claimed a right of action for damages against the defendant Atchison, Topeka and Santa Fe Railway Company, arising out of an accident occurring near Mountainair, New Mexico, on January 16, 1953; that the defendant DeParcq, an attorney of the Illinois bar, was employed by Criswell to collect and prosecute his claim; that said cause of action was filed by De Parcq in Creek County, Oklahoma, for and on behalf of Criswell; that the employment of DeParcq for Criswell was solicited by the defendants Hayter and Furlow in violation of § 18–1–28 et seq., New Mexico Statutes, 1953 Compilation. By a second cause of action it is alleged that Hayter and Furlow are not attorneys and are not licensed to practice law in New Mexico; that De Parcq,

Irving E. Moore, Albuquerque, for petitioners.

Richard H. Robinson, Atty. Gen., Fred M. Standley, Asst. Atty. Gen., for respondent.

Grantham, Spann & Sanchez, Albuquerque, for Atchison, T. & S. F. Ry. Co.

COMPTON, Chief Justice.

Hayter and Furlow were engaged in a course of conduct and operated a scheme and device to obtain the employment of DeParcq as attorney to collect personal injury claims arising in New Mexico against various railway companies operating in New Mexico, including the defendant Atchison, Topeka and Santa Fe Railway Company; that prospective claimants are solicited by Hayter and Furlow to employ DeParcq as attorney on a contingent fee basis; that Hayter and Furlow are paid a portion of the attorney fee charged by DeParcq for their services in soliciting claims for him. The action then sought to enjoin Criswell from continuing the employment of De Parcq; to enjoin the Atchison, Topeka and Santa Fe Railway Company from negotiating a settlement of his claim with De Parcq, Hayter or Furlow; to enjoin De Parcq, Hayter and Furlow from soliciting employment in New Mexico of any attorney in the prosecution of claims against railway companies; and, to enjoin De Parcq from soliciting employment personally or through his agents, or dividing fees with them.

The defendant Atchison, Topeka and Santa Fe Railway Company admitted the allegations of the complaint. By cross-claim, it sought to permanently enjoin the further acts of the defendants De Parcq, Hayter and Furlow in such unlawful activities.

Thereafter, a consent decree was entered by the defendants Hayter and Furlow, whereby they were permanently enjoined from such further solicitation of employment in the prosecution of claims arising within New Mexico and from sharing in fees charged by attorneys in the prosecution of such claims. So much for the Valencia County case.

De Parcq now represents Mrs. Adair in an action brought by her in Oklahoma against the Atchison, Topeka and Santa Fe Railway Company, growing out of the accidental death of her husband in New Mexico in 1955, and a motion was filed by the Attorney General for authority to take depositions of relators who reside in Clovis, New Mexico. An order was entered by respondent granting such authority, but relators refused to answer certain questions propounded to them by deposition. They were cited into court for refusal to answer, and after a hearing, the court entered an order compelling them to do so. It was at this stage of the proceeding we issued our alternative writ.

Relators argue that the judgment entered against Hayter and Furlow is final as to all defendants, including Criswell and De Parcq. They mistake the effect of the judgment. Neither Criswell nor De Parcq have been served with process and the cause is pending as to them. Likewise, the cross-claim of the defendant, Atchison, Topeka and Santa Fe Railway Company, is pending. Whether Hayter and Furlow, or either of them, were instrumental, directly or indirectly, in soliciting Mrs. Adair's

claim for De Parcq, is still a proper subject of inquiry in determining whether Hayter or Furlow may have violated the orders of the court. Clearly, the court retains jurisdiction to make such determination. Furthermore, relators are in no position to raise the jurisdictional question, not being parties to the Valencia County suit.

It follows that the alternative writ of prohibition was improvidently granted and should be vacated. It is so ordered.

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

296 P.2d 752

Autry Bruce SHANAFELT,
Plaintiff-Appellant,

v.

T. S. HOLLOMAN, Defendant-Appellee.

No. 5948.

Supreme Court of New Mexico.

April 26, 1956.

Neal & Girand, Hobbs, for appellant.

G. T. Hanners, Howell Spear, Lovington, for appellee.

KIKER, Justice.

This case was instituted by Autry Bruce Shanafelt against T. S. Holloman on the claim that Lot 6 of Block 121, Highland Park Addition, City of Hobbs, and Lot 10 of Block 95, Original Town of Hobbs, Lea County, were their community property while they were husband and wife.

It was alleged that the parties were married in the year 1947 and were divorced in Ector County, Texas, on the 9th day of November, 1953; that the New Mexico property was not mentioned in the property settlement or decree in Texas; that the de-

fendant husband had received rentals from the property since the date of divorce; and plaintiff prayed for a decree that she owned a one-half undivided interest in said real estate and for an accounting of all rents and profits from said properties since the divorce of the parties.

Defendant answered alleging that the parties were married on June 9, 1947, and divorced on the stated date, but denied that the properties described in the complaint were ever the community property of the parties. Defendant alleged that he owned Lot 6 of Block 121, Highland Park Addition, before the marriage of the parties but then still owed part of the purchase price which he was paying in small monthly installments; that the balance due was approximately $450 at the time of the marriage; that defendant owned other separate property when the parties were married and that the monthly installments on said Lot 6 were paid by defendant after the marriage from the rents, income and profits from his separate properties. Defendant further alleged affirmatively that plaintiff had no right, title or interest in said Lot 6, known as 205 E. Park, Hobbs. He further alleged that Lot 10, Block 95, Original Town of Hobbs, known as 315 North Houston, was purchased by defendant on July 11, 1949, during the marriage of the parties for the approximate sum of $3,700, and that $2,300 of the purchase price was paid from the proceeds of the sale of defendant's separate property, and he alleged that the balance of $1,400 was paid by him with rents, income and profits from other separate property owned by him, and that the said Lot 10 was his separate property.

Defendant admitted that he had received monthly rentals from the said Lot 6, the property at 205 E. Park, but alleged affirmatively that plaintiff had wrongfully received and retained rentals of $65 per month on the property at 315 North Houston, being Lot 10, Block 95, Original Town of Hobbs, and stated that she should be required to account to him for rentals received therefrom.

Defendant filed a counter claim by which he alleged that when the parties were married, plaintiff owned Lots 6, 7, and 8 of Block 95, Original Town of Hobbs, known as 307–9–11 North Houston, subject to certain mortgage indebtedness in the amount of $750, and that two days after the marriage, defendant, at plaintiff's special instance and request, paid the $750 for plaintiff's account, retiring the existing mortgage; that thereafter, in April, 1948, at the special instance and request of plaintiff, defendant paid the sum of $600 for adding one room to a four-room house located on the property at 307–9–11 North Houston; that in August, 1948, defendant paid approximately $2,000, at the special instance and request of plaintiff, for building a house consisting of two rooms and bath on the rear of one of the lots at 307–9–11 North Houston; that in 1950, at plaintiff's special instance and request, defendant ex-

pended $200 for building a bathroom onto a two-room house located on plaintiff's said property; that, during a paving program in Hobbs, defendant, during the marriage of the parties, paid approximately $850 for paving assessments against the said property of the plaintiff; and that all of the said payments were made by defendant from his separate property.

Defendant further alleged that the parties owned their separate properties, as above stated, at the time of their divorce, and that all of said properties should be taken into account in settling the property rights of the parties. Defendant further alleged that he was entitled to a lien against the said property of the plaintiff in the aggregate sum of $4,400 on account of expenditures by him made as he had alleged; and that he was entitled to have the amount of his lien increased by the total receipts of plaintiff from rentals on defendant's property at 315 North Houston, being Lot 10, Block 95, Original Town of Hobbs.

Plaintiff, answering, denied specifically the various allegations in defendant's counter claim. The issues between the parties were made up in cause numbered 11426 on the docket of the Lea County District Court as above stated.

Plaintiff also brought suit against defendant in cause numbered 11324. In this case she alleged that defendant was indebted to her on account of two promissory notes, one in the sum of $1,800, and the other in the sum of $900, the first being made on July 18, 1948, and the second on July 29, 1948. For answer the defendant filed a general denial.

At the trial, in cause No. 11324, the defendant was permitted to file trial amendments in which he asserted the bar of the statute of limitations; and that there was no consideration for the execution of either of the notes. Affirmatively, defendant also pleaded that there had been a material alteration in each of the notes without the knowledge or consent of defendant in that the dates had been changed and that the notes were therefore void on account of material alteration.

The two suits were consolidated for purposes of trial and are here on appeal from the judgment of the district court covering both cases. Plaintiff below is the appellant here.

As to cause No. 11324, the court found as matter of fact that there was no consideration for either of the notes; and that they were not intended by the parties, when executed, to be binding obligations of the defendant. These notes were held to be void.

As to Lot 6 of Block 121, Highland Park Addition, the court, found this to be the separate property of defendant, but subject to a lien in favor of the plaintiff for $426.-40, being one-half of community funds paid on the balance of the purchase price.

The court found also that Lot 10 of Block 95, Original Town of Hobbs, being

315 North Houston, was the separate property of defendant and that it was not intended by the parties that the title thereto should have been taken in the name of both parties in joint tenancy. The court found that this lot was subject to a lien in favor of the plaintiff for $700, being one-half of $1,400 paid on the balance of the purchase price from funds belonging to the community after the initial payment was made from the separate funds of defendant.

The court found that plaintiff is indebted to defendant on account of rents collected from 315 North Houston in the sum of $65 per month since July, 1953. The total amount was not calculated in the findings of fact and conclusions of law made by the court, but at the time of judgment, which was entered on January 27, 1955, rent so collected amounted to $1,170.

The court found that the plaintiff was the owner of Lots 6, 7, and 8, Block 95, Original Town of Hobbs, but subject to a lien in favor of defendant in the amount of $2,525 for improvements made thereon from his separate funds.

After crediting the amount of the liens allowed to plaintiff upon the total indebtedness of plaintiff to defendant, the trial court found a balance in favor of defendant in the sum of $2,568.60.

Judgment was entered in accordance with the findings as to ownership of lots and balance of indebtedness from plaintiff to defendant. Plaintiff's appeal follows.

The appellant has properly assigned error as to the findings of fact made by the court as to the ownership of the lots adjudged to be defendant's separate property. Plaintiff also assigned error as to the findings and conclusions of the court as to the notes sued on in cause No. 11324, and as to the judgment.

Appellant states two points as basis for the claimed error as to the ownership of Lot 10, Block 95, Original Town of Hobbs, involving assignments of errors 1 to 8, inclusive. The two points are argued together and challenge the finding of the court that the property just described is the separate property of defendant, but is subject to a lien in favor of plaintiff for $700, that amount being one-half of community funds used in the payment of the balance of the purchase price remaining after an initial payment of $2,300 had been made by defendant from his separate property; and that plaintiff is indebted to defendant for rents collected from the described property since July, 1953, at the rate of $65 per month; and the conclusions of law made by the court based upon said findings. Appellant further claims error in the refusal of the court to give findings of fact and conclusions of law contrary to the findings and conclusions made by the court.

■ The first point is, "Property acquired by purchase during the existence

of a marriage is community property under the laws of the state of New Mexico, even though some separate funds may have been used in making the purchase." The argument is that this result follows even when the purchase is made by one spouse by an initial payment from his separate funds.

This is in direct conflict with former decisions of this court. From Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010, 1020, we quote:

> "Property acquired in community property states takes its status as community or separate property at the very time it is acquired, and is fixed by the manner of its acquisition. [Citing cases.] If property is acquired by the wife it is her separate property at that very time, and the fact that a part of the purchase money is later paid out of the community or separate estate of the other spouse does not alter such status. [Citing cases.]"

Two propositions of law are stated in the second of appellant's points. The first is that any property acquired by purchase during marriage is presumed to be community property; and the second is, in order to overcome the presumption, clear, strong and convincing proof to the contrary is necessary.

In section 57-4-1, N.M.S.A.1953, the presumptions as to ownership of property acquired after marriage by either husband or wife are stated. There are several exceptions. One of these is that where property is acquired by husband and wife by an instrument in writing in which they are described as such, the presumption as to community property does not obtain if a different intention is expressed in the instrument.

Appellant, in support of the contention that clear, strong and convincing testimony, a higher degree than a mere preponderance of evidence, is necessary, cites In re Trimble's Estate, 57 N.M. 51, 253 P.2d 805. The Trimble case was dealing with an apparently attempted transmutation of community property into real estate to be held in joint tenancy. The court held, Justice Sadler dissenting, that in order to effect the change, clear, strong and convincing evidence must be adduced as to the intention of the parties. The court also held that the evidence in that case did not meet the quantum of proof required.

We are not dealing here with a situation such as that which existed in Re Trimble's Estate, supra. We are dealing with the original acquisition of real estate where the testimony is conflicting as to the funds with which it was purchased. The purchase was made during the marriage and the court found, in effect, that the initial payment, about 62% of the purchase price, was paid by defendant from his separate funds, and that the community later advanced $1,400 to complete payment. By so holding, the court was taking the testimony

of the husband as convincing of the existing facts.

Where the acquisition of property has been involved, this court has stated in several cases that the presumption of community property may be overcome by a preponderance of evidence. Strong v. Eakin, 11 N.M. 107, 66 P. 539; Barnett v. Wedgewood, 28 N.M. 312, 211 P. 601; Carron v. Abounador, 28 N.M. 491, 214 P. 772; In re Faulkner's Estate, 35 N.M. 125, 290 P. 801; Roberts v. Roberts, 35 N.M. 593, 4 P.2d 920; McElyea v. McElyea, 49 N.M. 322, 163 P.2d 635.

We find substantial evidence supporting the findings of fact as to said Lot 10 and they will not be disturbed.

Appellant, for Point Three, states, "A husband who advances funds for the payment of a mortgage on and for the improvement of the separate property of his wife is not entitled to reimbursement in the absence of a specific agreement established by clear evidence."

The court found that Lots 6, 7 & 8, Block 95, Original Town of Hobbs, were the separate property of plaintiff who had filed her suit seeking a decree for the determination of property rights between herself and her former husband.

The court found that the defendant, a few days after the marriage of the parties, paid $700 to satisfy a mortgage against plaintiff's said lots. The court held, and we think properly so, that this payment was from defendant's separate funds and that he was entitled to collect the amount from plaintiff. The court further found that plaintiff's property was improved by the expenditure of the sum of $3,650 from community funds. The court took one-half that amount and added to it the sum of $700 paid on the mortgage, holding defendant entitled to collect the total sum of $2,525 from plaintiff. As security for defendant, the court impressed a lien upon the real estate above described and directed that, in case the indebtedness was not paid within a certain length of time, the property should be sold to satisfy the indebtedness.

Appellant's Point Three is not well taken. This court has previously ruled to the contrary in at least two very well-considered opinions.

In the first, Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010, 1022, Mr. Justice Brice, speaking of the rental value of a farm owned by the wife, said:

> "This rental value could be set off against any claim appellant might have for his part of the community funds paid to settle appellee's separate mortgage debts."

In McElyea v. McElyea, 49 N.M. 322, 163 P.2d 635, 637, Mr. Justice Brice made a statement which adds force to all that is

said herein with respect to appellant's Points One and Two, and in its closing language fully covers appellant's Point Three:

> "That the credit of the appellee belonged to the community was held in Laughlin v. Laughlin, 49 N.M. 20, 155 P.2d 1010; but we also held in that case that property acquired in New Mexico takes its status as community or separate property at the time and by the manner of its acquisition; and if a part of the purchase money is later paid by other funds than those of the owner of the property, whether of the community or an individual spouse, the owner is indebted to the source of such funds in that amount, but such payment does not affect the title of the purchaser."

This statement goes further than the statement quoted from Laughlin v. Laughlin, supra, in that it declares that the owner of separate property becomes indebted to his or her spouse for any separate funds of that individual expended upon that property. Such an indebtedness would not arise, however, if the improvements were made over the objection of the owner. Point Three must be ruled against appellant.

Appellant presents her Points Four and Five jointly. In effect, these points state that when the separate property of the wife is used for community purposes, the wife is entitled to reasonable rental value during its term of use by the community; and that in case the community has expended money in the improvement of that property, the wife is entitled to offset the reasonable rental value of the property against the claims for the benefit of the community for improvements.

Defendant claims that plaintiff can have no benefit from the rental value of her separate property used by the community for the reason that no such question, point or issue was raised by the pleadings of plaintiff. Appellee further objects saying that appellant is attempting to inject an extraneous issue into the case; and asserts that he had no opportunity to bring evidence before the court to contest this point.

The briefs and the record show that both plaintiff and defendant were interrogated as to the reasonable rental value of plaintiff's residence occupied by them and that both testified as to the monthly rental value. The minimum stated as such value was $80. The testimony was pertinent and admissible upon the question of the rights of the parties with respect to advances made by defendant appellee for the improvement of plaintiff's property.

As to defendant's claim that he had no opportunity to produce evidence on the question of rental value, we fail to see how any other evidence would have been of

any avail to defendant when he testified, admitting the occupancy, that the reasonable rental value of appellant's separate property used by the parties as a residence was $80 per month. The appellant had placed the rental at a higher amount.

Plaintiff requested a finding of the court to the effect that for the first five years of the married life of the parties they lived in the property just above described and that in any accounting as to the indebtedness of plaintiff to defendant on account of improvements made on that property, defendant should be charged with the reasonable rental value of the property, occupied as a residence by the community, $80 per month, making a total of $4,800.

The plaintiff properly reserved exceptions to the finding made and to the refusal of requested findings pertinent to the point.

It is admitted by the parties that the husband, the wife, and her two children by a previous marriage occupied the house belonging to the wife for a period of five years after their marriage. It was in evidence that the minimum reasonable rental value of the property so occupied was $80 per month.

We have previously said that defendant should recover from plaintiff the amount of money expended from his separate funds in the improvement of plaintiff's property. Plaintiff claims that she should be entitled to set off against defendant's lien the reasonable rental value of her separate property while occupied as a family residence.

Under the circumstances, we are of the opinion that plaintiff is not entitled to full rental value for the use of her separate property. The improvements placed upon plaintiff's property by defendant, and the paving paid for by him, made the rental value thereof higher than it previously had been, and increased the sale value of the property, and this increase will continue for years to come. Both parties benefited from the living arrangements made. Plaintiff and her two children had a better home in which to live than had formerly been the case or than would have been the case had they occupied the defendant's smaller house at 205 E. Park. Defendant received rentals from his separate property during this period.

Each of the parties having come into equity seeking equitable determination of property rights, will be required to do equity. The record in this case convinces us that the equities of the parties are virtually in balance and the claims of each should off-set those of the other.

With respect to cause numbered 11324, it is only necessary to say that the two notes in suit were executed for the purpose of perpetrating a fraud by one or the other of the parties thereto. The appel-

lant contends that the notes were executed by the parties to assist defendant in the perpetration of a fraud and she argues that the defendant is estopped to claim that the notes are void for want of consideration. On the other hand, it is argued by defendant that the notes were executed for the purpose of enabling plaintiff to perpetrate a fraud.

It is not claimed by either of the parties that there was any actual consideration about the matter of the execution of the notes. Whether the fraudulent purpose was that of the appellant or of the appellee, both knew that the notes were being executed for a fraudulent purpose and without consideration.

In this situation the court will leave the parties exactly as it found them. Delgado v. Delgado, 42 N.M. 582, 82 P.2d 909, 118 A.L.R. 1175. The trial court was correct in dismissing this cause.

The judgment with respect to cause No. 11426 should be reversed and remanded with instructions to the lower court to revise its judgment in accordance with this opinion. The judgment with respect to cause No. 11324 should be affirmed.

Each of the parties should bear one-half of the costs in this court.

It is so ordered.

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

296 P.2d 759

Robert GARCIA, Claimant, Plaintiff-Appellant,

v.

NEW MEXICO STATE HIGHWAY DEPARTMENT, Employer,

and

Mountain States Mutual Casualty Co., Insurer, Defendants-Appellees.

No. 6057.

Supreme Court of New Mexico.

May 1, 1956.

Joseph L. Smith, Henry A. Kiker, Jr., Oscar H. Beasley, Albuquerque, for appellant.

A. T. Hannett, G. W. Hannett, T. G. Cornish, Albuquerque, for appellees.

McGHEE, Justice.

Plaintiff brought action under the Workmen's Compensation Act against his employer, New Mexico State Highway Department, and its insurer, Mountain States Mutual Casualty Co., for compensation for personal injuries resulting from an automobile accident which occurred February 10, 1953. Claim was filed on April 26, 1954. By answer the defendants set forth that the defendant employer, as an agency of the state, was immune from suit without its consent and further that plaintiff's claim was barred because not filed within one year after the defendant insurer's failure or refusal to pay compensation; dismissal was asked as to both defendants.

A hearing was had before the court and, in accordance with findings of fact and conclusions of law made by it, judgment of dismissal was entered as to both defendants.

The plaintiff appeals from the dismissal of the claim as to the defendant insurer, arguing his claim was not barred by the statute of limitations, § 59–10–13, N.M.S.A. 1953, in that payment of certain of his medical expense by the insurer in November, 1953, constituted payment of compensation within the purview of the Workmen's Compensation Act and effectively removed the bar of the statute of limitations, or that his delay in filing his claim was

caused in whole or in part by conduct of the defendants in paying his medical expense and making offer of settlement, which led claimant to believe compensation would be paid, relying upon § 59–10–14, N.M.S.A.1953.

At the hearing before the court plaintiff's deposition, taken by stipulation of the parties, was presented and considered by the court. Both sides filed requested findings of fact and conclusions of law. The findings of fact made by the court may be summarized as follows:

On February 10, 1953, the plaintiff, while working as a field man for the New Mexico State Highway Department, suffered an accidental injury arising out of and in the course of his employment at or near Bernalillo, New Mexico. The defendant insurer paid installments of compensation to him beginning February 11, 1953, and continuing through March 10, 1953. At all times since March 10, 1953, plaintiff has known of his disability and has claimed a permanent disability as a result of his accident but claim was not filed until April 26, 1954. Under § 59–10–18, N.M.S.A. 1953, compensation, once started, is to be paid at regular intervals of not more than sixteen days apart and the next compensation from the insurer became due not later than March 26, 1953. The defendant insurer failed to make compensation payment on that date and has failed to pay regular installments of compensation since March 10, 1953. The only conduct claimed by plaintiff to have led him to believe compensation would be paid is set forth in his deposition and briefly summarized is that in other compensation cases involving the highway department settlements had been made by the compensation carrier, of which plaintiff had knowledge, and that defendant insurer had paid certain of plaintiff's doctor bills subsequent to the last payment of compensation and consented to his being further treated.

The court concluded that plaintiff failed to file his claim within one year from the failure of the defendant insurer to pay the installment of compensation to which the plaintiff was entitled on or about March 26, 1953, and that the claim was barred under § 59–10–13, supra; that no conduct of the employer or insurer led plaintiff to believe his installments of compensation would be paid and that plaintiff's claim should be dismissed.

We will first consider the question whether payment of medical expenses by an employer or insurer constitutes a payment of compensation under our Workmen's Compensation Act tolling the period of limitation. Section 59–10–13, supra, provides, so far as material here:

> "The compensation herein provided shall be paid by the employer to any injured workman entitled thereto in semi-monthly instalments as nearly equal as possible excepting the first instalment which shall be paid not later than thirty-one (31) days after the

date of such injury. * * * In event such employer shall fail or refuse to pay the compensation herein provided to such workman after having received such notice, or, without such notice when no notice is required, it shall be the duty of such workman, insisting upon the payment thereof, to file a claim therefor in the manner and within the time hereinafter provided. In event he shall either fail to give such notice within the time required, or fail to file such claim within the time hereinafter required, his claim for such compensation and all right to the recovery of the same and the bringing of any legal proceeding for the recovery thereof shall be and is hereby forever barred. * * * *In event of the failure or refusal of any employer to pay any workman entitled thereto any instalment of the compensation to which such workman may be entitled* under the terms hereof, such workman shall be entitled to enforce the payment thereof by filing in the office of the clerk of the district court a claim which shall be signed and sworn to by the injured workman or some one on his behalf before any officer authorized to administer oaths, and *filed not later than one* (1) *year after such refusal or failure of the employer so to pay the same.* * * *" (Emphasis supplied.)

The plaintiff argues that because payments for surgical, medical and hospital services and medicines are included in the description of "compensation" under § 59–10–19, N.M.S.A.1953, they should also be considered to be a payment of an instalment of compensation tolling the period of limitation. The defendant insurer contends, on the other hand, that the last mentioned section, and § 59–10–18, N.M.S.A. 1953, when read in conjunction with § 59–10–13, supra, make it clear that reference to installments of compensation means payment of semi-monthly benefits and cannot mean payments in discharge of medical expense.

Section 59–10–18, supra, provides, in part:

> "No compensation shall be due or payable under this act * * * for any injury which does not result in either the temporary disability of the workman lasting for more than seven (7) days or in his permanent disability or permanent injury, as herein described, or death; Provided, however, that if the period of temporary disability of the workman shall last for more than four (4) weeks from the date of the injury, then compensation under this act * * * shall be payable in addition to the amounts hereinafter stated in a like amount for the first seven (7) days after date of injury.
>
> "But for any such injury for which compensation is payable under this act * * * the employer shall in all proper cases, as herein provided, pay to the injured workman or to some

person authorized by the court to receive the same, for the use and benefit of the beneficiaries entitled thereto, compensation at regular intervals *or* [of] no more than sixteen (16) days apart, in accordance with the following schedule, * * *."

Section 59–10–19, supra, provides, *inter alia:*

"No compensation shall be allowed for the first seven (7) days after injury is received except where such injury results in disability of the workman for more than four (4) weeks, then compensation shall be allowed from the date said injury occurred; * * *

"After injury, and continuing so long as medical or surgical attention is reasonably necessary, the employer shall furnish all reasonable surgical, medical, osteopathic, chiropractic and hospital services and medicine, not to exceed the sum of seven hundred dollars ($700.00), unless the workman refuses to allow them to be furnished by the employer, provided nevertheless: In the event hospital, medical and surgical attention is necessary, in excess of the above sum and the employer refuses to furnish the same, the employee may make application to the district court for an order requiring the employer to furnish such additional hospital, medical, and surgical services as may be found by the court to be reasonably necessary to fully and completely care for the employee.

* * * * * *

"Compensation for all classes of injuries shall run as follows:

"Surgical, medical and hospital services and medicines, as provided in this section. After the first seven (7) days, compensation during temporary disability lasting less than four (4) weeks from date of injury and provided that after four (4) weeks from date of injury if the workman continues to be temporarily disabled, then also for the first seven (7) days, until the injury has healed, and thereafter compensation as provided in this act * * * as amended according to the condition of permanent total or permanent partial disability the workman has suffered as a result of the injury. * * *"

Plaintiff in support of his contention the period of limitation was tolled by payment of medical expense relies upon numerous cases from other jurisdictions passing upon the question under their compensation statutes, the question never having been ruled upon by this Court. A considerable number of these cases are digested in the annotation entitled: "Payments, or furnishing medical or hospital services, or burial, by employer or his insurer, to employee after injury, as affecting time for filing claim under Workmen's Compensation Act," 144 A.L.R. 606, 617, under the general statement:

"Where the facts are sufficient to show that an employer or his insurance carrier has furnished an injured employee medical and hospital services, it is generally held that this constitutes a payment of compensation, or a waiver which suspends the running of the time for filing a claim for compensation."

Of course, the wording of the limitation provisions varies from state to state, but our examination of the authorities relied upon shows the following cases to be typical of this line of authority: Industrial Commission of Colorado v. Globe Indemnity Co., 1923, 74 Colo. 52, 218 P. 910; Richardson v. National Refining Co., 1933, 136 Kan. 724, 18 P.2d 131; McEneny v. S. S. Kresge Co., Mo.App.1932, 53 S.W.2d 1075, and Baade v. Omaha Flour Mills Co., 1929, 118 Neb. 445, 225 N.W. 117.

The Colorado statute has since been amended to provide that furnishing of medical, surgical or hospital treatment by the employer shall not be considered payment of compensation within the meaning of its limitation provision, but the decision in Industrial Commission of Colorado v. Globe Indemnity Co., supra [74 Colo. 52, 218 P. 911], was based upon a statute providing:

"'* * * If no such notice is given, and no payment of compensation has been made within one year from the date of the accident, the right to compensation therefor shall be wholly barred.'" § 62, p. 515, Colo.Laws 1915.

It was there held:

"* * * defendant in error claims that no compensation was paid within the year, but the employer within that time paid certain hospital, surgical, and medical expenses of the claimant, which plaintiff in error says is compensation under the act. With that we agree. Such payment is clearly within the meaning of the word compensation. See Webster, Century Dictionary, Words & Phrases, First & Second Series, pages 1352, 826, and the use of the word elsewhere in the Act; e. g., § 57(1). This conclusion is strengthened by the fact that the Act of 1919, C.L. § 4458, expressly excepts such expenses and certain others from the payments of compensation which will prevent the bar."

The statute before the Kansas court, § 44-520a, Rev.St.Supp., 1931, in the case of Richardson v. National Refining Co., supra [136 Kan. 724, 18 P.2d 132], provided:

"'No proceedings for compensation shall be maintainable hereunder unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or to his duly authorized agent, * * * or in cases where compensation payments have been suspended within ninety (90) days after the date of the last payment of compensation.'"

Of a contention like that made here, the Kansas court declared:

"* * * The answer to this question lies in the statute. R.S.Supp.1931, 44-510, provides, among other things, as follows: 'The amount of compensation under this act shall be: (1) Treatment and care of injured employees. It shall be the duty of the employer to provide the services of a physician or surgeon and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches and apparatus, as may be reasonably necessary to cure and relieve the workman from the effects of the injury; but the cost thereof shall not be more than $100, nor shall the period of time during which same are to be provided exceed sixty (60) days from date of accident.' It will be seen that the statute provides that the furnishing of medical aid is the payment of compensation.

"Since this is the case, we conclude that the written claim for compensation was filed within time."

In McEneny v. S. S. Kresge Co., supra [53 S.W.2d 1077], the statute considered was described as providing:

"* * * that no proceeding for compensation shall be maintained unless the claim therefor be filed with the commission within six months after the injury, it also provides that in case payments have been made on account of the injury or death within six months from the date of the last payment, the date for the filing of the claim is extended to date from such last payment. * * *" (§ 3337, Mo. Rev.St., 1929)

The court continued:

"* * * It is essential, therefore, to determine what is a last payment within the provisions of this section.

"Section 3311, Rev.St.1929 (Mo.St. Ann. § 3311 and note) provides that in addition to all other compensation the employee shall receive and the employer shall provide such medical, surgical, and hospital treatment, etc., as may reasonably be required.

"Thus it will be seen that section 3311 specifically provides that medical treatment shall be considered as a part of the compensation the employee shall receive * * * [citing cases], and since payments on account of an injury within six months preceding the date of the filing of the claim tolls the statute, it seems to us that since the rendition of medical services at the instance of the employer or his insurer comprises part of the compensation of the injured person, therefore, if the employer or his insurer has caused the rendition of medical services to the injured person, it constitutes the payment of compensation under the Workmen's Compensation Act * * *."

In Baade v. Omaha Flour Mills Co., supra [118 Neb. 445, 225 N.W. 118], the statute declared:

> "'In case of personal injury, all claim for compensation shall be forever barred unless, within one year after the accident, the parties shall have agreed upon the compensation payable under this act, or unless, within one year after the accident, one of the parties shall have filed a petition as provided in section 3680 (3062) hereof. * * * Where, however, payments of compensation have been made in any case, said limitation shall not take effect until the expiration of one year from the time of the making of the last payment.'" (§ 3061, Neb. Comp.St., 1922)

The Nebraska court ruled:

> "Without going more into detail, we think the defendants by their conduct recognized liability, and this, in part, from the fact that their physician had not released plaintiff, and also because the expenses for medical and hospital services were paid by the defendant's insurance company almost up to the time that plaintiff filed his claim for compensation. The payments made by plaintiff's employers to his physician for hospital expenses and the like clearly constitute payments of compensation within the meaning of section 3061, Comp.St.1922, above cited, which provides, *inter alia,* that 'said limitation shall not take effect until the expiration of one year from the time of the making of the last payment.'"

The review of these cases and statutes is somewhat lengthy, but this exposition is deemed necessary to demonstrate what we deem to be a major and crucial difference between other statutes and ours —a difference to which we cannot close our eyes even under the canon of liberal construction of the compensation act to effect its remedial purposes. The difference is that under our law the act which sets the period of limitation running is the failure or refusal of the employer to pay any workman entitled thereto any *installment* of the compensation to which such workman may be entitled.

The qualifying word "installment" does not appear in the statute of limitations of any other state among the many we have examined and which have been called to our attention.

We are of opinion that the use of this word in the limitation provision, considered in conjunction with other provisions of the act set out above, compels the conclusion that the period of limitation commences to run upon the failure or refusal of employer or insurer to pay the regular semi-monthly benefits established under the act. By the inclusion of this word the legislature has rendered our statute even more restrictive in this regard than those statutes from jurisdictions where it has been held the giving of medical benefits and the making

of payments therefor do not constitute payment of compensation which will toll the period of limitation. See, for example: Marshall v. Pletz, 1943, 317 U.S. 383, 63 S. Ct. 284, 87 L.Ed. 348; Royer v. United States Sugar Corporation, 1941, 148 Fla. 537, 4 So.2d 692; Pipes Chevrolet Co. v. Bryant, Ky.1954, 274 S.W.2d 663, and Paolis v. Tower Hill Connellsville Coke Co., 1919, 265 Pa. 291, 108 A. 638.

It must therefore be held that the trial court correctly ruled plaintiff's claim was not seasonably filed, unless plaintiff is correct in his contention that the delay in the filing of claim was caused in whole or in part by conduct of the defendants in the matters of paying for his medical care and making offer of settlement (which offer he refused) which reasonably led him to believe compensation would be paid.

In his deposition plaintiff testified:

"Q. Now, you have alleged in your claim, Bob, that the defendants' conduct—the defendants are New Mexico State Highway Department and the Mountain States Mutual Casualty Company—has reasonably led you to believe that compensation to which you are entitled will be paid in full. Now, what has been their conduct? A. Well, in my work I have done a lot of safety work. Every time they fire a safety man I take over the job. I handle the papers and send them on to Santa Fe. That was the impression I got—don't worry about anything this man will be taken care of. After I had seen Dr. Forbis and Dr. Clark they told me it was time I needed to get better. So I just kept on taking time to see what I could do to improve my knee. And I figured when nothing else could be done for my knee, ankle and back I would get settlement for it that was reasonable.

"Q. This was the conduct of the Highway Department? A. Not so much the Highway Department—it was the insurance people.

"Q. And just what had they done? A. When somebody did get hurt we put in a report, and call them and they take good care of them, get treatment and doctor bills and everything right away. When the times comes around they will be around to take care of your settlement and whatever claim you have against them.

"Q. Was that all of their conduct which you relied on as having led you to believe that you were going to get compensation? A. No, that was not the only thing that led me to believe that I would get compensation. I knew I had a disability. I was pretty sure that they would compensate me for it. After I had exhausted all the methods the doctors had given me —Dr. Forbis showed me how to walk on my foot to relieve the pressure on my back. The insurance people said it was perfectly all right to go to Dr. Forbis and try him out.

"Q. Well, was there any other conduct that you can think of? A. No, sir. Not offhand. I can't think of anything else.

"Q. Well, summarizing it, would this be a statement of what you said that they did in previous instances when persons had been injured while working for the Highway Department—they had taken care of their claims and had told you to see that good care was taken of them, and that they had said to get good treatment from the doctors and go to such doctors as you see fit? A. Yes, sir.

* * * * * *

"Q. And when were you last attended by any of the three physicians you mentioned. A. I saw Dr. Clark about one and one-half months ago or a month ago.

"Q. And the insurance company has paid all those bills? A. Yes, sir.

"Q. Now, Mr. Fred Calkins—are you acquainted with him? A. Yes, sir. He is with the insurance company.

"Q. Did Mr. Calkins at any time tell you that he would pay you compensation?

"Mr. Hannett: I object to that.

"Q. What did he do? A. Mr. Calkins?

"Q. Yes. A. Well, I seen Mr. Lodens first, and Mr. Lodens offered me $1,750.00.

"Q. When was that? A. It has been quite awhile.

"Q. Within the past year? A. Yes, sir. Then I went back and Mr. Calkins was there, and he was the one that offered me $1,750.00 a couple—three months ago.

"Q. Did he tell you that was all that you were entitled to? A. No, he told me the insurance company was being very generous with me, and he wouldn't offer half that much.

"Q. And he never complained, or did Mr. Loden, about paying your doctor bills? A. No, sir.

"Q. As far as you know, you could still go to the doctors and they would pay? A. Yes, sir.

"* * * * * * *"

The claimant made several requested findings of fact based upon this deposition, as did the defendant insurer and the trial court made the following finding noted above but here set out in full:

"That the only conduct claimed by the Plaintiff to have led him to believe that compensation would be paid is set forth in his deposition and, briefly summarized, is that in other compensation cases involving the highway department, settlements had been made by the compensation carrier, of which claimant had knowledge, and that the Defendant-Insurer had paid certain of his doctor bills subsequent to the last

payment of compensation and consented to his being further treated."

Then the court concluded that no conduct of the employer or insurer led claimant to believe his installments of compensation would be paid.

The utmost that can be said of plaintiff's deposition, viewing it most favorably as to him, is that it raised a question of fact as to whether or not the insurance carrier's or employer's conduct reasonably led him to believe compensation would be paid, and the trial court resolved the question against him. It certainly cannot be said that the conduct asserted had the effect claimed by plaintiff as a matter of law and there is nothing in our decisions in Lucero v. White Auto Stores, Inc., 1956, 60 N.M. 266, 291 P.2d 308, or Gilbert v. E. B. Law & Son, Inc., 1955, 60 N.M. 101, 287 P.2d 992, to bring comfort to plaintiff under such contention.

It is argued in the reply brief of plaintiff that it was improper for the trial court to consider the deposition in making its ruling, but that it was bound to accept as true the statement of plaintiff in his claim that he had been led to believe by the conduct of the defendants that compensation would be paid in full. This argument is untenable because the plaintiff not only acquiesced in the submission of the deposition to the court, but requested extensive findings of fact and conclusions of law which could only have been based thereon.

The order dismissing plaintiff's claim must be affirmed and it is so ordered.

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

KIKER, J., not participating.

297 P.2d 313

James B. DUDLEY, Claimant-Appellee,

v.

FERGUSON TRUCKING COMPANY, a Corporation, Employer,

and

Travelers Insurance Company, Insurer, Defendants-Appellants.

No. 5934.

Supreme Court of New Mexico.

May 15, 1956.

Hubert O. Robertson, Silver City, for appellants.

Garland & Sanders, James T. Martin, Jr., Las Cruces, for appellee.

McGHEE, Justice.

The defendants, employer and insurer, appeal from a judgment of the district court awarding claimant, employee, workmen's compensation benefits.

Claimant sustained a compensable injury when he was helping to load oil well drilling equipment on a truck. A drill collar rolled off a flat bed and struck his right foot. It was necessary that the great toe on this foot be amputated through the proximal portion of the first phalanx. Claimant was hospitalized at Farmington, New Mexico, in excess of two and one-half months, during which time four operations were performed on his foot. The insurer paid for the medical and hospital expense involved and also paid $392.29 for the period of time of claimant's temporary total disability. After claimant's release from

the hospital he moved to Deming, New Mexico, where he commenced work on his brother's farm.

The insurer sent claimant a check for $450 for settlement of his compensation on the basis of loss of the great toe. Claimant refused this settlement and thereafter he was examined by Dr. W. C. Basom, an orthopedic specialist in El Paso, Texas, whose medical report, communicated to the defendant insurer by claimant's attorney, indicated further surgical treatment would probably improve the condition of claimant's foot. The insurer again offered $450 in settlement for the loss of the toe plus $300 for future medical expense and loss of time. This offer, too, was refused by claimant and suit by him was then instituted.

Trial was had to the court which found claimant entitled to compensation at the rate of $30 per week for (a) fifteen weeks for the loss of his great toe, and (b) twenty-five weeks for twenty-five percent permanent disability to his right foot, and, in addition, that he should recover:

(1) $400.00 for necessary medical treatment which will be required in the future;

(2) Four weeks' compensation for temporary total disability incurred in the future as a result of additional medical treatment;

(3) $55 for a specially built boot purchased by claimant;

(4) $34 for medical services rendered by the El Paso doctor;

(5) $350 for services of claimant's attorney.

Judgment was entered making these awards.

The defendants maintain on this appeal that the judgment improperly pyramids the benefits allowed to claimant in that he was allowed compensation for the loss of the great toe on his right foot and also for twenty-five percent permanent disability to the right foot. Principal reliance is placed upon the decision in Gonzales v. Pecos Valley Packing Co., 1944, 48 N.M. 185, 146 P.2d 1017. That case held a workman could not recover an award for loss of a specific bodily member under the statutory schedule and also an award for general percentage disability which, as the Court assessed the proof in that case, was necessarily based upon the loss of member.

Superficially, it would appear that the instant awards do allow claimant double compensation, upon the assumption that the loss of claimant's toe must have at least entered into the computation of disability to the foot. However, the medical testimony, viewed most favorably as to claimant-appellee, and bolstered by all reasonable inferences flowing therefrom, seems to us adequate to support the permissibility of both awards.

Dr. Basom's testimony, by deposition, was, in part:

"Q. Please state what your examination revealed? A. That he had

post-traumatic artrophy and amputations and post-traumatic sesamoiditis and stiffness in the second toe.

"Q. Doctor, would you explain in layman's language what that means? A. This patient had the great toe amputated, more or less totally. Then the remaining part of it and at the end of the bone which connects with the great toe was a very roughened area due to the injury. Then the two small bones called sesamoids were also roughened and made a painful condition in the patient's foot.

"Q. These bones you referred to then, are they primarily in the arch of the foot? A. These bones are located within the phalanges of the foot and along the metatarsal toe region. This is the place—see, here is a little bit of the great toe remaining—here is the joint and here is the second sesamoids. He had a bread (sic) right through there.

"Q. Doctor, you are referring to an x-ray there, and is that x-ray a picture you took of Mr. Dudley's foot? A. Yes, it was taken in our office.

"Q. From your examination, can you estimate the disability, if any, which he has in his foot? A. He has a definite amount of permanent disability to his foot. I would estimate about twenty-five percent.

* * * * * *

"Q. The disability you have testified to—to what portion of the foot are you referring? A. The disability is located in the forepart of the foot just above where the toes join on to the foot.

"Q. The estimate of disability you had made—a moment ago—does that include the loss of the great toe? A. On what the patient has at the present time. I did, however, assume that the toe, of course, was gone.

* * * * * *

"Q. Doctor, in the report which I received from you, you stated there was moderate osteoporosis—would you explain what that is? A. The bones in this patient's foot are very soft. They are not as strong as they normally should be. They are not as white in the x-ray as they are normally seen, and this is a painful condition.

"Q. Did you find osteoporosis present in Mr. Dudley's foot? A. Yes, he had a definite amount. I referred to it as post-traumatic, which is practically the same.

"Q. Is that condition a result of this injury? A. Yes sir.

"(The doctor continued on cross examination:)

* * * * * *

"Q. What factors did you take into consideration in arriving at your esti-

mate of twenty-five percent disability? A. Mine is mainly based on the estimate of how much the foot falls short of being a normal one. The loss of the toe and the involvement in the forefoot area with the pain, were the basis of the estimate. Of course, pain is a very difficult thing to estimate. It was my impression this was about ¾ths as good as a normal foot.

"Q. You did consider the loss of the great toe as one of the factors in arriving at that estimate? A. Well, the toe—and of course the second toe had some disability, too. All of that actually would be included in my twenty-five percent estimate.

"Q. If there had been no involvement of the second toe, no painful scar tissue, roughening of the sesamoids, or fragment of the first great toe phalanx—leaving out those conditions, how much disability would you have estimated just from the loss of the great toe? A. Actually, just the loss of a great toe is merely loss concerned with a toe, and I don't think it would particularly enter into a foot estimate.

"Q. Did I understand, however, that in reaching your estimate, you did lump the loss of the great toe in these other factors in reaching your result? A. I merely estimated the disability as a whole on the foot.

"Q. How much of that twenty-five percent was due to involvement of other parts of the forefoot and how much simply to the loss of the toe? A. I don't think the loss of the great toe enters into the twenty-five percent particularly. The forefoot disability ratings are based on conditions in the forefoot. The toe amputation is a separate proposition if you want to make an issue of that. If you want the man to have an estimate of amputation, there is separate disability for amputation of the great toe. The disability to the forefoot is a disability rating based on conditions in the forefoot and like I say—I made just an estimate of the full disability rating. I just included the toe as part of it. I didn't even put any added disability rating on for the toe loss.

"Q. Would you be able to evaluate the percentage of the loss or usefulness of the entire foot which would be caused by a clean amputation of the great toe without any further disability to the foot? A. I think what you are driving at is actually—I don't think the loss of a great toe is any particular disability rating for the whole foot.

"Q. Do you mean from a legal aspect or from a medical aspect? A. No, I mean medical. In other words, whenever it is an amputated toe by itself, I just call it an amputated toe with no disability rate to the foot.

"Q. Doesn't the loss of any toe affect the usefulness of the whole foot? A. I don't really think so."

Claimant, in his answer brief, asserts: "From this testimony it is quite apparent that Dr. Basom concluded that there were two separate and distinct injuries, one being to the forepart of the foot and the other being the amputation of the great toe." We believe the fact finder was justified in so interpreting this testimony.

It should also be noted that the claimant exhibited his foot to the court, pointing out the parts involved, at which time he testified:

"Q. I will ask you to take off your boot and show to the Court the injury which you sustained?

"Mr. Robertson: We object. It is not material. It is immaterial, incompetent and irrelevant in this case. This is a compensation case.

"(Argument.)

"The Court: I will overrule the objection.

"Q. Would you point out the part of your foot that is still giving you trouble? A. Right in here, and these toes. They are stiff.

"The Court: Are those toes stiff? A. Yes, sir.

"Q. I notice that wound there doesn't appear to be healed. Has it healed to the extent—

"Mr. Robertson: I object to that line of comment and argument.

"The Court: Has that healed? A. No, sir.

"Mr. Martin: I think that's all.

"The Court: Does your foot bother you on the bottom? A. Yes, sir, this bone in here. When there is pressure pushed on this, it pushes those bones up there and aches across here and this, too. I tried to have something made that keeps that toe from hurting. It won't touch the floor when I step down. My toe is sticking up instead of like it should be."

There was substantial evidence before the court that claimant sustained an injury which extended beyond his toe. The testimony given by Dr. Basom may fairly be interpreted that he did not include the loss of the toe in his computation of disability to the foot. As a result of these particular circumstances, this case falls within the principle of our decisions in Mathews v. New Mexico Light & Power Co., 1942, 46 N.M. 118, 122 P.2d 410, and Lipe v. Bradbury, 1945, 49 N.M. 4, 154 P.2d 1000. Similar allowances have been approved in these cases from other states: General Accident, Fire & Life Assur. Corp. v. Beatty, 1932, 174 Ga. 314, 162 S.E. 668; Lane v. Sonken-Galamba Corp., 1925, 119 Kan. 256, 237 P. 875; Fame Armstrong Laundry Co. v. Brooks, 1928, 226 Ky. 22, 10 S.W.2d 478; Lentz v. Mumy Well Service, 1954, 340 Mich. 1, 64 N.W.2d 673.

Defendants under their second point protest that the trial court has allowed an award of compensation for permanent partial disability before an end medical result has been reached. This argument is based upon the medical testimony in the case that claimant's condition would be benefited by a further operation; that claimant has refused at this time to undergo such operation; and that under § 59–10–20, N.M.S.A. 1953, it is in the discretion of the court to reduce or suspend compensation if the workman shall refuse to submit to medical or surgical treatment as is reasonably essential to promote his recovery. As here material, this section provides:

> "If any workman shall persist in any unsanitary or injurious practice which tends to imperil, retard or impair his recovery or increase his disability or shall refuse to submit to such medical or surgical treatment as is reasonably essential to promote his recovery, the court may in its discretion reduce or suspend his compensation."

While the doctors testifying were of the opinion further surgery would eliminate part of claimant's disability, there was other testimony, already noted above, that claimant had present permanent partial disability in his foot which Dr. Basom estimated at twenty-five percent.

Claimant's testimony about the further operation was:

> "Q. Do you want an operation? A. No sir. I have had four and I don't want another. If it gets worse, I will. They told me they would help me every time they operated, but it never seemed to, and I have had four of them. If it gets worse I will have one—if it stays like it is, I won't.
>
> "Court: Then as I understand, you don't want an operation at this time, is that correct? A. No sir. If it stays like it is, I am satisfied. It will be all right."

It cannot be said that claimant's refusal to submit to another operation is unreasonable and the court's finding of present permanent partial disability is supported by substantial evidence.

This brings us, however, to another matter objected to by defendants—that is, the allowance to claimant of $400, the estimated cost of further surgical treatment and four weeks' compensation for temporary disability to be incurred in the future as a result of additional medical treatment. We agree with defendants that our Workmen's Compensation Act contains neither authorization nor suggestion for a present award of future medical expenses and temporary disability benefits where the claimant refuses the present administration of such treatment and it is only speculative whether the treatment will ever be undertaken in the future. Our statute, § 59–10–19, N.M.S.A. 1953, provides, in part:

> "After injury, and continuing so long as medical or surgical attention;

is reasonably necessary, the employer shall furnish all reasonable surgical medical, osteopathic, chiropractic and hospital services and medicine, not to exceed the sum of seven hundred dollars ($700.00), unless the workman refuses to allow them to be furnished by the employer, provided nevertheless: In the event hospital, medical and surgical attention is necessary, in excess of the above sum and the employer refuses to furnish the same, the employee may make application to the district court for an order requiring the employer to furnish such additional hospital, medical, and surgical services as may be found by the court to be reasonably necessary to fully and completely care for the employee.

"Such application shall be informal in character and filed as claims under this act are filed. * * *

"Upon * * * hearing the court shall inquire into the necessity of such additional services and the reasonableness of the cost thereof and shall order such additional services to be paid by the employer or his insurer as the equity of the hearing demands, it being the intention hereof that the employee shall receive all such hospital, medical and surgical treatment and services as may appear to the court to be reasonably necessary."

The defendants have already expended $1,390.06 for claimant's medical treatment; claimant has never requested further medical treatment; instead, he presently refuses it and has been given an award for permanent partial disability based upon his present condition. In this situation, the award made for possible future medical treatment and temporary disability has no justification under the statute.

Claimant, as already stated, was awarded $55 for a specially built boot which he purchased. The defendants challenge the validity of this allowance, as well as an award of $34 given claimant for expense of an examination of his condition made by Dr. Basom. The trial court found the plaintiff was required to wear a specially constructed boot by reason of his injury and that the boot cost $55, that he had received medical services from Dr. Basom and the latter's fee of $34 was reasonable for the examination.

The record discloses that on his own initiative claimant ordered a pair of cowboy boots made for him at a boot and saddle shop in El Paso, Texas, but at no time did he ever notify defendants in any manner of his need of or desire for special shoes or boots, or for any further medical treatment after he left the care of the doctors and hospital in Farmington, except, as already stated, that Dr. Basom's medical report was sent to the defendant insurer by claimant's attorney.

In addition to portions of § 59–10–19, supra, already set forth, it is there provided:

"In case the employer has made provisions for, and has at the service of the workman at the time of the accident, adequate surgical, hospital and medical facilities and attention, and offers to furnish such during the period necessary, then the employer shall be under no obligation to furnish additional surgical, medical or hospital services or medicine than those so provided; * * *."

It is apparently the contention of the claimant that under our compensation act to support the award of the sums for the boot and the medical examination he need only show the expenditures were justified from a medical standpoint and were of reasonable amount.

Certainly these matters must be shown, but it must also be established that some request or demand, however informal, was made upon the employer or insurer to provide the articles or services. We note in this connection the following language from George v. Miller & Smith, Inc., 1950 54 N.M. 210, 213, 219 P.2d 285, 286:

"All medical expenses had been paid by the defendants up to February 7, 1948 the date when the injured workman returned to his regular employment. The record discloses that when the plaintiff filed his claim for compensation on February 24, 1949, he did not at that time claim any additional expenses for medical care. He did, however, on October 12, 1949, file a statement from Dr. Thomas L. Gore, for neuro-psychiatric examination and treatment rendered the plaintiff, from February to August 1949. He did not request additional medical treatment from his employer nor did he apply to the district court for an order requiring the employer to furnish such additional services as required by Section 57–919 of 1941 Compilation [§ 59–10–19, N.M.S.A. 1953]. Consequently, it is apparent that the statute had not been complied with. This is a special proceeding and additional medical services are to be paid by the employer and his insurer only under the terms of the statute. If the terms of the statute relating to such payments have not been met, then, of course, the court cannot order the payment therefor."

See also: Wright v. Schultz, 1951, 55 N.M. 261, 265, 231 P.2d 937; Rowland v. Reynolds Electrical Engineering Co., 1951,

55 N. M. 287, 294, 232 P.2d 689. This is the general rule under statutory provisions similar to ours. 2 Larson, Workmen's Compensation Law, § 61.12; Annotation: 7 A.L.R. 545.

In view of our determination the awards made to claimant for compensation for loss of his great toe and partial disability to his foot should stand, we must reject defendants' final contention on this appeal that they had offered claimant all the compensation to which he was entitled and that an award of attorney's fees in the sum of $350 by the trial court was improper. Claimant's attorneys will be allowed $200 for their services in this Court.

The judgment is reversed and remanded with direction to the trial court to enter judgment in favor of claimant for compensation at the rate of $30 per week for (a) fifteen weeks for loss of the great toe and (b) twenty-five weeks for twenty-five percent permanent partial disability in the right foot, and for attorneys' fees as directed herein.

It is so ordered.

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

KIKER, J., not participating.

297 P.2d 319

H. CROSS, individually, and Alfred G. Butler, trustee, Plaintiffs-Appellants and Cross-Appellees,

v.

Winnie M. RITCH, Defendant-Appellee and Cross-Appellant,

and

Sierra Talc Company, a corporation, Watson L. Ritch, Jr., if living, if deceased, the unknown heirs of Watson L. Ritch, Jr., deceased, and all unknown claimants of interest in the premises adverse to Plaintiffs, Defendants.

No. 5885.

Supreme Court of New Mexico.

May 9, 1956.

Nils T. Kjellstrom, Truth or Consequences, for appellants.

Chavez & Cowper, Belen, for appellee Winnie Ritch.

KIKER, Justice.

In this case plaintiffs filed their complaint to quiet title to "Red Rock Talc Lode Mining Claim" located partly in Dona Ana County and partly in Sierra County. The claim was unpatented and plaintiffs claimed

to be the owners thereof to the exclusion of any and all claims of defendants.

No defendant answered in the case except Winnie M. Ritch, who denied all allegations of plaintiffs' complaint as to ownership, and by counter-claim asserted that she was the owner of "The Red Rock Talc Lode Mining Claim", being partly in Sierra County and partly in Dona Ana County.

The names of the alleged claims, as above quoted, are somewhat different, but their descriptions are the same.

The plaintiffs claim that all attempted locations made prior to the month of December, 1941, were abandoned and that they made a location under the name "Red Rock Talc Lode Mining Claim" in December, 1941, and did everything necessary to complete their ownership as against all other individuals claiming any right or interest or claim of possession thereto.

Defendant Winnie M. Ritch, answering plaintiffs' complaint, denies most of the material allegations stated in the complaint, but states "That she admits that on the 1st day of September, 1941, defendant Watson L. Ritch Jr., together with others, undertook to locate and claim, as a lode mining claim, * * * The Red Rock Talc * * *" and denies abandonment of the claim.

The issues in the case are (a) when and by whom was a valid location of the claim made; (b) whether there was any abandonment of any claims; and (c) who now owns the claim.

At the conclusion of the trial, plaintiffs-appellants requested 30 findings of fact and 9 conclusions of law. Defendant-appellee and cross-appellant requested neither findings of fact nor conclusions of law. The trial court made 8 findings of fact and 4 conclusions of law. Both parties appeal from the decision.

Appellants' statement of facts makes no reference whatever to the findings of fact made by the trial court, nor does it make any reference whatever to the testimony contained in the 283-page bill of exceptions. Without examining the record, we can know nothing of the facts until we come to the assignments of error set out in appellants' brief, as, in stating the assignments of error, appellants copy into their brief the findings of fact made by the court to which they object.

The first finding of fact as to which error is assigned is that on September 1, 1941, H. Cross, L. C. Butler, O. M. Nelson and Watson L. Ritch, Jr., made location of the mining claim in question, placed monuments thereon and posted the necessary notice. The second assignment of error attacks the court's third finding of fact which is that the necessary location work was done on the claim and that the notice of location was duly recorded in Socorro County, New Mexico.

Appellants also assign error as to the court's fourth finding of fact to the effect

that on December 8, 1941, Cross, Butler and Nelson, together with one Nate C. Smith, attempted to make a location upon the same property omitting the name of Ritch as one of the locators.

Plaintiffs-appellants also assert error as to the court's finding No. 5 which is:

> "That the plaintiffs, H. Cross and Alfred G. Butler, as Trustee, own an undivided one-quarter interest each in the Redrock Talc unpatented lode mining claim; that Oscar M. Nelson, sometimes known as O. M. Nelson, according to his testimony sold his one-quarter interest to H. Cross, but that the deed therefor has never been placed of record, and there was no evidence presented to the Court as to its loss or destruction; that the interest of Watson L. Ritch, Jr. in and to said mining claim was conveyed to Winnie M. Ritch and she is now owner of one-quarter interest therein." (Tr. 63)

Appellants also assign error in refusal of the court to make certain findings of fact requested by them, in effect as follows: (1) that on December 8, 1941, Cross, Butler, Nelson and one Nate C. Smith made a location on the same mining property called the Redrock Talc lode mining claim; (2) that this claim was completed by doing the necessary location work and the necessary posting, filing and recording; (3) that Nelson later sold all his interest to Cross; (4) that Butler later transferred his interest to Alfred G. Butler in trust for himself and that said trustee still holds an undivided ¼ interest in the claim; (5) that Cross owns an undivided ¾ interest in the claim; (6) that the claimants under the location notice of September 1, 1941, failed to do the location work required by law; (7) that the notice of location of September 1, 1941 "was not posted upon the ground which said notice of location described and purported to locate until on or after January 1, 1942"; (8) that the purported location of September 1, 1941 was never completed and said location was abandoned; and (9) that Watson L. Ritch, Jr., made no claim to the December, 1941 location. Plaintiffs-appellants requested conclusions of law in accordance with their requested findings. If the court had found as appellants requested, they would have had judgment for the entire mining claim.

So far as we can ascertain, appellants' first point is "The only valid location of the premises was that of December 8, 1941." The quoted statement is found in the closing paragraph of appellants' brief in chief under point one of argument. The argument under point one refers to each of the assignments of error. In an attempt to support the assignments and the point, plaintiffs have written eleven pages of argument which deals almost entirely with facts alleged to be in the record, but not once in those pages is there a reference to the record. From plaintiffs' brief we have no way of finding out what the testimony was as to this point.

This court has stated more than once that it is a court of review and will not search the record in an effort to find facts with which to overturn the findings made by the lower court. Rhodes v. First National Bank, 35 N.M. 167, 290 P. 743; Richards v. Wright, 45 N.M. 538, 119 P.2d 102; Sands v. Sands, 48 N.M. 458, 152 P.2d 399; Gore v. Cone, 60 N.M. 29, 287 P.2d 229; Supreme Court Rule 15 (6). For the reasons stated, we must pass appellants' point one.

Defendant-appellee and cross-appellant Winnie M. Ritch undertakes to argue that the valid location of the claim was not on December 8, 1941, or on September 1, 1941, but on some date in August, 1941, thereby taking a position at variance with both appellants and the court. Appellee did not present this theory by requested findings and did not object to the finding made by the trial court as to a valid location date. The contention appears to have been urged for the first time on appeal and cannot be considered, no proper foundation for review having been laid by requested findings and appropriate objections to the findings of the court. Wright v. Atkinson, 39 N.M. 307, 46 P.2d 667; Brown v. Gurley, 58 N.M. 153, 267 P.2d 134; Miller v. Smith, 59 N.M. 235, 282 P.2d 715. We are convinced, moreover, that the finding of the trial court is justified by the evidence. We must hold that the location of the claim was made September 1, 1941.

Under their second point, appellants assert that H. Cross, for good and sufficient consideration, succeeded to all the right, title and interest of O. M. Nelson, the former owner of a ¼ interest in the mining claim.

The contention is that Nelson and Cross had a clear understanding about this sale and that on August 4, 1942, Nelson executed a mining deed conveying his interest to Cross for a consideration of $700; that the deed was prepared by Charles H. Fowler, then a practicing attorney at Socorro and later a District Judge in New Mexico, who went with Mr. Nelson to the Hot Springs National Bank where the arrangement was completed by which the deed was left with the Hot Springs bank to be delivered to Cross, who resided in New York, upon payment of the check for $700.

It is undisputed that Nelson was one of the locators of the mining claim under any of the three disputed dates. He testified at the trial, without objection, that he did not at that time own any interest in the claim; that he had sold it to H. Cross in 1942 and that Judge Fowler was attorney for Mr. Cross at that time; that he and Judge Fowler went to the bank at Hot Springs together and left a deed with the bank with instructions to deliver the deed to Cross when the $700 check given in payment had cleared; that he left the deed at the bank and had no knowledge what became of it but that the bank paid him the $700; that it

was his intention to convey all the interest he had in the mining location known as Red Rock Talc to Cross at that time and that he had never intentionally since that time made any claim of interest in the mining claim and that he had never intentionally signed any papers since that time concerning the mining claim; that he had nothing left to convey after he signed that deed naming Cross as grantee.

Judge Fowler testified by deposition that the deed conveying the property to Cross was signed in his presence and delivered to the bank in his presence with the understanding that it should be held by the bank until the check in payment was cleared and then it was to be forwarded to Cross by the bank.

Mr. Cross testified by deposition, taken in New York, that he sent his check for $700 payable to the bank which was left with the bank with instructions to collect and deposit the proceeds to Mr. Nelson's account; that after the check had cleared, the Hot Springs National Bank, in their letter of August 14, 1942, "forwarded such deed from Mr. Nelson to me at New York which deed was, unfortunately, misplaced, and has not been located." (Tr. 241)

It is not claimed that there was any other testimony showing that the deed from Nelson to Cross had been lost or destroyed; and the court refused to admit in evidence the copy of the deed which was submitted with Judge Fowler's deposition. The trial court was not seriously impressed, evidently, with the testimony by Mr. Cross as to what happened in New Mexico while Mr. Cross was in New York. The deposition contains statements as to what the bank did with the deed after paying the money to Nelson. The deposition does not state clearly that Mr. Cross ever had the deed in his hands. It merely says that it was forwarded to New York and that it was misplaced and has not been located. When or where the deed was misplaced is not shown. What search was made to locate the deed, if any search was made, does not appear in the evidence. We reluctantly approve of the ruling of the trial court in refusing to admit the copy of the deed.

Defendant, on cross-appeal, urges that she, Winnie M. Ritch, is the owner of the interest formerly held by O. M. Nelson in the mining claim. Once again, defendant made no request of the trial court to find for her on this theory, and did not object to the finding made that O. M. Nelson did not intend to convey this interest to her. In addition, we may say that the finding of the court on the point is supported by substantial evidence.

The judgment of the trial court should be affirmed. It is so ordered.

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

297 P.2d 322

Rosalia Sandoval C. DE BACA, Plaintiff-Appellant,

v.

John FIDEL, Joe Fidel, T. M. Fidel, Rosa S. Nidor, Nazim Joseph Nidor, Continental Bus System, Inc., Transcontinental Bus System, Inc., and Horace P. Vandeventer, d/b/a Yellow Cab Co., Defendants-Appellees.

No. 6040.

Supreme Court of New Mexico.

May 9, 1956.

B. C. Hernandez, Jr., Albuquerque, for appellant.

Iden, Johnson & Mechem, Richard G. Cooper, Albuquerque, for appellees.

LUJAN, Justice.

This is an appeal from a summary judgment entered in favor of defendants and

plaintiff appeals. The parties will be referred to as they appeared in the district court.

The material facts are as follows:

On April 1, 1937, the plaintiff leased to John Fidel certain premises in Albuquerque, New Mexico, for twenty-five years, with an option of renewal at the expiration of said term for a further period of twenty-five years. This lease, among other things, contained the following provision:

> "The tenant shall not, except by way of mortgage of its leasehold estate to secure some actual indebtedness, assign or transfer this lease without the written consent of the landlord."

On October 15, 1942, John Fidel assigned the lease to himself as an individual and to Joe Fidel, T. M. Fidel and A. S. Nidor with the consent of the plaintiff. On the same day the defendants executed a paper denominated "assumption of performance of lease by assignees", as follows:

> "The undersigned, John Fidel, Joe Fidel, T. M. Fidel and A. S. Nidor named as assignees in the annexed assignment, do hereby, in consideration of the consent to said assignment by Rosalia Sandoval C. de Baca, accept the assignment, hereby assuming the obligations of the lease assigned and agreeing to perform and to be bound by all of the terms, conditions and covenants thereof to the same manner and to the same extent as if we had been originally designated as lessees therein."

Thereafter the defendants rented a portion of the premises to one Horace P. Vandeventer and to the Continental Western Lines, Inc., as tenants from month to month of the defendants. The terms of the subletting were for less than the term of the original lease.

On December 15, 1953, the attorney for plaintiff wrote the defendants the following letter:

> "This is to advise you that I represent Mrs. Rosalia Sandoval C. de Baca, and that I am writing you in her behalf.
>
> "I do hereby declare, in her behalf, a forfeiture of that certain lease between you and Mrs. DeBaca, dated May 1, 1937, and the assignment thereof dated October 15, 1942, covering (here description), for the reason of your violation of paragraph 'g' of Article II, which provides in part: 'The tenant shall not, except by way of mortgage of its leasehold estate to secure some actual indebtedness, assign or transfer this lease without the written consent of the landlord.'
>
> "Pursuant to paragraph 'e' of Article III of said lease, you are hereby given thirty (30) days written notice to vacate the said premises, more than sixty (60) days having elapsed since your violation of the lease as set forth above.

"You are further notified that Mrs. DeBaca desires to exercise her election to enter upon the demised premises and that she will take possession thereof on January 16, 1954."

Upon the defendants' refusal to vacate the premises, as requested, the plaintiff instituted this suit for restoration of the property and for damages for withholding the same.

The plaintiff seriously contends that the transaction between the defendants and their above mentioned tenants constituted an assignment or transfer of the lease in violation of the provision thereof. A determination of this question is decisive of this appeal.

Is a covenant in a twenty-five year lease "not to assign or transfer this lease without the written consent of the landlord", violated by a subletting of a portion of the premises, without the written consent of the landlord, for a period shorter than the unexpired term of the original lease? We think not.

A clear distinction between an assignment of the lease and a subletting of the premises is recognized by the authorities. 35 C.J. p. 991, Section 83; 16 R.C.L. p. 832, Section 329; 51 C.J.S., Landlord and Tenant, § 37 d, p. 556; Hobbs v. Cawley, 35 N.M. 413, 299 P. 1073.

The distinction depends upon the quantity of interest that passes by the transfer, and not upon the extent of the premises involved. An assignment transfers the entire interest in the leasehold, or, if the assignment be merely pro tanto, it passes the entire interest in such part of the demised premises. A subletting is a grant of a portion of the term, with some reversionary interest in the sublessor. Hobbs v. Cawley, supra.

Reasonable restrictions upon the alienation of property are enforced, but they are rigidly construed so as to confine their operation within the exact limits defined by the precise terms of restraint. 35 C.J. p. 978, § 61; 51 C.J.S., Landlord and Tenant, § 33; 16 R.C.L. p. 832, § 328; 32 Am. Jur. p. 296, § 327; Hobbs v. Cawley, supra.

It is the general rule that a restrictive covenant in a lease against the assignment thereof is not violated by a subletting of the premises, and a limitation upon the right to sublease is not violated by an outright assignment of the lease. 35 C.J. p. 982, § 68; 16 R.C.L. p. 832, § 329; 16 R.C.L. p. 872, § 375; 51 C.J.S., Landlord and Tenant, § 33 d, p. 544; Hobbs v. Cawley, supra.

In the leading English case of Crusoe v. Bugby, 3 Wilson, 234, 2 Bl.Rep. 766, a tenant for twenty-one years convenanted "not to *assign, transfer* or set over, or otherwise do or put away the premises or any part thereof", without permission of the landlord. Afterwards the lessee *sublet* the premises for fourteen years. It was held that there was no breach of the cove-

nant, on the ground that the demise for fourteen years was an underlease, and not an *assignment.* And it was observed that the landlord, if he so desired, might have provided against a change of possession, as well as against an *assignment,* but that he had not done so in language admitting of no other meaning, and that *"assign, transfer* and set over" were mere words of assignment, and "otherwise do or put away", as there used, meant any other mode of getting rid of the whole interest, and would not be held to *prohibit* the making of an underlease. (Emphasis ours.)

Applying these principles to the instant case, we conclude that the defendants did not violate the provision of the lease against assigning and transferring the same by subletting a portion of the premises for a shorter period than the term of the original lease; and that the court did not err in sustaining the defendants' motion for summary judgment and in entering the judgment it did.

In view of the fact that counsel for the respective parties have agreed that a determination of the question discussed herein is decisive of the case, other points raised for a reversal of the judgment will not be considered. There is no error in the record.

The judgment will be affirmed.

It is so ordered.

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

297 P.2d 325

STATE of New Mexico, Appellant,

v.

R. D. COLLINS, Appellee.

No. 6045.

Supreme Court of New Mexico.

April 25, 1956.

Rehearing Denied May 23, 1956.

Richard H. Robinson, Atty. Gen., Paul L. Billhymer and Fred M. Standley, Asst. Attys. Gen., for appellant.

G. T. Watts, Jerome L. Cathey, Roswell, for appellee.

LUJAN, Justice.

This appeal brings here for consideration a challenge to the constitutionality of Section 3 of Chapter 124 of the Laws of 1951, Section 67–9–15 of 1953 Comp.

Defendant, R. D. Collins, on the 6th day of September, 1954, was charged in a

criminal information with a violation of the above section of the act which provides:

"Restrictions on use of designated terms—Emergency drugs dispensed by physicians, dentists or veterinarians.—No person shall carry on, conduct, or operate a drug store or pharmacy, or transact any business under a name which contains as a part thereof the words 'pharmacist,' 'pharmacy,' 'apothecary,' 'apothecary shop,' 'chemist's shop,' 'drug store,' 'druggist,' 'drugs,' 'drug sundries,' 'prescriptions,' or any word or words of similar or like import, or in any manner by advertisement, circular, poster, sign, or otherwise describe or refer to the place of business conducted by him by the terms 'pharmacy,' 'apothecary,' 'apothecary shop,' 'chemist's shop,' 'drug store,' 'drugs,' 'drug sundries,' 'prescriptions,' or any word or words of similar or like import, unless the place of business so conducted is a drug store or pharmacy in which a registered pharmacist is constantly employed on a regular basis."

The defendant (appellee) moved to dismiss the information on the following grounds: (1) That it is a deprivation of private property without due process or compensation; (2) it constitutes an unreasonable exercise of the police power without reasonable regard toward the health, morals and welfare of the public; (3) it is discriminating in scope and tends to create a monopoly by the pharmacists.

On June 29, 1955, the court made and entered its decision which reads as follows:

"* * * 1. That it is the decision of the Court that the defendant's motion herein be sustained.

"2. The court is rather reluctant to make this decision, as any Court is reluctant to declare a law unconstitutional. However, the Court can see only one reason for the existence of this law. It would have to come under the Police power of the State to preserve the health and safety of the public. The Court can see no way in which the law does this, and on the other hand, it is an unreasonable restraint of trade, and takes property without due process of the law, and is therefore unconstitutional."

On July 12, 1955, the court, based on its decision, made and entered an order dismissing the information, and the State appeals.

It was stipulated by and between the parties: "That the defendant at the time of the filing of the information, and on the date alleged in the information, was operating a retail store * * * under the name and style of 'Packaged Drug Sundries', and that he displayed a sign or signs advertising the name of the store under that name and style; that he was open and engaged generally in the retail business, * * * and sold various items such as aspirin, anacin, milk of magnesia, castor oil, vitamin capsules, nose drops, and the

usual patent medicines like that, but sold in unbroken packages; that it is not contended by the State that he was compounding prescriptive medicines, and that neither is it contended that he was selling patent medicines from broken packages, and further that he did not at that time have on duty a regularly licensed prescription druggist."

"Mr. Watts: I don't believe he is charged with operating a drug store. He is only charged with operating a business under the name that contained the words 'Drug Store,' or 'Drug Sundries,' and did not have employed a registered pharmacist on duty, and that is the section of the statute I am prepared to argue."

The State contends, and correctly so, that the provision of the Act in question does not violate any constitutional provision of either the Constitution of the United States or the Constitution of the State of New Mexico.

We regard the business of selling drugs and medicines as so intimately connected with and having such a vital relationship to the health, safety and welfare of the public that there ought not to be any doubt that its regulation falls within the authority of the Legislature in the exercise of its police power. A determination of what is reasonably necessary for the preservation of the public health, safety and welfare of the general public is a legislative function and should not be interfered with, save in a clear case of abuse.

By enacting the present statute, which comes peculiarly within the province of the police power, the Legislature has determined that to properly safeguard the health, safety and welfare of the public it is necessary to prohibit any person from using the words "drug store" or "drug sundries" or any words of similar or like import in advertising their place of business, unless the place of business so conducted is a drug store or pharmacy in which a registered pharmacist is constantly employed on a regular basis. That determination must be given great weight. Every presumption is to be indulged in favor of the validity of the statute.

The statute is neither discriminatory nor in restraint of trade and does not tend to create a monopoly by the pharmacists as contended by the appellee. Section 67–9–15, supra, further provides: "That nothing in this act contained shall be construed * * * to prevent the sale of non-narcotic, non-poisonous, or non-dangerous patent or proprietary medicines by non-registered persons or stores, when sold in original packages." This proviso evinces a purpose to permit the sale of certain medicines usually found in legitimate drug stores by persons not conducting a drug store or who have these medicines for sale as an incident to the sale of other merchandise, provided they do not advertise their place of business under the words

"drug store" or "drug sundries" or words of similar or like import. The field is left wide open to every one to sell exempted medicines, subject only to the inhibition of the use of such words as connote the establishment to be a drug store.

We held in the case of Arnold v. Board of Barber Examiners, 45 N.M. 57, 109 P. 2d 779, that the question of monopoly and restraint of trade must yield to a more important consideration, that of reasonably exercising the police power of a business or profession having a vital relationship to public welfare and health, and we reaffirm that holding.

It is undoubtedly the right of every citizen to follow any lawful calling, business or profession he may choose, subject only to such restrictions as are imposed upon all persons. State v. Spears, 57 N.M. 400, 259 P.2d 356, 39 A.L.R.2d 595. This right may in many respects be considered as a distinguishing feature of our republican institutions. All businesses, trades and professions are open to every one on like conditions. All may be pursued as sources of livelihood. The interest, or, as it is sometimes termed, the estate in them, that is the right to continue their prosecution, is often of great value to the possessors, and cannot be arbitrarily taken from them, any more than their real or personal property can thus be taken. But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the State for the protection of the public. The power of the state to provide for the general welfare of its people authorizes it to prescribe such regulations as in its judgment are reasonably calculated to secure the public against deception and fraud. So long as they bear a valid relationship to the evil sought to be prohibited, no objection to their validity may be successfully interposed. It is only when they have no relation to such business or profession that they can operate to deprive one of his right to pursue a lawful business or vocation. Appellee insists that by being prohibited from advertising his place of business as "Packaged Drug Sundries" he is deprived of a vested right without due process of law. We perceive nothing in the Act which indicates an intention of the legislature to deprive him or any one else of his or their rights.

The offense with which the defendant is charged falls literally within the language of the proscribed act. "No person shall * * * transact any business under a name which contains as a *part thereof* the words * * * 'drug sundries,' * * * or any word or words of similar or like import, * * * unless the place of business so conducted is a drug store or pharmacy in which a registered pharmacist is constantly employed on a regular basis." 1953 Comp. § 67-9-15 (Emphasis ours.)

No doubt the legislature had in mind prohibiting not alone the open and blatant advertising of a business enterprise as a

"drug store", when it was not, but as well sought to minimize the opportunities for establishments, not drug stores, to mislead the public into believing they were or that they had a department which could fill prescriptions and supply other services of a well regulated drug store or apothecary shop. This he was not permitted to do without the services of a registered pharmacist "constantly employed on a regular basis."

We entertain no doubt about the act's validity so far as the challenges here made against it are concerned. It offends neither the state nor the federal constitution in the respects urged in the motion to dismiss nor in the decision of the trial court.

In reaching the decision we do, we have not overlooked the case of Pike v. Porter, 126 Mont. 482, 253 P.2d 1055, but to the extent that our holding herein conflicts with the views expressed in that case, we decline to follow it. We do not share the apprehension expressed in that opinion that the act will give a monopoly to the registered pharmacists in the sale of patent medicines. Indeed, the defendant in the case at bar might very easily have framed a sign indicating the sale of packaged patent medicines without violating the provision of the act in question.

For the reasons stated, the judgment of the trial court will be reversed and the cause remanded for further proceedings in conformity with the views herein expressed.

It is so ordered.

COMPTON, C. J., and SADLER, J., concur.

KIKER and McGHEE, JJ., dissenting.

KIKER, Justice (dissenting).

This appeal grows out of a criminal prosecution. An information was filed in the District Court of Lincoln County charging the defendant with the violation of section 67–9–15, N.M.S.A.1953. The section of the statute is quoted in the majority opinion. No complaint was made of the fact that the information charged the defendant with the doing of one act "and/or" another. State v. Smith, 51 N.M. 328, 184 P.2d 301.

A motion was made by defendant-appellee to dismiss the information on the claim that the section of the law under which the prosecution was brought is in violation of both the United States Constitution and that of the State of New Mexico in that it is a deprivation of private property without due process of law. Later, at the hearing on the motion, an addition to the motion was allowed, alleging that the section of the law in question constitutes an unreasonable exercise of the police power in violation of Article 2, § 18 of the Constitution of New Mexico and the 14th Amendment to the Federal Constitution; and for the reason that the section is discriminatory in its scope and tends to create a monopoly by the pharmacists in the handling of packaged drugs and drug sundries.

Before considering the propositions of law raised by the amended motion, the parties entered into a stipulation as to the facts, which stipulation is set forth in the majority opinion. The case was then in exactly the same condition as if witnesses had been called, examined and cross-examined. All of the facts in the case were, therefore, before the court at the time of argument on the motion to dismiss. The court ruled with the defendant and entered judgment of dismissal. The State appealed.

The stipulation entered into by the parties and which was considered by the court points clearly, I think, to the vice in the statute involved. That which the stipulation shows the appellee was doing in his place of business was perfectly innocent and in full compliance with the law. He was not engaged in the sale of narcotic, poisonous or dangerous medicines or drugs. He offered for sale only articles in original unbroken packages. The stipulation shows that defendant is guilty of no wrong unless it was criminal conduct for him to advertise his lawful business by a sign on his building, "Packaged Drug Sundries".

In testing the constitutionality of the Act in this case, as in all, we must begin with the presumption that the Act is constitutional; and it will be sustained unless the conflict between the Act and the Constitution is made to clearly appear. In re Southern Pacific Co., 37 N.M. 11, 16 P.2d 402; State ex rel. Hannah v. Armijo, 38 N.M. 73, 28 P.2d 511; State ex rel. New Mexico Dry Cleaning Board v. Cauthen, 48 N.M. 436, 152 P.2d 255.

In State ex rel. New Mexico Dry Cleaning Board v. Cauthen, supra, Mr. Justice Sadler, then Chief Justice, said:

> "The question presented thus reduces itself to a consideration whether, with the price fixing provisions of the act eliminated by our decision in State v. Alexander, supra [46 N.M. 156, 123 P.2d 724], the defendant has successfully challenged it as representing an unreasonable and unwarranted exercise of the police power. This will be answered by deciding whether, as against the attack here made, it bears any reasonable or valid relation to the public safety, health or morals. For, if it does, our inquiry must end, the policy and wisdom of legislation touching such matters being of purely legislative concern." 48 N.M. at page 440, 152 P.2d at page 257.

What reasonable or valid relation exists between a sign on the window of a store reading "Packaged Drug Sundries" and the public safety, health or morals? If the sign appears on the window of a building and one enters inquiring for poisonous drugs or for drugs other than packaged drugs commonly sold in grocery stores, variety stores and elsewhere, he can suffer no more than disappointment at not finding any such article for sale in such a store.

His health is in no way injured; his safety is in no way imperilled; and his morals, if good when he entered, cannot have suffered. That is true as to everyone in the community and those passing through. A mere sign on the window which points to nothing injurious for sale on the inside of the building cannot affect the public health, safety or morals.

In Pike v. Porter, 126 Mont. 482, 253 P.2d 1055, the facts were that plaintiffs, since 1925, had operated a store under the name of Superior Drug Store. In that store there were carried and sold household drugs, confections, paints and miscellaneous merchandise, but no prescriptions were filled and no pharmacy as defined by law was in operation. There was no registered pharmacist in the store.

The Montana law is substantially the same as ours. Section 66-1522, RCM 1947, provides:

> "Use of words 'drug store,' 'pharmacy,' etc. It shall be unlawful for any person to carry on, conduct or transact a retail business under a name which contains as a part thereof, the words, 'drugs,' 'drug store,' 'pharmacy,' 'medicine,' 'apothecary,' or 'chemist shop,' or any abbreviations, translations, extension or variation thereof; or in any manner by advertisement circular or poster, sign or otherwise, describe or refer to the place of business conducted by such person by such term, abbreviations, translation, extension or variation unless the place so conducted is a pharmacy within the meaning of this act, and duly licensed as such and in charge of a registered pharmacist."

Portions of two other pertinent sections of the Montana Code are:

> § 66-1525(c) "* * * nothing in this act shall prevent the sale of common household preparations and other drugs, provided stores selling same are licensed under the terms of this act."

> § 66-1508(a) "The state board of pharmacy shall upon application upon such forms as it may prescribe, and upon the payment of an annual fee of three dollars ($3.00), license pharmacies and stores other than a pharmacy wherein may be sold ordinary household or medicinal drugs prepared in sealed packages or bottles by a manufacturer, qualified under the laws of the state wherein such manufacturer resides. The name and address of such manufacturer shall appear conspicuously on each package sold by such licensee. It shall be unlawful for any such store to sell such household medicinal drugs, without first having secured such license and thereafter keeping the same in force by proper renewal, provided, also, that nothing herein shall be construed to prevent any vendor from selling any patent or proprietary medicine in the original package when plainly labeled, nor such

non medical articles as are usually sold by such vendors."

The only practical difference between the Montana law and the New Mexico law is that in Montana any store selling any kind of medicine or drugs is required to have a license from the pharmacy board. That is not true in New Mexico. § 67-9-18, § 60-1-1, § 60-1-5, N.M.S.A.1953.

Remembering now that the applicant for the license conducted its business under the name of Superior Drug Store, we quote from the opinion of the Montana court:

> "Hence it is clear that plaintiffs holding a license under the Act in question had the right to sell everything which they do sell even though the store is not in charge of a registered pharmacist.
>
> "Can they be deprived of the use of the name 'drug' in advertising their business? We think not, because we believe the means employed by the legislature, viz., the attempt to prevent the use of the name 'drug' in its advertising has no reasonable relation to the public health or safety but tends merely to create a monopoly in the sale of drugs.
>
> "It attempts to give to registered pharmacists the right to sell the drugs in question by the use of the word 'drug' in advertising and excludes that right from every other person. It makes no requirement that the registered pharmacists who may use the name and sell the drugs make any analysis, inspection or examination of the drug to be passed on by him to the purchasing public." 253 P.2d at page 1056.

Again we quote from the decision in Pike v. Porter, supra:

> "There is nothing in the statutes that requires those who are authorized to use the name 'drug' in advertising household remedies to in anywise protect the public or to give advice that would tend to promote their safety, health, or welfare. The provision excluding those who are not registered pharmacists from the use of the word 'drug' in advertising household drugs bears no reasonable relationship to the protection of human life, health or safety but merely discriminates in favor of a certain class and is in consequence unconstitutional and invalid" 253 P.2d at pages 1056-1057.

See also Noel v. People, 187 Ill. 587, 58 N.E. 616, 52 L.R.A. 287, 79 Am.St.Rep. 238; State v. Stephens, 102 Mont. 414, 59 P.2d 54; State v. Wood, 51 S.D. 485, 215 N.W. 487, 54 A.L.R. 719.

In State v. Stephens, supra (Mont.1936), the defendant, a grocer, was convicted upon a charge of selling aspirin in original packages without a license. This case is interesting for the reason that it is a criminal case and in addition involves the ac-

tual sale of aspirin and not the mere advertising that packaged drugs could be bought in defendant's store. The charge was that the merchant sold an original package without having a license to do so and that he was not a physician, wholesale dealer or registered pharmacist and did not have a registered pharmacist in charge of his store.

At the time, a section of the Montana law made it unlawful for any person other than a registered pharmacist to sell any kind of medicine or drugs or to institute or conduct any kind of store wherein drugs were sold unless a registered pharmacist was in charge of the business.

This is, I think, an exceptionally well-considered case. The writer of the opinion discussed a good many cases having to do with statutes similar to that of Montana. All of the cases had to do with sales, not merely with advertising.

In reaching its decision, the Montana court quoted from Noel v. People (Ill.), supra, and from State v. Wood (S. D.), supra, another well-considered case.

As to restricting the sale of common remedies and proprietary medicines to pharmacists, the court in State v. Stephens, supra, spoke as follows, quoting State v. Wood, supra:

> "'It is argued that pharmacists have knowledge of the effect of medicines they sell; this is no doubt some protection against accidental injury resulting from ignorance, but it is not plain that pharmacists do know the ingredients of patent and proprietary medicines, or that they are required to use or possess any knowledge in making a sale of such medicines. If one has a doctor's prescription filled at a drug store, he buys not the medicine alone, but the druggist's knowledge and skill in dispensing it; but if he were to buy Watkins' Pain-Oleum at the drug store, what more would he buy than if he bought elsewhere? Certainly neither knowledge nor skill, unless the druggist is bound to know the ingredients and their effects upon the human system, and to warn a purchaser, if there be any danger in its use. * * * It does not seem that merely selling an article, though that article be medicine, can be classed as the practice of a learned profession.'" 59 P.2d at page 57.

I approve of the reasoning of the Montana cases.

There is one case and only one which on its face lends apparent support to the opinion of the majority here, but which, I think, when seriously considered, fails to do so and even as to part of the declarations found in the opinion there is support for the position taken in this dissent. This is the case of People v. Bernstein, 237 App.Div. 270, 261 N.Y.S. 381, 382, decided in 1932.

The defendant Bernstein was convicted upon a charge of violation of a section of the New York law, as follows:

> "'Unauthorized use of terms. No person or corporation shall hereafter carry on, conduct or transact business under a name which contains as a part thereof the words "drugs", "medicines", "drug store" or "pharmacy", or similar terms or combinations of terms, or in any manner by advertisement, circular, poster, sign or otherwise describe or refer to the place of business conducted by such person or corporation by the terms "drugs", "medicines", "drug store" or "pharmacy".'"

The court stated that there were two methods of violating the statute: "(1) By the use of the interdicted words in the trade-name of an unlicensed person. (2) By the use of the terms 'drugs,' 'medicines,' 'drug store,' or 'pharmacy' in advertising the place of business conducted by an unlicensed person."

The defendant had a sign on his store which read Boro Cut Rate Store, beneath which were the words "We Sell Drug Sundries." The words "We Sell" were in small letters; the words "Drug Sundries" were in larger letters. As a last line of the sign were the words "Patent Medicines."

Section 1364 of the New York pharmacy act contained schedules which listed various items, some of which must be sold by licensed pharmacists only and others which might be sold by non-licensed persons in their stores. Schedules A and B had to do with various kinds of poisons. Non-licensed persons were forbidden to sell these items but persons without a license could sell articles enumerated in Schedule C. Schedule C did not deal in generalities; it enumerated commodities having a non-poisonous character, so that it was pointed out exactly what could be sold by persons having no license.

The court said, among other things, that the provisions of the act permit the sale of articles enumerated in Schedule C, provided such sale is not advertised under the term "drugs".

The court said that the apparent reason for denying the right to advertise was to protect the public and argued that when one buys an article in a drug store conducted by a licensed pharmacist, the purchase is made "under a more skillful supervision than occurs when the purchase is made from an unlicensed person." 261 N.Y.S. at pages 383–384. The argument continues that the provision proscribing advertising matter is to "protect the public from being misled as to presence or absence of benefits, if any, of which they might desire to avail themselves in making a purchase from a licensed person skilled in the handling of drugs." 261 N.Y.S. at page 384. The placing of the word "sundries" after the word "drugs" did not save the act of the defendant from the inhibition of the

statute and the court said: "The statute prohibits the use of the word 'drugs' or 'medicines' 'in any manner by advertisement.'" 261 N.Y.S. at page 384.

The New York court held that the defendant violated the section of the statute by using the words "Drug Sundries", "even though he be referring to articles which he is permitted to sell under the statute, but which statute limits his privilege to sell them by requiring him to avoid the use of the word 'drug' so that the public may not be misled into thinking that he is a licensed pharmacist or druggist." 261 N.Y.S. at page 385.

Because of the use of the words "Drug Sundries" the New York court held that the judgment of conviction should be affirmed; but as to the words "Patent Medicines", the court held there was no violation of the section proscribing the use of the word "medicines". The court held that where the word "patent" was a prefix to the word "medicines" there was no violation of the statute while holding that the use of "sundries" as a suffix to "drug" was a violation. The reasoning of the court is difficult for me to understand. The court says that the general term "medicines" has a meaning in the public mind vastly different from the phrase "patent medicines". I say that the use of the phrase "drug sundries" has a meaning in the public mind vastly different from the word "drugs". There have been, all over the State of New Mexico, in the smaller towns, stores selling what are known as "drug sundries." This is a matter of common knowledge to all residents of New Mexico who have traveled about the state to any considerable extent. Some of the communities in which such stores are located do not even have a physician; many of them do not have a drug store in which prescriptions are compounded. The business of such stores is to furnish the public with what are known as home remedies and also numerous other useful articles. In such stores, as well as in pharmacies, whether in small town or city, many articles other than medicines or drugs are sold. This particular fact was well put in the words of Mr. Justice McGhee when he said: "* * * the writer would not be unduly surprised to see a tractor offered for sale in one of these (department drug) stores, * * *." Save-Rite Drug Stores, Inc., v. Stamm, 58 N.M. 357, 362, 271 P.2d 396, 399.

Even if the words "drug sundries" could have the effect, as suggested by the New York court, of misleading some of the public into thinking that the store selling such articles would necessarily have a licensed pharmacist who would fill prescriptions, I inquire what harm would thereby result? If someone believed that a store had a registered pharmacist where there was none, would the public morals in any way suffer? Would the public peace be seriously disturbed? How could such a belief affect the public health or welfare? These ques-

tions are all asked, of course, upon the premise that nobody within the place of business ever purported to act as a registered pharmacist. The stipulation in this case shows that only goods in original packages were sold. The advertising in this case was by sign reading "Packaged Drug Sundries". If a prefix of "patent" to "medicines" in New York can make advertising by use of the two words harmless, I say that the prefix "packaged" to "drug sundries" should make the three words harmless under our statute.

Before leaving the New York case, it should be said that there was no question raised in that case of the constitutionality of any part of the pharmacy act in that state. Our case does raise the question of the constitutionality of the New Mexico statute as to its prohibition of advertising that which may be lawfully done in any mercantile establishment. I consider the New York case of no support whatever for the majority opinion in this case.

Even if the New York case could be used to support any proposition in connection with our case, then, for my part, I much prefer the reasoning of the Montana and South Dakota cases cited and quoted from above.

For the reasons above stated, I dissent.

McGHEE, Justice.

I concur in the dissent.

297 P.2d 333

E. L. LUSK and Nettie V. Amonett, Executors of the Estate of Mollie Lusk, Deceased, Plaintiffs-Appellants,

v.

Beth DAUGHERTY, Defendant-Appellee.

No. 6033.

Supreme Court of New Mexico.

May 9, 1956.

Frazier & Cusack, Roswell, for appellants.

Atwood & Malone, Roswell, for appellee.

SADLER, Justice.

The plaintiffs as appellants in this Court have appealed from a judgment rendered against them by the district court of Chaves County in an action involving two causes of action, one in replevin and the other in conversion, involving the ownership of a diamond ring alleged to be of the value of $750.

The present plaintiffs are the son and daughter, respectively, of the late Mollie Lusk of Chaves County, New Mexico. Prior to the latter's death the present action was begun in her name by one or the other, or both, of her children who, as executors of her will were substituted as plaintiffs, pendente lite. Due to mental infirmities, decedent died without knowing the suit was contemplated, or filed.

Mollie Lusk, a former resident of Roswell, New Mexico, was the aunt of defendant. During the latter's childhood, she spent a large part of her time in the home of her aunt and the relationship between them was very close. The decedent died October 20, 1954, while a patient at Woodcroft Sanitarium in Pueblo, Colorado, where she had been confined by reason of mental incapacity resulting from advanced age, from April 28, 1951, until the time of her death. During her lifetime she was the owner of a solitaire diamond ring which is the subject matter of the present action. The ring mentioned at the present time has a reasonable market value of $650.

During the lifetime of Mollie Lusk, she and her husband, Charles Lusk, who predeceased her, expressed to the parents of

defendant the desire that the ring referred to should become the latter's property and stated their intention of making a gift of it to her when Mrs. Lusk, her aunt, no longer wished to wear the ring. In conformity with this desire on the part of Mrs. Lusk, and on or about February 23, 1950, she voluntarily made a gift of the diamond ring, the subject of this action, to the defendant. The latter, a short time previously, had suffered a tragedy in the death of a member of her immediate family and sympathy for her on the part of the aunt, no doubt, influenced the timeliness of the gift.

The gift so made was not the result of any importuning or request by defendant. Indeed, both at the time of the gift and on the following day, she sought to return the ring to her aunt, suggesting that she might wish to give the ring to her daughter, or granddaughter. On each occasion, Mrs. Lusk refused to accept a return of the ring, expressing the wish that it remain the property of defendant.

At the time the said Mollie Lusk made a gift of the diamond ring to her niece, as aforesaid, the donor while of an advanced age was, nevertheless, in possession of her mental faculties and had full knowledge and understanding of the effect of the gift she was making, nor did she at any time thereafter, prior to the loss of her faculties, express any desire or intention inconsistent with the gift of the ring so made to the defendant. The gift was entirely voluntary on the part of Mollie Lusk. The defendant neither requested of her aunt that she make a gift of the ring to her nor did she exercise influence of any kind over her aunt in connection with the gift of the ring.

Subsequent to her confinement in Woodcroft Sanitarium, Mrs. Lusk signed written directions and statements in connection with the ring and as well respecting her intention and desire with reference to it. However, at no time during her confinement at Woodcroft Sanitarium was her mental condition such that she knew or understood the effect of the directions and statements so written.

Having found the facts as hereinabove recited at the conclusion of the trial of this action, the court concluded as a matter of law that title to the diamond ring passed to the defendant when possession thereof was delivered to the defendant by her aunt, Mollie Lusk, with the intention to make a gift of it to her niece, the defendant. The court, likewise, concluded that the gift so made was in all respects valid and binding upon the donor, Mollie Lusk, and upon the plaintiffs as her successors in interest.

The court further concluded that the evidence of conversations between Mrs. Lusk and the parents of defendant, and conversations with Mr. Lusk in the presence of Mrs. Lusk, and with Mrs. Lusk herself, expressing a joint desire that defendant should be the ultimate owner of the ring in question, taken together, satisfy the re-

quirements of the "Dead Man's Statute" and meet the burden of proof resting upon defendant in view of the death of Mollie Lusk.

The court concluded, conformably to its finding on the subject, that the written directions and statements signed by Mollie Lusk while a patient at Woodcroft Sanitarium were void and of no effect by reason of her mental incapacity at the time they were signed. The court held, nevertheless that, under other evidence in the case, the defendant is established as the owner of the diamond ring in question and as such entitled to judgment against the plaintiffs on both causes of action stated in their complaint and to recover her costs.

While counsel for the plaintiffs divide their argument into several points, actually all resolve themselves into two main contentions which we shall treat separately and in the order in which they are presented to us by counsel. First, they contend the elements of a valid gift do not appear in what transpired between the decedent and the defendant, her niece. Counsel for the defendant, citing 38 C.J.S. Gifts, § 10, p. 786, lists the elements of a valid gift as follows:

1. Property subject to gift.

2. A donor competent to make the gift.

3. A donation intent on the part of the donor, not induced by force or fraud.

4. Delivery to the donee.

5. Acceptance by a competent donee.

6. A present gift fully executed.

We think these requisites are fully recognized by the decisions of this Court in Ross v. Berry, 17 N.M. 48, 124 P. 342, and Medler v. Henry, 44 N.M. 275, 101 P.2d 398. See, also, on sufficiency of evidence in cases of this kind, Menger v. Otero County State Bank, 44 N.M. 82, 98 P.2d 834; Medler v. Henry, supra, and Brown v. Cobb, 53 N.M. 169, 204 P.2d 264. Furthermore, the trial court in this case fairly found, either that, or the parties assumed, the presence of all these requisites in the case at bar and there is no real dispute as to the correctness of its findings in this behalf, save in one particular. This one particular is with respect to the mental capacity of the donor at the time of the alleged gift. Accordingly, it has become our duty to examine the record with utmost care to ascertain whether the plaintiff has produced evidence meeting the test where the donor is deceased and mental capacity to make the gift is challenged.

Naturally, counsel for plaintiffs invoke the provisions of 1953 Comp. § 20-2-5, reading:

> "In a suit by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party to the suit shall not obtain a verdict, judgment or decision therein, on his own evidence, in respect of any matter occurring be-

fore the death of the deceased person, unless such evidence is corroborated by some other material evidence."

We look to decisions under this statute to ascertain when evidence is deemed to meet its requirements. In the early territorial case of Gildersleeve v. Atkinson, 6 N.M. 250, 27 P. 477, 480, the court gives us a definition of corroborative evidence as contemplated by this statute, as follows:

"* * * Keeping in mind the requirements of the statute above cited, that the evidence must be 'some other material evidence,' the rule fairly deducible from the adjudged cases may be thus announced: Corroborating evidence is such evidence as tends, in some degree, of its own strength and independently, to support some essential allegation or issue raised by the pleadings testified to by the witness whose evidence is sought to be corroborated, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of any other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue."

Later cases, both in territorial days and since statehood, have adhered pretty closely to the definition pronounced for the court by Justice Seeds in Gildersleeve v. Atkinson, supra. Byerts v. Robinson, 9 N.M. 427, 54 P. 932; Childers v. Hubbell, 15 N.M. 450, 110 P. 1051; Paulos v Janetakos, 41 N.M. 534, 72 P.2d 1.

It thus becomes our duty to determine whether under the evidence here we find that corroboration of the testimony of defendant concerning the making of the gift by the decedent, her aunt, required by the governing statute quoted, supra. As a background to the vital testimony of defendant touching the gift, it may be stated that a genuine affection between the aunt and this particular niece existed. The father of defendant, A. B. Miller, was a half brother of Mollie Lusk, defendant's aunt.

The defendant, Beth Daugherty, was a widow with 7 children, residing on a ranch a few miles out of Roswell. For some time she had been employed at J. C. Penney Company in Roswell, to supplement her income from the ranch for the support of herself and children, driving back and forth each day from the ranch to Roswell.

On February 23, 1950, while at her ranch home following employment for that day at J. C. Penney Company in Roswell, the defendant received a call by telephone from Mrs. Grady, a tenant in the home of Mrs. Lusk, requesting that she drop by the aunt's home on the way to work the following morning. But we shall let the defendant state in her own words what

transpired when she arrived there. She was asked questions and gave answers, as follows:

"Q. State everything that was said that morning when you saw Mrs. Lusk? A. Mrs. Grady called me and asked me to come by as I started to work, and when I went in Aunt Mollie had a cold and was not feeling very well and I went in the bed room and sat on the side of the bed and she said, 'Betty, my hands are getting so small I am afraid of losing my ring, and Papa and I always said we would want you to have the ring, and I want you to have it now', and she took it off her finger and gave it to me. I said, 'do you not think you should give the ring to Nettie and Jean', and she said 'no, Betty, I have given Nettie a ring and Papa gave Jean his diamond so we want you to have this ring.' She said, 'do not give it to anybody, it is yours.'

"Q. Was there anything else said that you recall in that conversation? A. Nothing more.

"Q. When did you next talk to her about the ring? A. The next morning I went back and I said 'Aunt Mollie, I still wonder if you would not like to give the ring to Nettie and Jean', and she said 'no, it is yours and you keep it.'

"Q. Did she ever ask you to give the ring back to her or say it was not your ring? A. Never."

The foregoing incident took place some fourteen months before her aunt, Mrs. Lusk, was taken to the sanitarium in Pueblo. The testimony of Mrs. Daugherty, the defendant, touching the gift of the ring to her must rely for corroboration on what was said by her mother and father touching a conversation with Mrs. Lusk and her husband, Mr. Lusk, prior to his death in 1947. The conversation took place in Mrs. Lusk's home where Mr. and Mrs. Miller had gone to take Mr. Lusk, who was ill, a lemon pie. Testimony was given touching the conversation by Mrs. Miller, as follows:

"Q. State to the best of your recollection what was said on that occasion? A. Mr. Lusk was talking and said to Jean 'show Aunt Annie your ring I gave you', and she came over and showed it to me; she was fixing to leave and she left immediately after showing it to me, and then Mr. Lusk said 'Jean has been very upset over little Eds death and I gave her this ring thinking it would help her in her trouble.' He said 'now, I have given Nettie a ring and I have given Jean a ring', and he said 'now, Mollie and I want Beth to have the other one', and Mrs. Lusk immediately said 'yes, we want Beth to have that ring; you

know Anna, we love Beth about as much as we do Nettie and Jean.'

"Q. That conversation took place in the home after the death of the grandchild? A. Yes, sir, shortly after the death of little Ed."

Mr. Miller, who was a half brother of Mrs. Lusk, did not recall details of the conversation to the same extent as did his wife, Mrs. Miller, but he did make it clear that on this occasion Mrs. Lusk announced it as her intention to make a gift of the ring to the defendant. Among other things, he testified:

"Q. What did Mrs. Lusk say about it? A. She had not at that time given her the ring but said she was going to give it. The first information I had of it she said she was going to give that ring to my daughter.

"Q. She told you she was going to give that ring to your daughter? A. Yes, sir."

The prime consideration to be resolved, before determining the question of adequate statutory corroboration, is whether the donor, Mrs. Lusk, knew what she was doing and its effect, when she made a gift of the diamond ring to her niece, Beth Daugherty. In other words, did she understand the nature and effect of her act? The trial court, as reflected by its findings, felt that she did. We see no justification to overturn its findings on the subject. The mere fact that a donor is of advanced age and suffering from the normal deterioration of advancing age does not, standing alone, render such donor incompetent to make a valid gift. As said in Goldman v. Goldman, 116 Cal.App.2d 227, 253 P.2d 474, 478:

"Even though a donor suffers physical and mental debility, he is not thereby necessarily rendered incompetent to make a gift of his property so long as he has sufficient mental power to grasp and comprehend the nature of his act, the character of his property and his relation to the natural objects of his bounty."

See, also, Webb v. Saunders, 79 Cal.App.2d 863, 181 P.2d 43; Pfingst v. Goetting, 96 Cal.App.2d 293, 215 P.2d 93; Gibbs v. Barksdale, 199 Okl. 141, 184 P.2d 755, 2 A.L.R.2d 345; Fuller v. Fuller, 372 Pa. 239, 93 A.2d 462.

In a closely related question, the competency of a testator to make a valid will, we ourselves spoke along the same line as do some of the courts in cases cited. See Calloway v. Miller, 58 N.M. 124, 266 P.2d 365, 368. We there said:

"All of the testimony reflects a perfectly natural deterioration of decedent in his later years. However, the growing picture of physical weakness, mental weakness, loss of some memory

and some power of decision fits the picture known to everyone of the gradual ravages of age."

Under the evidence in this case in the light of the decisions cited above, including one of our own, we are compelled to hold the trial court's finding of mental capacity in the donor at time of the gift, sufficient to make it, is supported by substantial evidence.

This leaves for decision only the question whether the testimony tendered as corroboration meets the statutory test of sufficiency. That issue, too, must be resolved in favor of the defendant. There can be no doubt but that under our decisions, as well as the decisions of other states, the testimony of Mr. and Mrs. A. B. Miller, parents of the defendant, if accepted by the court, was of a character, "standing alone and unsupported by the evidence of the claimant," their daughter, as did "*tend* to prove the essential allegation or issue raised by the pleadings." (Emphasis supplied.) National Rubber Supply Co. v. Oleson & Exter, 20 N.M. 624, 151 P. 694, 696.

See, also, Paulos v. Janetakos, supra, where under testimony somewhat similar to that here relied upon for corroboration, we held it met the requirement of establishing a prima facie case. Certainly, statements antedating the gift are relevant and material to prove an intention to give, even though they take place prior to execution of the gift by a substantial period of time. Culpepper v. Culpepper, 18 Ga.App. 182, 89 S.E. 161; Meriden Sav. Bank v. Wellington, 64 Conn. 553, 30 A. 774.

Thus it is that both as to mental capacity of donor to make the gift and sufficiency of the evidence to support a finding that she did so, the trial court's rulings must stand. It follows from what has been said that the judgment of the trial court is correct and should be affirmed.

It will be so ordered.

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

297 P.2d 866

In the Matter of the Last WILL and Testament of Arthur S. HICKOK, Deceased.

TOLEDO SOCIETY FOR CRIPPLED CHILDREN, Riverside Hospital, Mercy Hospital, Toledo Community Chest, Toledo Chapter American Red Cross, Toledo Hospital, Starr Commonwealth for Boys, Toledo Society for the Blind, Little Sisters of the Poor, Toledo District Nurse Association, Toledo Public Health Association, Lutheran's Orphanage & Old Folks' Home, Boy's Republic, Trinity English Evangelical Lutheran Church, Jewish Federation, Old Ladies' Home of Toledo (a/k/a Old Folks' Home of Toledo), Adams Street Mission & Day Nursery, Madison Baptist Church, School Board of Madison, Ohio, *Movants-Appellants,*

v.

TOLEDO TRUST COMPANY, a corporation, Walter G. Kirkbride, Carl F. Eisenhour, and Clarence H. Hickok, Executors of the Last Will and Testament of Arthur S. Hickok, Deceased, and Ruth Hickok Marvin, Respondents-Appellees.

No. 6012.

Supreme Court of New Mexico.

March 12, 1956.

Rehearing Denied May 25, 1956.

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Hervey, Dow & Hinkle, W. E. Bondurant, Jr., S. B. Christy, IV, Roswell, for appellants.

Gilbert, White & Gilbert, Santa Fe, for Ruth Hickok Marvin.

Noble & Noble, Las Vegas, for executors.

McGHEE, Justice.

The appellants are nineteen of twenty named charities for whom provision was made under testamentary trust provisions in the will of Arthur S. Hickok, deceased, who died in 1945. These charities appeal from the denial of their motion in the court below, the District Court of Lincoln County, to set aside its final decree in ancillary probate proceedings upon the estate of said decedent, who at the time of his death was a resident of and domiciled in Ohio.

The basis for said motion was that the charities were "devised a remainder interest" in the properties of Hickok situated in this state; that although the charities were "devisees" under the will, they were not served with notice as to the pendency of the estate in New Mexico nor of the hearing upon the final account and report of the executors; that the final decree is void as to the charities and should be vacated.

The appellees are the executors and Ruth Hickok Marvin, decedent's daughter.

Appellants have raised three points on this appeal: (1) That the statute purporting to vest in the district courts of this state jurisdiction concurrent with that of the probate courts over the administration of estates, § 16-3-20, NMSA, 1953 is unconstitutional; (a point raised first in this Court) (2) That the final decree is void as to them because they were not served with notice of hearing upon the final account and report; (3) That the trial court erred in not admitting in evidence an exhibit said to contain admissions by some of the executors that they still held certain stock which was an asset of the corpus of the trust estate established by the will of decedent, and which exhibit is further said to have a bearing upon the issue of laches on the part of appellants asserted by appellees in the lower court.

Before proceeding to the merits of the issues raised, we must reckon with established juristic principles. It is certain that this Court does not sit to decide abstract questions. Valencia Water Co. v. Neilson, 1920, 27 N.M. 29, 192 P. 510; Hatch v. Keehan, 61 N.M. 1, 293 P.2d 314. Further, we have held time and again we would not "sit in judgment upon the action of the legislative branch of the government, except when the question is presented by a litigant claiming to be adversely affected by the legislative act on the particular ground complained of." Asplund v. Alarid, 1923, 29 N.M. 129, 219 P. 786, 790.

Upon the basis of these rules and our holding in In re Santillanes, 1943, 47 N.M. 140, 138 P.2d 503, considered hereafter, it is urged by appellees that appellants have

no standing to question the validity of § 16–3–20, supra, on constitutional grounds.

Appellants counter with argument they do have standing to challenge the constitutional validity of such section because of their assertion the final account and report shows certain burdens were saddled on the New Mexico property of decedent and appellants, owning or claiming an interest therein, should be apprised of such burdens.

The final account and report is complained of in these respects. First, complaint is made that the final account of the executors states that all expenses have been paid, i. e., filing fees, publication costs, appraiser's and attorney's fees, but the report does not state who paid the expenses, the amounts so expended or what portion of expenses was chargeable to the New Mexico properties. In this connection appellants point to the fact that although the final account states that no claims were filed against the estate, a later paragraph therein alleges that all claims have been paid. Also, appellants argue that since $379,629.39 was allowed for deductions on the state succession tax that it is reasonable to assume that some portion of this sum represents expenses and claims pertaining to the New Mexico probate and that they should be advised of the necessity for and the amount of such expenses.

It is next argued that no income is listed in the final account, although part of the property owned by decedent in New Mexico was a ranch, presumably operated during the two years while the estate was in probate.

Lastly, appellants point to the fact that the account and report states that the executors have conveyed the New Mexico properties but it is not stated to whom conveyance was made, for how much, or what happened to the purchase money.

Upon examination of the interests claimed by appellants under decedent's will, we must agree with appellees that the matters complained about by appellants respecting the final account and report resulted in no detriment to them.

Under the will the corpus of the Hickok estate, excepting certain specific bequests, is left to designated trustees. For twenty years the trustees are to divide the net income between testator's daughter and son (his widow having elected not to take under the will) and a class of employees of the Hickok Oil Corporation of Ohio. At the expiration of such period the trustees are directed to divide the assets in their possession into five funds of varying specified percentages which shall be distributed to the charities.

The will further provides that until distribution is made of the corpus of the trust no beneficiary other than members of testator's family may assign or otherwise deal with any possible interest they may have; that if alienation be attempted or attachment levied upon such interest, the absolute right of the beneficiary to take shall

cease and terminate. The will directs that no charity shall take thereunder unless it can do so without creating inheritance or estate tax liability. It is noted in this connection that § 31–16–1, NMSA, 1953, provides that gifts to foreign charities are tax exempt only if the property so passed shall be used within this state and if the law of the state of the domicile of such charity grants reciprocal exemptions.

The trustees are given extensive powers of management over the trust estate, including the right to sell, pledge, or otherwise dispose of the trust assets, the right to invest and reinvest the proceeds, the right to determine whether money or property coming into their possession shall be treated as principal or income, and to compromise, arbitrate and adjust claims relating to the trust estate. They are also given power to make inventory and appraisal of the trust estate and to make distribution in kind when any distribution of the principal is made; their decision in such case shall be binding upon the beneficiaries.

The will recognized a contract entered into in 1937 between the testator and Harry Reynolds whereby it was provided for the incorporation of Hickok & Reynolds, Inc., an Ohio corporation, to which the assets of the partnership of Hickok and Reynolds would be transferred. The executors were directed by the will to join in a transfer of the partnership assets to the corporation in exchange for half of the stock therein. The real estate which the decedent owned in New Mexico was held in partnership with Reynolds.

Reverting, then, to the matters in the final account and report to which appellants object, we note that the final account alleges that all expenses in connection with the New Mexico proceeding were paid by the executors and that resort to the real estate was unnecessary. This allegation is carried forward as a finding in the final decree and the fact stated that no charge of any kind exists against the estate. Since whatever interest the appellants have in the estate could only be asserted in our courts against the New Mexico realty, and since no resort to it for any payments was made and no charge placed thereon, we cannot see that there is any detriment to appellants on this score.

Because the appellants have no interest in the income from the trust properties under the express terms of the will, the failure of the executors to report income received from New Mexico properties, if any, does not work to their detriment either.

As to the matter of the conveyance of the New Mexico properties, it is not true that the final account and report does not state to whom the properties were conveyed. Paragraphs 12 and 13 thereof are as follows:

> "That under the terms of Item XIV of the said Last Will and Testament of said Arthur S. Hickok, deceased, and pursuant to the agreements therein

mentioned, the undersigned Executors of the Last Will and Testament of Arthur S. Hickok, deceased, were obligated to convey, assign and transfer all of said real property to Hickok & Reynolds, Inc., a corporation organized under the laws of the State of Ohio.

"That pursuant to said direction contained in said will and said agreements, the undersigned Executors did convey all of the interest of said Arthur S. Hickok in and to the real estate above described to said corporation."

As this appeal is presented to us, it is neither contended nor suggested that the executors were not bound by the agreement between decedent and his partner and the recognition thereof in the will, or that appellants desire to attack the conveyance in any manner. Instead they indicate concern over what the purchase price was and what happened to it. The direction of the will was that these and other partnership properties be conveyed in exchange for one half of the stock of the corporate grantee. For purposes of the present determination, we believe the final account stating the conveyances were made pursuant to the direction of the will is supported by and referable to the will itself, with the conclusion the conveyances were made in exchange for the corporate stock.

The effort of appellants to have the final decree vacated is, however, not an academic exercise, for they stand to gain a tactical advantage of potentially great value by the re-opening of probate proceedings as they would then be enabled under § 31–2–5, NMSA, 1953, to obtain service of process upon the ancillary executors in New Mexico in an independent action brought here to determine the validity of the will as to the New Mexico properties.

Appellants would have a direct and real interest to be served thereby, for the Ohio supreme court has held the provisions in favor of the charities invalid under a statute so providing where the testator dies leaving issue of his body and his will contains devises or bequests to charitable institutions, unless the will was executed at least one year prior to his death, which period had not elapsed at the death of Arthur S. Hickok. Kirkbride v. Hickok, 1951, 155 Ohio St. 293, 98 N.E.2d 815. Following this decision the validity of the provisions for the charities was brought before the courts of Texas where they were upheld under the law of Texas as to real estate owned therein by the testator in partnership with Reynolds. It was further held that the doctrine of equitable conversion did not apply to the real estate which had been exchanged for corporate stock in Hickok & Reynolds, Inc., under provisions of the will and agreements already noted. Toledo Soc. for Crippled Children v. Hickok, 1953, 152 Tex. 578, 261 S.W.2d 692, 43 A.L.R.2d 553.

It is not asserted that the intention of appellants to avail themselves of the pro-

visions for service of process upon the executors in this state gives appellants standing to re-open the proceedings for want of jurisdiction, and, if the constitutional question were the sole issue raised by this appeal, we should, perhaps, refuse to consider it.

However, the question of jurisdiction over the subject matter of this proceeding seems to us to be peculiarly tied to the challenge made in appellants' second point that the final decree is void as to them for failure of service of notice of hearing upon the final account and report. If it be held, as appellees urge, that appellants are not entitled to such service and that their interests are to be represented in the proceedings by service upon their trustees, then we have grave doubt whether appellants have been accorded that representation in the proceedings to which they are entitled unless, in turn, it be determined the trustees themselves, as recipients of the legal interests under the will, were validly served. This doubt, like a boomerang, brings us unerringly back to the substantive jurisdictional question, for process issued without foundational jurisdiction over subject matter can have no validity whatever.

At this juncture, therefore, we consider appellants' second proposition under which it is contended they should be considered to be in the class of "heirs, legatees and devisees", and, as such, entitled to be served with notice of hearing on the final account and report under the provisions of § 31–12–7, NMSA, 1953. This section provides, in pertinent part:

> "The notice of hearing above referred to [upon final account and report] * * * shall contain the title of the cause and be addressed to all of the heirs, legatees and devisees as shown in the report, or petition for appointment of the administrator or will, and to all unknown heirs of said decedent and all unknown persons claiming any lien upon or right, title or interest in, or to the estate of said decedent, * * *."

This rather lengthy section also provides

> "* * * Notice of hearing upon such final account and report shall be given in the same manner as now provided for the service of summons in civil actions; * * *."

Service of summons in civil actions is provided for in Rule 4, New Mexico Rules of Civil Procedure, § 21–1–1(4), NMSA, 1953, and constructive service without the state may be had either by personal service in such other state, or by publication and mailing. Mailing of notice was made to the trustees under the will and publication was addressed to them, although only in their individual names (of which no point is made), but no constructive service was attempted to be obtained upon any of the present appellants.

The argument of appellants is, in substance, (a) that they are remaindermen and

devisees upon the theory the trustees have only the duty of parcelling out the corpus of the trust estate to them at the expiration of twenty years, and, although designated as beneficiaries, their interest is really legal rather than equitable; or, (b) that although they are given only an equitable interest, nevertheless they should be considered to be in the class with "heirs, legatees and devisees" under the provisions of our statute for service of notice.

As to the first contention, it is generally held that where property is placed in trust for a term and the trustees at the expiration of the term are to divide the corpus among *contingent remaindermen*, the trust is an active one, in view of the evident purpose of the settlor to suspend the procurance by the remaindermen of the legal estate until the expiration of the term stated. 1A Bogert, Trusts and Trustees, § 207, pp. 288, 289.

It is held by a majority of courts that a trust is not executed where the trustee is directed by the will or trust instrument to convey the corpus to the beneficiaries; that the direction to convey makes the trust active. 1 Scott on Trusts, § 69.1, at pp. 416, 417. Certainly this must be true where the trustee is directed to divide the corpus into varying proportionate shares and the beneficiaries are not given any interest in specific property and where their interests are contingent upon their being qualified to take when the time comes. See 1A Bogert, Trusts and Trustees, § 206 (Trusts to Convey) p. 281, et seq.

In view of the contingent nature of the interests of appellants in the estate and the extensive powers of management given the trustees, it is inconceivable to regard the interests of appellants as those of legal remaindermen and not equitable beneficiaries.

As holders of contingent, equitable interests in the estate, is it prescribed by our statute that they shall be served with notice of the hearing upon the final account and report of the executors? We must answer the question in the negative upon the basis of these controlling considerations: (a) A probate proceeding is a special, statutory proceeding. In re Towndrow's Will, 1943, 47 N.M. 173, 138 P.2d 1001; In re Roeder's Estate, 1940, 44 N.M. 429, 103 P.2d 631. (b) We do not ascribe to our legislature any laxity of terminology in the use of the words "heirs, legatees and devisees" each of which has a precise, established meaning referring to legal estates, dating back to the beginnings of common-law terminology. Annotation 4 A.L.R. 246; Desloge v. Tucker, 1906, 196 Mo. 587, 94 S.W. 283; In re Lewis' Estate, 1916, 39 Nev. 445, 159 P. 961, 4 A.L.R. 241; Pratt v. McGhee, 1882, 17 S.C. 428. (c) Elsewhere in our statutes governing probate procedure provision is made that at any time after the issuance of letters testamentary any person interested in the estate, whether as heir, devisee, legatee,

creditor, *beneficiary under a trust,* or otherwise, may serve upon the executor and file with the clerk of the court wherein the administration is pending a written request stating he desires notice of the filing of any or all petitions involving the administration of the estate, or the proposed allowance of accounts or approval of reports, etc., and thereafter such persons shall be entitled to be given five days' written notice of all contemplated proceedings or orders therein. § 31–5–2, NMSA, 1953. (d) The beneficiaries of a trust take through it and their interests are in law generally protected, served and represented by the trustee, the holder of the legal estate. 2 Scott on Trusts, § 280; 3 Bogert, Trusts and Trustees, § 593.

Appellants rely chiefly on the California case of In re Loring's Estate, 1946, 29 Cal.2d 423, 175 P.2d 524, which would appear to direct a result different from that which we announce. However, the probate courts of that state are given general equitable jurisdiction over the administration of testamentary trusts. In re White's Estate, 1945, 69 Cal.App.2d 749, 160 P.2d 204; Luscomb v. Fintzelberg, 1912, 162 Cal. 433, 123 P. 247. It is not even contended that the probate courts of this state have such jurisdiction.

Thus are we confronted with the doubt suggested above, whether appellants enjoyed in the probate proceedings the representation to which they were entitled, for, although they be not entitled to service of notice of the hearing upon the final account and report, this does not mean they are to be given no part in the proceedings whatever. This is apparent from the fact that the statute specifically provides they may request notice, and we believe they are entitled to urge that their trustees be served with notice by a court of competent and valid jurisdiction.

In In re Santillanes, supra, we declined to consider an attack upon the constitutionality of the Juvenile Court Act. The grounds of the attack were (1) that the judge of said court was necessarily a county officer and hence must be a resident of the county in compliance with art. V, § 13, of the Constitution of New Mexico, a condition the district judge serving in an ex-officio capacity in three counties could not fulfill save as to one county thereof; and (2) that the act collided with another constitutional barrier in that the judge selected by it enjoys a six-year term, whereas being a county officer as judge of a county court he was limited to two successive terms of two years each by art. X, § 2 of our Constitution. In that case it is said [47 N.M. 140, 138 P.2d 509]:

> "There are thus presented for consideration and decision separate challenges to the existence of the juvenile court itself which, if either be of the effect claimed, will result in a declaration of nullity, all because of the ineligibility of the judge selected to preside over it. And the challenges come,

not in a direct proceeding by the state to test, on the grounds urged, the judges' right to sit, but rather from a *private suitor* in a *collateral proceeding* having for its *primary* aim his discharge from a claimed illegal detention, the declaration of nullity to be merely an incidental means of accomplishing the primary end sought."

In a following paragraph, and after citing a number of cases, it is said:

"* * * Suffice it to say, these cases plainly hold it to be the prerogative of the state alone, moving in its sovereign capacity, not that of the private suitor, to initiate and conduct to judgment proceedings fraught with such fateful and weighty consequences as, in the case at bar, for instance, would attend a declaration that a court which has functioned for nearly a quarter of a century, never had any existence at all."

We are of opinion that our holding in the Santillanes case related to both facts and contentions distinguishable from those presently before us. It is apparent from the language of that opinion already quoted, and from the cases relied upon, State v. Blancett, 1918, 24 N.M. 433, 174 P. 207; City of Albuquerque v. Water Supply Co., 1918, 24 N.M. 368, 174 P. 217, 5 A.L.R. 519; and Ackerman v. Baird, 1938, 42 N.M. 233, 76 P.2d 947, that the decision turned upon the rule respecting the manner in which status of an officer may be questioned. We do not believe the language of the decision should or can be so stretched as to foreclose a determination by this Court of the substantive jurisdiction of the court below. We therefore proceed to a determination of the constitutional question raised respecting the validity of § 16-3-20, NMSA, 1953.

The will of Arthur S. Hickok, deceased, was admitted to probate August 13, 1945; the final decree was entered in the probate proceedings November 24, 1947. Consequently, we are concerned with the problem of probate jurisdiction during those years and prior to the constitutional amendment of art. VI, § 23, of September 20, 1949, in which the principal change was to declare the probate courts have jurisdiction to determine heirship with respect to real property. Prior to this amendment the section read:

"A probate court is hereby established for each county, which shall be a court of record, and, until otherwise provided by law, shall have the same jurisdiction as is now exercised by the probate courts of the Territory of New Mexico. The legislature shall have power from time to time to confer upon the probate court in any county in this state, general civil jurisdiction coextensive with the county; provided, however, that such court shall not have jurisdiction in civil causes in which the matter in controversy shall exceed in value one thousand

dollars, exclusive of interest; nor in any action for malicious prosecution, divorce and alimony, slander and libel; nor in any action against officers for misconduct in office; nor in any action for the specific performance of contracts for the sale of real estate; nor in any action for the possession of land; nor in any matter wherein the title or boundaries of land may be in dispute or drawn in question; nor to grant writs of injunction, habeas corpus or extraordinary writs. Jurisdiction may be conferred upon the judges of said court to act as examining and committing magistrates in criminal cases, and upon said courts for the trial of misdemeanors in which the punishment can not be imprisonment in the penitentiary, or in which the fine can not be in excess of one thousand dollars. A jury for the trial of such cases shall consist of six men.

"Any civil or criminal case pending in the probate court, in which the probate judge is disqualified, shall be transferred to the district court of the same county for trial."

Our territorial probate courts had the jurisdiction pronounced in § 21 of the Kearny Code, Courts and Judicial Powers. It was originally provided thereby: "The several prefects shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments; the granting letters testamentary and of administration, * * *" Then followed a lengthy enumeration of specific matters included within such jurisdiction not necessary to be detailed here. The section has been many times amended, but the provision as to "exclusive original jurisdiction" has been carried forward in our laws each time. A comprehensive discussion of the history of the section in territorial and later days is to be found in First Nat. Bank of Albuquerque v. Dunbar, 1927, 32 N.M. 419, 422, 258 P. 817. The section today, § 16-4-10, NMSA, 1953, provides in such regard: "The probate courts shall have exclusive original jurisdiction in all the following cases, to-wit: The probate of last wills and testaments, the granting of letters testamentary and of administration * * *" etc.

So matters stood when Ch. 104, § 1, Laws of 1941 was enacted providing:

"In addition to their existing jurisdiction the District Courts of this State shall have concurrent jurisdiction with the Probate Courts in each county within their respective districts as to all matters heretofore within the exclusive jurisdiction of said Probate Courts."

By Ch. 96, § 1, Laws of 1949, a paragraph was included in such section providing the district courts should have power to determine heirship in any probate or administration proceeding. As amended this enactment now appears as § 16-3-20, NMSA, 1953, the constitutionality of which is questioned by appellants.

It is the specific contention of appellants that exclusive original jurisdiction in probate matters was vested in the probate courts of this state by the enactment of the New Mexico Constitution; and, further, that under the Constitution, art. VI, § 13, jurisdiction in probate is "excepted" from the jurisdiction which may be exercised by or conferred upon the district courts. The latter section provides:

> "The district court shall have original jurisdiction in all matters and causes not excepted in this Constitution, and such jurisdiction of special cases and proceedings as may be conferred by law, and appellate jurisdiction of all cases originating in inferior courts and tribunals in their respective districts, and supervisory control over the same. The district courts, or any judge thereof, shall have power to issue writs of habeas corpus, mandamus, injunction, quo warranto, certiorari, prohibition, and all other writs, remedial or otherwise in the exercise of their jurisdiction; provided, that no such writs shall issue directed to judges or courts of equal or superior jurisdiction. The district courts shall also have the power of naturalization in accordance with the laws of the United States. Until otherwise provided by law, at least two terms of the district court shall be held annually in each county, at the county seat."

The appellees argue, in support of the jurisdiction asserted by the lower court under § 16–3–20, supra, that the Constitution does not itself invest the probate courts with exclusive original jurisdiction; that probate proceedings both in territorial days and after statehood have been considered to be and are special in nature and described by statute; that the Constitution recognized the province of the legislature in such matters, expressly providing the probate courts should have the same jurisdiction as exercised under territorial enactments *until otherwise provided by law;* that under Const. art. VI, § 13, it is expressly recognized that district courts shall have such jurisdiction of special cases and proceedings *as may be conferred by law.*

The argument of appellants that jurisdiction in probate is by the Constitution excepted from that jurisdiction which may be conferred upon district courts depends for its validity upon acceptance of their premise that the Constitution does confer "exclusive original jurisdiction" in probate upon the probate courts; they do not attempt to argue that probate proceedings are not special proceedings and creatures of statute, jurisdiction over which might otherwise be lodged in the district courts under art. VI, § 13. We cannot accept the premise stated.

In In re Conley's Will, 1954, 58 N.M. 771, 276 P.2d 906, 908, we said the word "exclusive" had, by our decision in Dunham v. Stitzberg, 1949, 53 N.M. 81, 201 P.2d

1000, been interpolated into art. VI, § 13, so as to make it read "'The district court shall have *exclusive* original jurisdiction in all matters and causes not excepted in this constitution.'" Of this we said in the Conley case:

> "* * * Significance is to be attached to the omission by the framers of the constitution of this word, unless elsewhere in the constitution we find a mandate to interpolate by implication where the framers of the constitution themselves omitted it."

In view of the Constitutional provision, "A probate court is hereby established for each county, which * * * *until otherwise provided by law,* shall have the same jurisdiction as is now exercised by the probate courts of the Territory of New Mexico" and the further fact that probate proceedings are special in their nature and creatures of statute, In re Towndrow's Will, supra, we not only are unable to find any mandate that the word "exclusive" be read into art. VI, § 23, but we think the direction given by proper construction is in direct opposition to such reading or interpretation.

The words "until otherwise provided by law" certainly mean something. The appellants maintain they mean that the probate courts shall have exclusive original jurisdiction of probate matters until a law is passed taking such jurisdiction away from the probate courts and confirming it on some other tribunal. Obviously, we need not pass upon whether the legislature might validly abolish the probate courts, but where is there any reason in saying that the legislature has power to do away with them entirely and to confer their jurisdiction upon some other court, and yet deny it has the lesser power of investing concurrent jurisdiction upon the district courts? The proposition is untenable. Instead, we believe it is provided that the legislature shall have power to modify or alter the particular exercise of probate jurisdiction; that included within this grant is power to confer concurrent probate jurisdiction upon the district courts; that the power has been properly exercised and § 16–3–20 supra, is not constitutionally objectionable.

It follows that the proceedings below withstand the challenge they were in excess of substantive jurisdiction.

Upon the basis of the determination made, if any error was committed by the lower court in excluding from evidence the offered exhibit of appellants, such error was harmless. The action of the trial court is affirmed, and it is so ordered.

COMPTON, C. J., LUJAN and SADLER, JJ., and EDWIN L. SWOPE, District Judge, concur.

KIKER, J., not participating.

On Motion for Rehearing.

McGHEE, Justice.

In our opinion filed herein reference is made to the fact the testamentary trustees

(who were also executors of decedent's estate) were served with notice of hearing upon the final account and report in their individual names. Our opinion then stated appellants had made no point thereof. On this motion for rehearing, appellants now contend that some statements made in their reply brief under their point objecting that they (appellants) were not served with such notice sufficiently raised the point now argued. We think otherwise, Rule 15(14, 15), Supreme Court Rules; Montgomery v. Karavas, 1941, 45 N.M. 287, 114 P.2d 776, but will hold our rule in abeyance because of the nature of the question. We will also assume for purposes of our consideration that appellants have standing to question the character of service upon their trustees.

Directing our attention to the question raised, it is immediately noted that Walter G. Kirkbride, Carl F. Eisenhour and Clarence H. Hickok, the named devisees in the will as testamentary trustees, duly qualified and acting as such, were specifically named as trustees in the final account and report. Each of them entered an appearance in the proceedings and consented that final judgment be entered. Their entry of appearance and consent to judgment under these circumstances must place beyond doubt their participating in the probate proceedings in their capacity as trustees, fully curing any defects which might exist in the service of notice upon them. Hignett v. Atchison, T. & S. F. Ry. Co., 1928, 33 N.M. 620, 274 P. 44. Compare State ex rel. Skinner v. District Court, 1955, 60 N.M. 255, 291 P.2d 301.

The rule is where it is doubtful in what capacity a party is sued, reference may be had to the record to determine the question. Boland v. Cecil, 1944, 65 Cal. App.2d Supp. 832, 150 P.2d 819; Duke v. Williams, 1955, 92 Ga.App. 151, 88 S.E.2d 289; Rose v. Third Nat. Bank, 1944, 27 Tenn.App. 553, 183 S.W.2d 1.

The only case relied upon by appellants is Farmers' Loan & Trust Co. v. Essex, 1903, 66 Kan. 100, 71 P. 268, which was concerned with the effect of a *default* judgment purporting to bar a first mortgage lien assigned of record to "Farmers' Loan & Trust Company, trustee", and service by publication had been had upon that company without the designation of trustee. The case has no application here.

The objection is ruled against appellants and their motion for rehearing is hereby denied. It Is So Ordered.

COMPTON, C. J., and LUJAN and SADLER, JJ., and EDWIN L. SWOPE, D. J., concur.

KIKER, J., not participating.

297 P.2d 876

George MUTZ and Adolph Mutz, Plaintiffs-Appellees,

v.

Robert S. LE SAGE, Defendant-Appellant.

No. 6049.

Supreme Court of New Mexico.

May 28, 1956.

John B. Wright, Raton, for appellant.

Robertson & Skinner, Raton, for appellees.

McCULLOH, District Judge.

Plaintiffs and defendant will be so designated herein as they were in the lower Court.

Plaintiffs obtained a declaratory judgment against the defendant holding that the plaintiffs own a right of way easement acquired by prescription over the lands of defendant.

Plaintiffs own a tract of land in Taos County which is reached by a road leading from the highway from Eagle Nest to Red River near the boundary between Colfax and Taos Counties. The portion of the road involved crosses a part of defendant's land in Colfax County.

Defendant is the owner of a large tract of land previously called the Heck Ranch, owned by J. M. Heck and subsequently by his heirs. This tract originally was a part of The Maxwell Land Grant.

The road in question has been in existence and used by various persons for many years. Originally it crossed uninclosed lands, but about 1907 the lands were fenced and gates were placed at the entrance and exit of the road from the highway through a portion of defendant's land.

In 1920 and 1923 plaintiffs' father acquired the land to which the road leads and ever since plaintiffs have used the road in going to and from the land which lies beyond the boundary of defendant's land, a short distance.

The trial court found that the road was not a public road but that plaintiffs had acquired and now own an easement and right of way for vehicles, horseback and foot travel, and for the driving of livestock. By consent of the plaintiffs, the defendant is allowed to keep the gates locked to the entrance and exit of the road across his land, provided he supplies the plaintiffs with keys to the locks and does not interfere with plaintiffs' use of the road.

The defendant in his first point challenges the sufficiency of the evidence to sustain the trial court's findings that plaintiffs acquired an easement by prescription. He argued strenuously that plaintiffs' use of the road was permissive and therefore was not adverse under a claim of right.

The evidence shows that permission to use the road was never asked by plaintiffs and never expressly given by defendant's predecessors in title. Defendant seeks to imply permission as a result of the rule laid down in Hester v. Sawyers, 41 N.M. 497, 71 P.2d 646, 112 A.L.R. 536, relating to large bodies of uninclosed lands. However the evidence discloses that defendant's land was fenced in 1907 and was not uninclosed in 1920 when plaintiffs began using the road. An incident from which the trial court could conclude plaintiffs' use was adverse under claim of right, occurred in 1924 shortly after plaintiffs acquired their land and began using the road. Defendant's predecessor closed the upper gate on the road, presumably by wiring it shut. One of the plaintiffs went to him about it and told him he would take an axe and chop the gate down. The reply was, "If you take it down, put it back." It is therefore apparent that

there was substantial evidence to support the finding of the trial court that plaintiffs' use was adverse under a claim of right. The other requirements for acquisition of the easement by prescription being conceded, defendant's argument on this ground must fall.

Defendant in his brief on the first point also invokes Section 20–2–5, N.M.S.A. 1953 Compilation, requiring corroboration with respect to matters occurring prior to the death of J. M. Heck, a predecessor in defendant's title. This matter was not presented to nor passed upon by the trial court. This Court upon occasions too numerous to require citation of authorities, has insisted upon compliance with Subd. 2 of Rule 20, Supreme Court Rules, requiring that a ruling or decision of the trial court must be fairly invoked to preserve a question for review.

Defendant contends in his second point that a quiet title action brought in 1949 by defendant's predecessor in title foreclosed the plaintiffs' right to use the road in question.

The record discloses that plaintiffs and defendant's predecessor were neighbors. The road was well defined and had been used by plaintiffs continuously since about 1920. Defendant and his predecessors had knowledge or were charged with knowledge of plaintiffs' use of the road and of their possible claim to an easement.

Nevertheless the plaintiffs were not named as parties defendant in the quiet title action. Defendant contends that they were made parties under the designation "unknown Claimants of interest in the premises described in the complaint adverse to the plaintiff".

The nature and extent of plaintiffs' interest may have been unknown, but the plaintiffs were well known to defendant's predecessor in title. The logical conclusion is that they were not intended to be named as parties defendant in the quiet title action. The decision of the trial court in this regard is correct and is sustained by ample authority. See State ex rel. Swayze v. District Court, 57 N.M. 266, 258 P.2d 377. Where a real owner may be brought into court by name, his property may not be taken by constructive service against unknown claimants. Priest v. Board of Trustees, 16 N.M. 692, 120 P. 894.

Defendant next contends in point three that he purchased the Heck tract in good faith without actual or constructive notice and therefore plaintiffs' rights were extinguished. The trial court, based upon substantial evidence, found against him in this connection. The road was well defined, clearly marked and plainly visible. He knew plaintiffs were using the road and failed to make any inquiry concerning their right to do so. Had he done so he could have learned of their claim to the right of way. Under such circumstances he is charged with notice of facts which an inquiry would have disclosed. 41 A.L.R.

1448; 17 Am.Jur. (Eastments), Sec. 131, Page 1019.

Finding no error the judgment of the trial court should be affirmed.

It is so ordered.

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

297 P.2d 1051

The BARELAS COMMUNITY DITCH CORPORATION, a body corporate, et al., Plaintiffs-Appellees,

v.

CITY OF ALBUQUERQUE, New Mexico, a municipal corporation, Defendant-Appellant.

No. 5993.

Supreme Court of New Mexico.

May 31, 1956.

Frank L. Horan, City Atty., Peter Gallagher and Albert T. Ussery, Sp. Counsel, Albuquerque, for appellant.

Robert Hoath LaFollette, Albuquerque, for appellees.

COMPTON, Chief Justice.

The question presented is whether the court erred in dismissing appellant's appeal from a final judgment rendered against it. The judgment was entered December 29, 1954. The court granted an appeal therefrom March 9, 1955. Notice of allowance of appeal as well as praecipe was also filed on the later date. On June 10, 1955, upon appellees' motion, the appeal was dismissed and appellant is seeking a review of the order of dismissal.

The pertinent part of the dismissal order reads:

> "* * * That the defendant filed its motion for allowance of appeal and obtained an order of this Court allowing an appeal herein on the 9th day of March, 1955, filing and giving Notice of Appeal on the same day, and on said day filed a Praecipe for the record desired with the Clerk of this Court; that the return day was permitted to expire for docketing the cause in the Supreme Court, without the defendant having taken any further action of record in this cause and without it having seasonably applied for or obtained any extension of time for having the stenographer's transcript settled as a bill of exceptions or for filing transcript of record in the Supreme Court; that more than three months have elapsed since said 9th day of March, 1955, and the only action taken toward perfecting said appeal during that time was the filing of a second praecipe after the plaintiff's Motion to Dismiss Appeal had been filed, so that the Court concludes that *due diligence* has not been shown by the defendant in connection with the perfection of said appeal, and said appeal should be dismissed.
>
> "Wherefore, It Is Ordered, Adjudged and Decreed that the appeal taken by the defendant herein on March 9th, 1955, be and the same is hereby dismissed." (Emphasis ours.)

It is well to state here that at the very time the motion to dismiss was under consideration, appellant also was moving for an extension of time within which to file the transcript. The court was advised that the record proper had been prepared and that

the delay in filing the transcript was due solely to the failure of the court reporter to complete the transcript.

The basis of the ruling is not clear. It would seem, however, the decision rests on the provisions of § 21–2–1(13)(7), 1953 Comp., our Rule 13(7) of Civil Procedure, which provides that an extension may be granted only on a showing of good cause and diligence and on the provisions of § 21–2–1(12)(1), 1953 Comp., as amended, our Rule 12(1) of Civil Procedure, which requires an appellant to furnish a copy of the praecipe to the court stenographer and to make satisfactory arrangements with him and the clerk for their compensation, which appellant failed to do. Even so, while these rules have their place in our jurisprudence, the trial court failed to properly evaluate the force of § 21–2–1(16)(4), Rule 16(4) our Rules of Civil Procedure. This rule provides:

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

It is the announced policy of this court to dispose of causes on the merits. Clearly the motion is not based on jurisdictional grounds, and there was no showing of prejudice to appellees or that the ends of justice warrant the granting of a dismissal. Pankey v. Hot Springs National Bank, 42 N.M. 674, 84 P.2d 649; Fairchild v. United Service Corp., 52 N.M. 289, 197 P.2d 875; Tindall v. Bryan, 54 N.M. 112, 215 P.2d 354.

It follows that the failure to file the transcript within the time allowed was not fatal to appellant's right of appeal. Additional time to perfect the appeal should have been granted on such terms as the court may have deemed proper. New Jersey Zinc Co. v. Local 890 of International Union, etc., 57 N.M. 617, 261 P.2d 648; National Mutual Savings & Loan Ass'n v. McGhee, District Judge, 38 N.M. 442, 34 P.2d 1093.

Moreover, the amendment of Rule 12(1), supra, only affects judgments entered after its effective date, February 1, 1955. Section 21–3–1, 1953 Comp. It was not our intention to give to the rule retroactive operation so as to affect existing appeals. State v. Arnold, 51 N.M. 311, 183 P.2d 845; State v. Roy, 40 N.M. 397, 60 P.2d 646, 110 A.L.R. 1; City of Raton v. Seaberg, 39 N.M. 544, 51 P.2d 606.

The order dismissing the appeal should be set aside with direction to allow appellant such additional time as may be reasonably necessary to perfect its appeal, and it is so ordered.

SADLER and KIKER, JJ., concur.

LUJAN, J., not participating.

McGHEE, Justice (specially concurring).

It is my belief the appeal was dismissed by the lower court for the reason the appellant had not complied with Amended Rule 12(1), Rules of Civil Procedure, requiring an appellant to furnish a copy of the praecipe to the court stenographer and to make satisfactory arrangements with the court stenographer and court clerk for their compensation. As stated by the Chief Justice, the amended rule was not intended to apply to cases where judgments had been filed prior to its effective date, and I concur in the opinion of the majority reinstating the appeal upon this ground.

297 P.2d 1053

STATE of New Mexico, Plaintiff-Appellee,

v.

Valentino Ruben OCHOA, Defendant-Appellant.

No. 6044.

Supreme Court of New Mexico.

May 29, 1956.

H. E. Blattman, Las Vegas, for appellant.

Richard H. Robinson, Atty. Gen., Fred M. Standley, Asst. Atty. Gen., A. T. Montoya, Sp. Asst. Atty. Gen., for appellee.

McGHEE, Justice.

The appellant seeks a reversal of his conviction of murder in the second degree because of claimed insufficiency of the evidence to sustain the charge, and a claimed error in the instructions on unavoidable accident or misfortune.

The appellant and the prosecuting witness, Carlos Baca, attended a dance in Tucumcari, New Mexico, where trouble started between them and an innocent bystander was killed. Earlier, the appellant and one Bennie Paiz were standing together outside the dance hall when Bennie Baca, a brother of Carlos Baca, went out to address Paiz about some foul remarks it was claimed the latter had made to Bennie's wife. Appellant pulled a gun from his coat pocket, dropped it to the ground, picked it up and pointed the gun at Bennie Baca and asked, "What is going on?" Baca stated that what he had to say was for Paiz alone. The appellant then went into the dance hall. Bennie Baca followed shortly thereafter where he told a sister what had happened. The sister then told her brother, Carlos Baca, of the occurrence and pointed out the appellant who was then dancing with a Miss Salazar. When the dance stopped Carlos Baca testified that he tried to talk to the appellant, asking him what had happened; that appellant did not reply but jumped back, pulled the gun and pointed it at him (Carlos Baca), who then pulled a spring bladed knife and started for appellant but was grabbed by two women who stopped and held him. At that time Special Officer Garcia testified he stepped between Carlos Baca and the appellant, stating there must not be a fight there, and that he pushed appellant back so they could not fight; that appellant said to Garcia, "You are not going to play with me." Garcia testified that when he pushed appellant away appellant fired two shots killing Mrs. Andrea Gutierrez, a bystander. As soon as Garcia pushed appellant back and saw he had a gun, Garcia started striking appellant with a black jack. There is some conflict in the testimony as to just when the gun was drawn, but it seems to be fairly well agreed the shots were fired while the officer was striking appellant with the black jack.

The principal argument of appellant is that there was no proof of malice, or evidence from which it could fairly be inferred.

The jury was instructed on the plea of self defense and unavoidable accident or misfortune and found both issues against the appellant. Necessarily included in the finding of a verdict of murder in the second degree was a finding of malice and premeditation. The record contains some 200 pages of testimony, but it would be of little

benefit to set any of it forth at length. The appellant had no reason to shoot the bystander, Andrea Gutierrez, but under the law the malice and deliberation as regards Carlos Baca was transferred to her. State v. Carpio, 1921, 27 N.M. 265, 199 P. 1012, 18 A.L.R. 914.

The malice necessary to sustain a conviction of murder in the second degree may be implied. Section 40–24–3, N.M.S.A.1953, defines it as follows:

> "Malice shall be implied when no considerable provocation appears, or when all circumstances of the killing show a wicked and malignant heart."

While malice may not be inferred from the mere carrying of the gun, the appellant was apparently on the warpath and looking for trouble that night. As heretofore stated, when Bennie Baca spoke to Paiz concerning the remarks to Bennie Baca's wife that Paiz was supposed to have made, the appellant, who was a stranger, immediately pulled the gun and pointed it at Paiz. Later when Carlos Baca asked about the argument, the gun, according to some of the testimony, was immediately drawn and pointed at Baca; appellant paid no heed to the admonition of the officer and instead said to the officer, "You are not going to play with me." Immediately thereafter appellant fired the shots.

In addition to the foregoing, it is stated in State v. Gilbert, 1933, 37 N.M. 435, 24 P.2d 280, 281, where there was a conviction of murder in the second degree:

> "It seems to be well established in this jurisdiction that it is within the province of the jury to imply malice in a case where a killing with a deadly weapon has been established. [Citing cases.] * * *"

There are other New Mexico cases which support the rule.

We hold the evidence is sufficient to support the verdict.

The appellant also says the court on its own motion gave an erroneous instruction on a killing caused by unavoidable accident or misfortune. A sufficient answer to that claim is that appellant stated he had no exceptions to take to the instructions as prepared by the trial court and that he had no instructions to tender. This precludes the consideration of a claim of error in that regard. State v. Sena, 1950, 54 N.M. 213, 219 P.2d 287.

It should be stated the attorney who represents the appellant here was not in the trial below.

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

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

297 P.2d 1055

C. L. LINDSEY, Plaintiff-Appellant,

v.

J. A. CRANFILL, Defendant-Appellee.

No. 5971.

Supreme Court of New Mexico.

May 28, 1956.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

KIKER, Justice.

Plaintiff filed suit against defendant on the claim that, as a real estate broker, plaintiff procured for defendant a purchaser to whom defendant sold a motel or tourist court in Las Cruces, N. M., and that commission was not paid to plaintiff therefor. Plaintiff lived in Lubbock, Texas, but was licensed to sell real estate in New Mexico, having an office in Roswell.

Plaintiff filed a complaint which was later amended. The amended complaint alleges that defendant listed with plaintiff the motel and that defendant fixed the sale price at $120,000 net to himself and that plaintiff's commission would be such amount in excess thereof as plaintiff's buyer would pay. Plaintiff's claim is that he got a man by the name of John T. Davis to go to Las Cruces, where he met Davis, and that he showed Davis several motor courts, among others the Kilby Kourts, the property listed with plaintiff by defendant.

Plaintiff states that at that time he introduced Davis to defendant; that Davis was shown several of the cottages at defendant's motel; that he later talked by telephone with Davis; that he priced the property to Davis at $125,000; but that he later found that thereafter defendant sold the motel to Davis for $120,000. Plaintiff claims that he should be paid a commission by the defendant of 5% of the price for which defendant sold the motel, or that, in the alternative, since the defendant had sold the court to plaintiff's purchaser at

Garland & Sanders, James T. Martin, Jr., Las Cruces, for appellant.

Whatley & Oman, Las Cruces, for appellee.

the exact price stated as the minimum acceptable to defendant, he should have the reasonable value of his services in procuring the purchaser, bringing him and the owner of the property together; and that the trial court erred in ruling out testimony in support of the reasonable value of his services.

Defendant first filed a motion to dismiss plaintiff's complaint, alleging two grounds for dismissal, each of which amounts to a declaration that the complaint does not state a claim upon which relief may be granted. Upon hearing this motion was overruled.

For answer, defendant declared (1) that the complaint failed to state a claim upon which relief could be granted; (2) that the complaint is predicated upon an alleged oral agreement and is unenforceable; (3) defendant admitted that he wrote two letters referred to by plaintiff and placed in evidence and that he and Davis entered into a contract whereby Davis became purchaser of the real estate at the price of $120,000; and that plaintiff had made demand for commissions but that defendant had refused all such demands.

The statute upon which the defense is based is § 70-1-43, N.M.S.A.1953, providing that the contract by which a broker is employed to sell real estate must be in writing or that some memorandum or note thereof shall be in writing and signed by the person to be charged therewith or some other person by him lawfully authorized. This court has held that the provisions of this statute are an extension of the Statute of Frauds and may not be used as an instrument to perpetrate a fraud. Harris v. Dunn, 55 N.M. 434, 234 P.2d 821, 27 A.L.R.2d 1277.

Plaintiff claims that his original arrangement with defendant was by telephone and that later defendant called upon him at his office; that the matter was thoroughly discussed and it was understood in these conversations that plaintiff would have an opportunity to procure a buyer who would pay in excess of $120,000 for the property.

Later defendant wrote plaintiff two letters which are in evidence, and it is plaintiff's contention that these letters are sufficient memoranda of the contract to constitute the necessary writing.

The first of these letters was written on October 4, 1951. This was a few days subsequent to the time when plaintiff introduced the purchaser, Mr. Davis, to defendant Cranfill. This letter is written on Kilby Kourt stationery and is addressed to plaintiff. It reads:

"Dear Mr. Lindsey:

"As I have already explained to you my situation it make it necessary for me to offer this beautiful court for sale.

"I have now in it 33,000.00 which I must have cash. Anything over that is yours. Of course I will continue to add 500 per month to the cash payment.

"(Reporter's Note: Then on second sheet of Kilby Kourt stationery, the following:)

"I have a contract that whoever buys will have to be *excepted* by Mr. John D. Meredith as well as myself.

"The price as you know to me was 120,-000. Your commission will have to be added.

"Very truly
(signed) J. A. Cranfill"
(Tr. 113.)

It seems that defendant had a farm in Texas which he also wished plaintiff to sell. There is a postscript to the letter about the farm, but it is not quoted here for the reason that it has nothing to do with the matter in controversy.

The second of the letters was written on October 17, 1951, on stationery of the Lone Star Motel & Grill of Pecos, Texas, addressed to plaintiff, and is as follows:

"Mr. C. L. Lindsey

"Dear Sir:

"I had your letter just as I were leaving *hom* for Pecos stating that you had some one to look at the Kilby *Kort* this week.

"You may go over and show them if you wish and if they want to buy I think we can get Mrs. Cranfill to agree. I will be back over there the last of the week. Then if it doesnt sell we may take it off the market.

"Very truly
(signed) J. A. Cranfill"
(Tr. 115.)

The defendant entered into a contract by which he assigned his contract of purchase for the Kourts on November 9, 1951 with John T. Davis.

The case was tried to a jury. When plaintiff rested his case, defendant moved for a directed verdict. The motion assigns as reasons therefor the following: (1) that there is no written agreement showing the employment of plaintiff; (2) that there are no sufficient memoranda of the oral agreement to comply with the requirements of the statute; (3) that plaintiff has failed to show that the sale price was in such amount that he was entitled to any commission under the terms of any contract he had with defendant; (4) that the evidence shows that the plaintiff was not to have a commission unless the sale price was in excess of $120,000, as it was not; and (5) that plaintiff forfeited any right to commission by saying that the Kilby Kourts was priced "too high".

In sustaining the motion for directed verdict the court explained to the jury that the letters signed by defendant show clearly a verbal agreement entered into by the parties and that the details thereof were sufficiently explained so that the letters would permit proof of the oral contract, but that the letters should only permit proof of such contract as is specified in the letters; and that suit could not be maintained for a 5% commission or for the reasonable value of the services of the plaintiff.

Judgment was entered in favor of the defendant on the directed verdict and plaintiff has appealed.

Plaintiff's point one is, in substance, that the testimony of a broker as to conversations with a prospective purchaser is admissible as is also testimony as to acts of the broker in trying to sell the property to show just what the broker did in carrying out or attempting to carry out his contract.

Under his point one, two of the assignments of error are restated and are argued together. The first is that the court erred in refusing to allow the purchaser Davis to testify as to the saving of money made by dealing direct with the owner; and the second is that the court erred in not allowing plaintiff to testify as to conversations between him and the defendant Cranfill as to the commission plaintiff should receive for sale of the Kilby Kourts.

Plaintiff-appellant first suggests that, since the directed verdict was sustained, the consideration of testimony put in by plaintiff before the motion was made should have every reasonable inference flowing from it and that all conflicts in the evidence should be disregarded, the action of the court resting solely upon the substantial evidence supporting plaintiff's cause of action. Plaintiff cites In re Garcia's Estate, 45 N.M. 8, 107 P.2d 866; Morrison v. First National Bank, 28 N.M. 129, 207 P. 62; Sanchez v. Torres, 35 N.M. 383, 298 P. 408; Jackson v. Gallegos, 38 N.M. 211, 30 P.2d 719; Pankey v. Hot Springs National Bank, 46 N.M. 10, 119 P.2d 636.

We agree with plaintiff's statement as to the consideration of testimony required when ruling upon a motion for directed verdict.

Plaintiff points out evidence in the record which shows that plaintiff and defendant had a telephone conversation about the listing of property and that later defendant called at plaintiff's office in Texas and they talked about the matter, and that the letters were written in confirmation of an oral agreement previously made between the parties to the effect that if plaintiff should procure and introduce to defendant a buyer ready, willing and able to buy the real estate, plaintiff should have such amount of commission as should be in excess of $120,000; and that plaintiff went to work on the matter, talked over the telephone several times with Davis at his home in Oklahoma City, both before and after Davis was introduced to the defendant at Las Cruces; and that after the introduction the letters were written which, as the court said, were sufficient memoranda to show the existence of an oral agreement previously made.

Plaintiff further points out that the evidence that the property was sold to Davis subsequent to the introduction and subsequent to the date of the last of the letters constituting the memoranda of the oral

agreement shows that the property was still on the market at the time the letters were written.

Plaintiff offered proof of what was said by defendant over the telephone as to plaintiff's commission. This referred to telephone conversations plaintiff testified he and defendant had. Objection was made to the offer on the ground that plaintiff was attempting to establish a different contract by parol evidence from that made by the two letters which have been quoted. The objection was sustained. The plaintiff was entitled to show what was said between him and defendant in that telephone conversation as to how plaintiff would be compensated. The testimony was admissible. It clearly had a bearing upon the whole contract between the parties. Hudgens v. Caraway, 55 N.M. 458, 235 P.2d 140. If the answer to the question asked was such as to destroy the value of the two letters as a memorandum of the previous oral agreement, it could have been stricken.

If the testimony was such as to show that an arrangement was made for the employment of plaintiff and was supported by the memorandum, then the evidence is competent to show how it came about that plaintiff was employed to and did put forth effort to make a sale of defendant's motel.

The two letters show that plaintiff would receive whatever portion of the sale price was in excess of $120,000. The property was sold by defendant to Mr. Davis for $120,000 after the introduction of the purchaser to defendant pursuant to the agreement between plaintiff and defendant.

The letters clearly support plaintiff's contention that there was a prior agreement orally made and that the two letters, taken together, constitute the memorandum of that agreement. The two letters, which were placed in evidence, are either a mere memorandum of a previous oral agreement or they are nothing.

For the court or jury to have had any complete understanding as to the arrangement between plaintiff and defendant for the sale of the motel, it was necessary that the court and jury have the benefit of the oral testimony as to such negotiations as plaintiff claimed had taken place. It would seem to be perfectly clear that plaintiff had some such arrangement as would give him assurance that defendant would not take the first buyer that he might produce and sell the motel to him in the absence of plaintiff for $120,000, thereby making it impossible for plaintiff to receive any compensation for services rendered. No sane broker would go to work on any such prospect. Plaintiff had the right to have a jury determine just what was the agreement between plaintiff and defendant that caused plaintiff to put forth effort to sell the property and to cause a prospective buyer to go from Oklahoma City to Las Cruces and to meet that buyer at that city and take him to Kilby Kourts and to cause

him to inspect a portion thereof. The tendered testimony was admissible. Hudgens v. Caraway, supra; Franciscan Hotel Co. v. Albuquerque Hotel Co., 37 N.M. 456, 24 P.2d 718; Amies v. Wesnofske, 255 N.Y. 156, 174 N.E. 436, 73 A.L.R. 918. Likewise plaintiff should have been allowed to testify fully as to his acts, telephone calls, and conversations with Davis, in his efforts to effect a sale.

Plaintiff's second point is that where an owner has listed property with a broker at a net cash price to the owner, the broker to have as commission the portion of the sale price in excess of that net, the owner will not be allowed to deprive the broker of a reward for his services. Plaintiff's third point is that the court erred in directing a verdict for the defendant. The two points are argued together.

Plaintiff asserts that the law is well settled that, under an employment to sell or exchange property, a broker has fully performed when he has produced a buyer with whom the principal makes a valid sale or exchange, citing Keinath, Schuster & Hudson Co. v. Reed, 18 N.M. 358, 137 P. 841; Jackson v. Brower, 22 N.M. 615, 167 P. 6. In this connection, it is immaterial that the broker did not have an exclusive listing of the property. Daughtry v. B. F. Collins Inv. Co., 28 N.M. 151, 207 P. 575.

Again, plaintiff cites and quotes from Williams v. Engler, 46 N.M. 454, 131 P.2d 267, to the effect that a broker has earned his commission when he has produced a purchaser who either consummates the purchase or is ready, willing and able to do so on the terms given to the agent by the owner. Hudgens v. Caraway, supra; Erb v. Hawks, 52 N.M. 166, 194 P.2d 266; Simmons v. Libbey, 53 N.M. 362, 208 P.2d 1070, 12 A.L.R.2d 1404; Proctor v. Moore, 53 N.M. 360, 208 P.2d 818; Vining v. Mo-La Oil Co., 312 Mo. 30, 278 S.W. 747; Glassman v. Barron, 277 Mass. 376, 178 N.E. 628.

The authorities cited above do not settle the matter as between plaintiff and defendant. Plaintiff's commission, as far as the memorandum of the alleged oral agreement shows, was to be that portion of the sale price in excess of $120,000. The actual question in the case is whether, after plaintiff had discussed the matter of defendant's motel with Davis, who later bought it, and after plaintiff had taken him to Las Cruces, or met him there, and had introduced him to the defendant who, with plaintiff, showed several of the cottages at the motel to Mr. Davis as a prospective purchaser, and after defendant sold the property to Mr. Davis in the absence of plaintiff and for the exact sum of $120,000, plaintiff can collect any commission.

We think that the plaintiff is entitled to the reasonable value of the services rendered by him, provided it be found that he procured the prospective purchaser, Mr. Davis, to whom defendant later sold the motel. This is a question of fact for the determination of the jury, just as it is for

the jury, after hearing the testimony as to the conversations between plaintiff and defendant about plaintiff being engaged to bring about a sale of the property, to determine the nature of the contract terms between plaintiff and defendant and whether plaintiff had a sufficient opportunity to carry out his agency and actually put forth effort so to do.

We find the law to be that if the agent is employed for the purpose of procuring a buyer and actually puts forth effort about his agency, and procures a buyer to whom the owner later sells, and because of the fraud, wrongful act or bad faith of the owner it is made impossible for the agent to further pursue his efforts to bring about a sale, the agent is nevertheless entitled to the reasonable value of his services. 12 C.J.S., Brokers, § 76, p. 167. In Weiss v. Northern Dredge & Dock Co., 155 Md. 351, 142 A. 253, 257, it is said:

> "But that rule is subject to the qualification that where the plaintiff's failure to perform was occasioned by some default, neglect, or wrongful act of the defendant, 'he may recover in general assumpsit for the work actually done, and the defendant cannot set up the special contract to defeat him.' [Citing cases.] For if the defendant accepts benefits accruing to him from plaintiff's services, he ought not to be permitted to escape what would seem to be his duty of reasonably compensating plaintiff for such services, by preventing him from completing his contract."

See also Crowe v. Trickey, 204 U.S. 228, 27 S.Ct. 275, 51 L.Ed. 454; Boydstun v. Hackney Land Credit Co., 145 Minn. 392, 177 N. W. 779.

Several questions should have been settled by the jury. About none of them do we express an opinion.

The verdict was directed erroneously and the judgment should be reversed and the cause remanded for new trial not inconsistent with this opinion. It is so ordered.

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

297 P.2d 1060

M. A. TRUJILLO, Ascencion S. Trujillo, Max Trujillo and Joe E. Trujillo, Plaintiffs-Appellants,

v.

George P. DIMAS, Paul L. Davis, Mary Frank Davis, Stanolind Oil & Gas Co., State of New Mexico, Horace F. McKay et al., Defendants-Appellees.

No. 5989.

Supreme Court of New Mexico.

April 14, 1956.

Rehearing Denied June 18, 1956.

E. P. Ripley, Santa Fe, Noble, Spiess & Noble, Las Vegas, for appellants.

Seth & Montgomery, Catron & Catron, Santa Fe, for appellees.

SADLER, Justice.

This is an appeal by the appellant, M. A. Trujillo, who was plaintiff below, from a judgment of the district court of Rio Arriba County rendered in a suit to quiet title, refusing to quiet title in him and quieting title instead in the defendants to four certain tracts of land designated in the pleadings as 8, 10, 11 and 12. The parties will be designated here as they were below.

The original complaint was filed on January 3, 1953, to be superseded subsequently by the first amended complaint filed on February 12, 1953. The defendants, Horace F. McKay and Elmyra McKay, his wife, duly filed their answer to plaintiff's original complaint, and thereafter an answer to plaintiff's amended complaint, together with a counter-claim against plaintiff seeking to quiet title in them to real estate, as follows:

(a) NE¼NW¼, N½NE¼ and SW¼-NE¼, Section 28; E½SW¼, NW¼SW¼ and SW¼SE¼, Section 21; T. 28 N., R. 5 W., N.M.P.M., being designated as Tract No. 8 in plaintiff's first amended complaint.

(b) SW¼SW¼, N½SW¼, Section 14; NE¼SE¼, Section 15; T. 29 N., R. 7 W., N.M.P.M., being designated as Tract No. 11 in plaintiff's first amended complaint.

(c) N½SE¼, SW¼SE¼, and SE¼-SW¼, Section 14; T. 29 N., R. 7 W., N.M.P.M., being designated as Tract No. 10 in plaintiff's first amended complaint.

(d) S½NW¼, Section 14; S½NE¼, Section 15; T. 29 N., R. 7 W., N.M.P.M., being designated as Tract No. 12 in plaintiff's first amended complaint.

A delinquent tax sale was held in Rio Arriba County on January 19, 1942, of properties upon which taxes were delinquent for the years 1937 through 1940, inclusive. It was conducted by the treasurer of said county. Included in the property offered for sale at that time, to be sold on account of non-payment of taxes, were the separately described properties hereinabove

set out. On the 5th day of the sale there having been no other bidders therefor, all of the properties above described were, by operation of law, sold to the State of New Mexico.

Each of the properties contained in the several designated tracts was correctly described on the tax rolls of the county for at least one of the years for which the taxes were unpaid and delinquent, and for which the properties were sold on account of such delinquency. In due course, the two-year period allowed by law for the redemption of the property sold for delinquent taxes expired, to wit, on January 23, 1944. None of the properties so sold was redeemed from the sale within the period provided by law for such redemption.

There was no fraud, actual or constructive, committed by the officer selling the properties, or by his predecessors in office, either prior to, at the time of, or after the sale thereof, for delinquent taxes.

Subsequent to the foregoing delinquent tax sale held in the month of January, 1942, and in the month of April of said year, the property described as Tract No. 8 was sold at an administrator's sale to raise money to pay expenses of administration and delinquent taxes thereon and purchased by the plaintiff, M. A. Trujillo. The proceeds of the sale having been turned over to the administrator in exchange for a deed to the premises the money was ordered paid into the registry of the court by the trial judge and was never employed to redeem Tract 8 from the tax sale aforesaid.

The facts recited above, however, did not relieve the plaintiff, as purchaser at the judicial sale, from the duty and obligation to pay the taxes thereon, or from redeeming or repurchasing same in the manner prescribed by law. No fraud was committed by the district court upon the plaintiff, in any respect in so far as said property is concerned in relation to the judicial sale mentioned.

There was no proper or valid tender by the plaintiff to the county treasurer of Rio Arriba County to pay the taxes on any of the property contained in any of said tracts for the years for which they were sold for delinquent taxes. Neither was there ever any proper or valid tender to redeem the properties in said tracts, or any of them, from the sale thereof for delinquent taxes. Nor did the plaintiff, or any predecessor in interest or title, make a timely application to the state tax commission of New Mexico to purchase or repurchase said properties or any of them.

Thereafter, the property hereinabove described and known as Tract No. 8 was duly and legally sold and conveyed by the state tax commission to George P. Dimas by deed dated February 16, 1948, one of the defendants herein, and recorded August 12, 1948, in Book 36, page 120, of the records of deeds of Rio Arriba County. This property was thereafter conveyed by him to defendants and counter-claimants, McKay, by in-

strument dated January 1, 1949, recorded February 7, 1949, in Book 36, page 532, of the records of deeds of said county. The McKays are the present owners of said property.

In due season, thereafter, the property described hereinabove as Tract No. 10, excepting the oil and gas and other minerals in and under SE¼SW¼, Section 14, T. 29 N., R. 7 W., N.M.P.M., was duly and legally sold and conveyed by the state tax commission to the defendants and counter-claimants, McKay, by deed dated January 17, 1948, recorded in Book 35, page 97, of the deed records of Rio Arriba County. Following acquisition of title by the McKays to the property in this paragraph described, they conveyed the surface rights therein to the plaintiff, M. A. Trujillo, reserving unto themselves all of the oil, gas, minerals and mineral substances in said property, together with the right to take all usual, necessary or convenient means for prospecting, working, getting and removing the oil, gas and/or other minerals, including the free right to enter upon said premises, together with other rights in connection with said mineral interests.

Thereafter, the property described hereinabove as Tract No. 11 was duly and legally sold and conveyed by the state tax commission to George P. Dimas, one of the defendants herein, by deed dated April 28, 1948, and recorded August 12, 1948, in Book 35, page 118, of the records of deeds of Rio Arriba County. The said Dimas, thereafter, conveyed the property to defendants and counter-claimants, McKay, by deed dated January 1, 1949, and recorded February 7, 1949, in Book 36, page 533, of the records of deeds of said county. The McKays, in turn, conveyed the surface rights in the property in this paragraph mentioned to M. A. Trujillo, plaintiff herein, reserving unto themselves the minerals thereunder and the usual rights relating to such minerals.

In like fashion, the state tax commission conveyed the property known and described as Tract No. 12, hereinabove, excepting an undivided one-half interest to the oil and gas and other minerals in and under SE¼NW¼ of Section 14, T. 29 N., R. 7 W., to the defendants and counter-claimants, McKay, by deed dated January 7, 1948, recorded in Book 35, page 197, of the records of deeds of said county. The McKays, in turn, conveyed the surface rights in the property in this paragraph described to plaintiff, M. A. Trujillo, reserving unto themselves the minerals thereunder together with the usual rights relating to such minerals.

The McKays abovementioned are the present owners in fee simple of all the oil, gas and other minerals in and under the lands hereinabove described as Tracts 10, 11 and 12, excepting the oil, gas and other minerals under SE¼SW¼, Section 14, T. 29 N., R. 7 W., N.M.P.M., and excepting an undivided one-half interest to the oil and gas and other minerals under SE¼-

NW¼ of Section 14, T. 29 N., R. 7 W., subject to certain oil and gas leases mentioned below.

In failing to pay the taxes on the properties here involved for the years for which said properties were legally sold and in failing to effect a timely redemption thereof from the sale for delinquency, neither the plaintiff nor his predecessors in title or interest acted in reliance on representation or misrepresentation of whatever kind or nature by the treasurer of Rio Arriba County, his agents or employees, relative to the taxes on the properties mentioned for any material year, or relative to the sale of said property for delinquency.

The Stanolind Oil and Gas Company is the owner and lessee of a valid oil and gas lease dated January 8, 1948, from George P. Dimas and Paul L. Davis appearing of record in Book 3, page 406, Oil and Gas Records of Rio Arriba County. The lease mentioned was assigned by Paul L. Davis and wife to Stanolind Oil and Gas Company by assignment dated February 2, 1948, recorded in Book 3, page 572, of the Oil and Gas Records of Rio Arriba County. The lease and assignment mentioned cover the following land situated in Rio Arriba County, to wit:

"NE¼NW¼, N½NE¼ and SW¼-NE¼, Section 28; E½SW¼, NW¼-SW¼ and SW¼SE¼, Section 21; T. 28 N., R. 5 W., N.M.P.M., containing 320 acres."

The Stanolind Oil and Gas Company is also the owner and lessee of a valid oil and gas lease dated December 24, 1947, from George *F.* (P.) Dimas to Paul L. Davis, appearing of record in Book 3, page 366, Oil and Gas Records of Rio Arriba County, which lease was assigned by Paul L. Davis and wife to defendant, Stanolind Oil and Gas Company, by assignment dated December 30, 1947, recorded in Book 3, page 584, of the Oil and Gas Records of Rio Arriba County. The lease and assignment described cover the following lands situated in Rio Arriba County, to wit:

"SW¼SW¼ and N½SW¼, Section 14; NE¼SE¼, Section 15; T. 29 N., R. 7 W., N.M.P.M., containing 120 acres".

Stanolind Oil and Gas Company is also the owner of a valid oil and gas lease dated December 24, 1947, from Horace F. McKay, Jr., and Elmyra K. McKay to Paul L. Davis, appearing of record in Book 3, page 363, Oil and Gas Records of Rio Arriba County, which lease was assigned by Paul L. Davis and wife to Stanolind Oil and Gas Company by assignment dated December 30, 1947, recorded in Book 3, page 489, Oil and Gas Records of Rio Arriba County, and by assignment dated April 6, 1953, recorded in Volume 14, page 593, Oil and Gas Records of Rio Arriba County. The lease and assignments just mentioned cover the following lands situated in said county, to wit:

"N½SE¼ and SW¼SE¼, Section 14, T. 29 N., R. 7 W., N.M.P.M., containing 120 acres"

The Stanolind Oil and Gas Company, likewise, is the owner and lessee of a valid oil and gas lease, dated December 24, 1947, from Horace F. McKay, Jr., and Elmyra K. McKay to Paul L. Davis, appearing of record in Book 3, page 365, Oil and Gas Records of Rio Arriba County which lease was assigned by Paul L. Davis and wife to defendant, Stanolind Oil and Gas Company, by assignment dated December 30, 1947, filed in Book 3, page 588, of the Oil and Gas Records of Rio Arriba County. The lease and assignment just described cover the following land situated in Rio Arriba County, to wit:

"An undivided one-half interest in and to the SE¼NW¼ and all of the SW¼NW¼, Sec. 14, and S½NE¼, Sec. 15, T. 29 N., R. 7 W., N.M.P.M., containing 160 acres"

The plaintiff, M. A. Trujillo, pursued a separate and deliberate plan to evade payment of taxes on the lands involved herein for the years material hereto. The defendant, Stanolind Oil and Gas Company, paid a valuable consideration for the issuance execution and delivery of the leases covering lands herein involved, in good faith and without notice of any claims or defenses made by plaintiffs in this action.

Having found the facts as hereinabove recited the court concluded that there was no fraud, actual or constructive, committed by the county treasurer of Rio Arriba County, his agents or employees, upon the plaintiffs, or any of them, or upon their predecessors in interest or title, nor was there any fraud, actual or constructive, committed by the officer selling the properties herein involved for delinquent taxes, or by the purchaser at the sale of said properties.

The court went on to conclude that there was no fraud, actual or constructive, committed by the state tax commission of the State of New Mexico, or any of its officers, agents or employees, upon plaintiffs, or any of them, or upon their predecessors in interest or title. The conclusions of the trial court, likewise, acquitted the district court of the First Judicial District of the State of New Mexico, in and for the County of Rio Arriba, and its agents and employees, of committing any fraud, actual or constructive, upon the plaintiffs, or any of them, or their predecessors in interest or title with respect to any of the properties involved.

All of the properties involved were subject to taxation for the years material hereto, except the several mineral interests heretofore excepted in the court's findings. The properties involved were duly and legally sold for delinquent taxes and no redemption of any of them from the sale was effected within the time allowed by law.

It was further concluded that no timely application to purchase or repurchase the properties, or any of them, was made by

plaintiffs, or any of them, or by their predecessors in interest or title in the manner prescribed by law before said properties had been sold by the state tax commission to other applicants. It was a further conclusion of the court that the sales of said properties by state tax commission to George P. Dimas and counter-claimants, McKay, were, in all respects, legal and valid sales.

Accordingly, it was concluded by the court that counter-claimants, McKay, are the owners in fee simple of the lands hereinabove described in subparagraph (a), subject to outstanding oil and gas lease, as aforesaid. Likewise, that said counter-claimants, McKay, are the owners in fee simple of the oil, gas and other minerals in all those properties described in subparagraphs (b), (c) and (d) of finding No. 2, other than those properties specifically excepted in the court's findings, subject to outstanding oil and gas leases as aforesaid; and, that the said counter-claimants, Horace F. McKay, Jr., and Elmyra McKay, his wife, are legally entitled to and should be granted the relief prayed by them in their counter-claim.

The court concluded, nevertheless, that as to those certain tracts described in subparagraphs (b), (c) and (d) of finding No. 2, the title of plaintiff, M. A. Trujillo, to the surface rights only should be quieted, subject, however, to the rights of mineral owners to the legitimate use of such surface in connection with the mineral rights.

The court concluded, also, that defendant, Stanolind Oil and Gas Company, was entitled to judgment quieting its leasehold rights, title and interest in and to the lands hereinabove described as to which it was found to hold leases.

It was finally concluded by the trial court that plaintiff's first amended complaint and the counter-claim of defendants, McKay, and Stanolind Oil and Gas Company should be dismissed as to the following oil and gas and other mineral interests, to wit:

> "All in and under the SE¼SW¼, and an undivided one-half interest in SE¼SW¼, Section 14; T. 29 N., R. 7 W., N.M.P.M."

Having found the facts and drawn conclusions of law from the facts so found, the court on, to wit, December 17, 1954, made and entered its final decree in said cause in conformity therewith, from which the plaintiffs have appealed to this Court for a revision and correction of the decree in so far as the same relates to said above described Tracts Nos. 8, 10, 11 and 12, or any of them.

It will perhaps contribute to a readier understanding of a truly complicated appeal if from an overall view of the whole case, we choose what seem to us are the basic questions presented which, if resolved in plaintiff's favor, as to any one of them, will sustain his position as to all four tracts involved, and having determined them, then move on to a consideration of questions

which relate to only one, or more, of the tracts, or affect any of them only indirectly.

We thus approach, as the first question to be considered, the sufficiency of the descriptions appearing on the assessment rolls upon which tax deeds 2133–C, 2171–C, 2138–C, 2120–C and 2182–C are based. We shall deal first with Tract No. 8. It should be borne in mind that the lands involved in this tract were sold for delinquency in the payment of taxes for the years 1937, 1938, 1939 and 1940. Thus it is that if the description on the assessment rolls for any one of the years involved was sufficient, any inadequacy of description in any other of the years would be immaterial. De Gutierrez v. Brady, 43 N.M. 197, 88 P.2d 281.

As a typical example of the assessments complained of, we will take up Tract 8, challenged by plaintiff, and give it as it appears for 1938 in the Teofilo Lopez Heirs (owned by plaintiff). It appears assessed to Teofilo Lopez Heirs in School District 63, Rio Arriba County, Post Office Serving Governador, New Mexico, the following:

	Sec.	Twp.	Rge.
NE¼NW¼; N½NE¼; SW¼NE¼;	28		
E½SW¼; NW¼SW¼; SW¼SE¼;	21	28	5W
SE¼NE¼; NE¼SE¼;	28	28	5W
NW¼; N½SW¼;	27	28	5W

The description of the legal subdivisions within sections 28 and 21 as shown in the first two lines are correct.

We continue with the assessment of this tract through the succeeding years involved, viz., 1939 and 1940. Counsel for defendants have given a fair portrayal of the situation in their brief with the contention made by plaintiff each year as to Tract 8 for 1939 and 1940 which we take the liberty of employing. On the 1939 tax roll, page 217, lines 18–19, there appears assessed to Teofilo Lopez Heirs in School District 63, Rio Arriba County, Post Office Serving Governador, New Mexico, the following:

	Sec.	Twp.	Rge.
NE¼NW¼; N½NE¼; SW¼NE¼	28		
E½SW¼; NW¼SW¼; SW¼SE¼	21		
SE¼NE¼; NE¼SE¼	28		
NW¼; N½SW¼	27	28	5W

Here, again, the legal subdivisions in sections 28 and 21, on the first two lines, are correct.

Appellants state that the 1940 assessment is identical with that of 1939, shown above, except that SW¼NE¼ Section 21 is added.

Appellants' contention as to the assessment of 1937 is that even that portion of the description shown to be correct in the second line is insufficient to identify the property because the township and range are not shown opposite the section number.

As to the 1938 assessment, appellants' contention is that though the description of the subdivisions in section 28 in the first line is correct, the description is insufficient to identify the property because the township and range are not shown opposite the section number on this line. Further, that though the description of the subdivisions on the second line in section 21 are correct, the description is in-

sufficient because it is not shown whether the township is north or south.

As to the 1939 assessment, appellants' contention is that though the descriptions of the subdivisions in sections 28 and 21 in the first and second lines are correct, the descriptions are insufficient to identify the property because no township or range is shown opposite the section number.

This same contention applies also to the assessment of 1940.

Like objections are made touching assessments as to the other Tracts (10, 11 and 12) for one or more of the years involved, either because the township and range is not set opposite the section number on the same line, even though it may appear below in summary, or because it is not shown whether the township is north or south, where shown on the second line.

The challenge made by the plaintiff through his counsel in this behalf, touching insufficiency of the description, is to Finding No. 5 made by the trial court, reading as follows:

> "That each of the properties contained in each of said designated tracts, was correctly described on the tax rolls of the county for at least one of the years for which the taxes were unpaid and delinquent, and for which said properties were sold on account of delinquency."

We think the trial court correctly ruled on the sufficiency of the descriptions found on the assessment roll for the years involved as to each of the properties or tracts, to wit, Tracts Nos. 8, 10, 11 and 12. Perhaps, it would put the matter more accurately if we say, as we do, that Finding No. 5, supra, so vigorously challenged by plaintiff, touching the questioned descriptions is supported by substantial evidence.

When we come to consider sufficiency of the descriptions we can not ignore, nor could the trial court, the fact that each and every assessment involved described the property as located in "Rio Arriba Co., School Dist. No. 63, Post Office Serving Governador, N. M." Obviously, the trial court in making the questioned finding considered this a part of the description as well as the congressional subdivisions given, namely, that the property was located in Rio Arriba County. Furthermore, the trial court knew judicially the location of Rio Arriba County, geographically, and as well that of the New Mexico Principal Meridian, crossing the state well south of the southerly line of Rio Arriba County, a fact disclosed on any map of New Mexico. Thus informed, the court properly determined that all townships in Rio Arriba County are "north".

One need only refer to 1953 Comp. § 21-1-1(44) (d), subsections 2 and 8, to demonstrate that the courts of New Mexico are directed to take judicial notice of:

A. Whatever is established by law.

B. The geographical divisions of the world.

Furthermore, a mere examination of the tax rolls offered in evidence (plaintiff's own Exhibits 22 to 42, incl.) discloses not only that it was the practice in the office of the assessor of Rio Arriba County to omit any designation of "north" or "south" opposite township numbers, but also that such practice was, in effect, considered and recognized as proper by the state tax commission.

Coming now to the failure of the assessor to carry out township and range numbers opposite the section numbers in the descriptions on the tax rolls of:

Tract 8 for the year 1938 in the first line opposite the section number 28;

Tract 11 for the years 1938 and 1939 in the first line opposite the section number 14.

In order to clarify this argument we set out here the 1938 assessment of the congressional subdivisions as they appeared on the assessment roll, for Tracts 8 and 11:

Tract 8

NE¼NW¼; N½NE¼; SW¼NE¼ Sec. 28
E½SW¼; NW¼SW¼; SW¼NE¼ Sec. 21, Twp 28 Rge 5 W.

Tract 11

N½SW¼; SW¼SW¼ Sec. 14
NE¼SE¼ Sec. 15 Twp 29 Rge 7 W.

It is to be observed that the township and range are not given directly opposite sections 28 and 14 on the same line. It is obvious, however, that in each instance the township and range opposite the description on the second line are related back to and become a part of the description on the first line, when the whole description is read continuously as, properly, it should be. The trial court, unquestionably so read the descriptions. See, Burdick v. Connell, 69 Iowa 458, 29 N.W. 416; Griffin v. Tuttle, 74 Iowa 219, 37 N.W. 167.

Richards v. Renehan, 57 N.M. 76, 253 P.2d 1046, 1047, is relied upon by appellants as supporting their claim of insufficiency of the description here involved. We think it is not in point on its facts. The real question in the Richards case was sufficiency of the description of the subdivisons in the section involved to identify the subdivisions themselves. No such question is presented here since, for the material years, the descriptions of the subdivisions within the section involved are concededly correct. We do, however, find support in Richards v. Renehan, supra, for the appellees' contention as to failure of the descriptions to show whether the township is north or south. Among other things, the court said:

> "The plaintiff's first two points on this appeal assert the official plats of public surveys filed in the United States Land Office are the necessary and sole guides for the determination of the location and area of any tract of land surveyed under the system of public surveys; that the abbreviations 'T.' and 'Twp.', 'R.' and 'Rge.' must be taken to mean, respectively 'Township'

and 'Range'; *and that since all townships are north and all ranges east in Santa Fe County, the court may by judicial notice complete the descriptions in the assessment rolls and tax deeds* to read 'Township 16 North, Range 9 East, N.M.P.M.'

"The defendant concedes *the general recognition of these principles.*" (Emphasis ours.)

We think the failure to say whether the township was north or south under present facts was not fatal. Knapp v. Josephine County, 192 Or. 327, 235 P.2d 564, and Keller v. Chournos, 102 Utah 535, 133 P.2d 318, 322. In the latter case, the court said:

"The descriptions of the property from the beginning of these tax proceedings are attacked by appellant as incomplete and insufficient. It may be said, in so far as the facts in this case are concerned, that the failure to state that the township was 'north' and the range 'west', where those omissions are shown, was not fatal, inasmuch as the property is clearly shown throughout to be located at Promontory, in Box Elder County, Utah, directed from Salt Lake Meridian, and that these designations must of necessity be 'north' and 'west', respectively, and the court would be authorized to and justified in taking judicial notice of such facts, provided the descriptions were otherwise acceptable; * * *."

The next important question presented by the plaintiff on this appeal is that the pretended sales, not alone of Tract No. 8 but, also, of all three other tracts involved, and the tax deeds upon which defendants and counter-claimants rely, are each and all, null, void and of no effect by reason of futile efforts on the part of plaintiff to redeem from such sales before the period of redemption had expired. He asserts he was prevented from doing so by constructive fraud on the part of the county treasurer. As already shown, the sale of these properties for delinquent taxes took place in January, 1942. They were sold for delinquency for all or two or more years over a four-year period from 1937 to 1940. Accordingly, the two-year period of redemption expired on January 23, 1944, which was two years from fifth day of the delinquent tax sale.

There was testimony by the plaintiff, however, that in December, 1943, and as well in December, 1944, as for that matter, he visited the county treasurer's office, taking with him his deeds and made an effort to pay taxes on all these properties, but was prevented doing so because, as he claimed, the county treasurer declined to issue him receipts correctly describing his lands, after refusing to strike from the rolls the assessments as they stood because of inaccuracies and errors of description contained therein, and entering on the rolls what he claimed were correct descriptions, as taken from deeds said to be in his possession at the time.

Of course, it is what transpired in December, 1943, that is important since in December, 1944, the period of redemption had expired nearly a year before, to wit, in January, 1944. The witness, Frank Garcia, who was then county treasurer, testified that the plaintiff visited his office in December, 1943, for the first time, bringing with him certain deeds and stated he wanted to pay his taxes on the properties described in the deeds. As to the four tracts here involved they had already been sold for delinquency nearly two years before. The plaintiff interposed as a condition to the payment of the taxes that receipts be issued to him describing the properties as set out in his deeds. The treasurer informed him he could only issue receipts to cover the taxes as found on the rolls and was without authority to change such assessments as they so appeared without a court order. Touching this phase of the case, the treasurer testified:

> "Q. And why didn't he pay his taxes? A. Those taxes that he didn't pay, he wanted me to—the descriptions were, as I said, complicated, and then he asked if I could give him a receipt with the correct description he had on his deeds and strike the taxes on the roll and make a different entrance and I could not do it."

It is to be remembered that the so called "complication" in the descriptions in one respect, at least, arose on the fact that the plaintiff after acquiring ownership of these tracts had permitted them to continue to be assessed in the names of former owners and, in some instances, of omissions of township and range numbers opposite section numbers, as hereinabove shown. To be sure, the descriptions of some tracts are actually garbled on the rolls. In the main, however, and more especially in so far as these four tracts are concerned, correct descriptions for one or the other of the years for which the properties were sold appeared on the rolls, as the trial court expressly found.

During the presence of the treasurer, Frank Garcia, on the stand, testifying as to what transpired on the visit to his office by plaintiff in 1944, the court, itself, took over, and examined him and elicited the following testimony, to wit:

> "Court. Do you remember how many pieces of property he wanted to pay the taxes on? A. Not the exact number, but there were quite a few tracts.
>
> "Court. Just why did he not pay them? A. Because the descriptions were not correct, if I remember right.
>
> "Court. You mean they were assessed under different names? A. Not under different names, but the description, townships and sections and ranges, in some records, they were not in the records.
>
> "Court. If Mr. Trujillo had offered to pay the taxes for each specific year

beginning 1937, on each piece of property, and coming down through 1943, could you have accepted the money? A. I could have accepted the money as it was in the tax rolls, yes.

"Court. Is the reason you did not accept the money was because he put the condition that you make corrections? A. Yes.

"Court. On the receipt or rolls? A. On the rolls.

"Court. And you could not make the correction? A. I could not make the correction without a court order."

Thus, even as long ago as a year following his first visit in December, 1943, the county treasurer again confirmed what he already had previously testified concerning the plaintiff's insistence that the assessments be stricken, as they appeared on the rolls and others substituted in conformity with descriptions to be taken from deeds which the plaintiff had in his possession. True enough, the treasurer by later testimony sought to modify the scope of what he earlier had said touching the condition attached by plaintiff to his offer to pay taxes if, indeed, the later testimony was not confined to what took place at the time of his December, 1944, visit. The record so indicates. At all events, it was for the trial judge to appraise the facts and say when the witness's testimony was truthful and accurate. Bubany v. New York Life Ins. Co., 39 N.M. 560, 51 P.2d 864; Wallach v. Paddock, 49 N.M. 317, 163 P.2d 632; Kutz Canon Oil & Gas Co. v. Harr, 56 N.M. 358, 244 P.2d 522.

Further background for the court's findings in this behalf appears from the testimony of several witnesses, among them James Paulantis, a member of the bar of this state, relative to a conversation with the plaintiff concerning his taxes. The conversation took place in the room of counter-claimant McKay at the Presbyterian Hospital in Albuquerque in April, 1948, on the occasion of plaintiff's visit there for purpose of purchasing back from Mr. McKay surface rights on Tracts 10, 11 and 12. The following is an excerpt from the examination of Mr. Paulantis at the trial, to wit:

"Q. At that time was there any discussion, or did the question come up, over the sale of these properties for taxes? A. Yes, sir, it did.

"Q. What was that discussion? A. There was a discussion that Mr. McKay had purchased the properties described in the deeds from the State of New Mexico, and that he was going to sell the surface rights to Mr. Trujillo and Mr. Trujillo requested that, I believe he stated that, he knew that it was only a tax deed, and then someone inquired of Mr. Trujillo why he did not pay the taxes and Mr. Trujillo's reply was that he laughed and said there was an administration in the tax office in Rio Arriba County that was

adverse to his political beliefs and as soon as the administration changed, the tax rolls would be fixed up to his satisfaction.

"Q. Was there any other comment that was made at that time with reference to the failure of Mr. Trujillo to pay his taxes, that you remember? A. No, sir, other than that he knew he had not paid them and that Mr McKay had a tax deed * * *.

* * * * * *

"Q. Did Mr. Trujillo on either of those occasions make any statement in your presence that he had tried to pay any of his taxes before the property was sold for taxes? A. I never heard him make that statement.

"Q. That he had tried to redeem the property from the tax sale? A. No, sir.

"Q. Was his only comment that which you related with reference to what would happen when the administration changed? A. He had a considerable sum in cash, and that is how the question came up as to why if he had the money he had not paid the taxes and then he made that reply that in the change of administration it would all be taken care of."

The plaintiff, himself, recalled as a witness virtually confirmed what Mr. Paulantis had testified to in this behalf. Witnesses Caroll Payne and Horace F. McKay, Jr., who were present on this occasion both testified in substance to what Mr. Paulantis did. The witness, Payne, testified:

"Q. Did he make any other remark about not having paid the taxes? A. He said he had not tried to.

"Q. Did he say why? A. He said that he thought that sooner or later one of his amigos would be in office and he could get his taxes marked paid and his titles cleared up. Before that happened, Mr. McKay bought these tax deeds, so he was trying to get them from him."

The testimony of Horace F. McKay, Jr., as to what was said by plaintiff on that occasion touching this subject follows:

"Q. During the course of that meeting, did any question come up as between you and Mr. Trujillo with reference to his payment or nonpayment of the taxes on the property involved in this case and his reasons for paying or not paying? A. It did come up.

"Q. What transpired in that respect? A. He stated at that time he had not paid his taxes, he had not attempted to pay, because he was waiting for a change in administration, of one of his friends to go in, and they would mark all the rolls paid and I had purchased the property before that change had taken place, and he was now trying to buy it."

We must give it as our settled judgment that substantial evidence supports the trial court's findings and conclusion that there was no fraud, actual or constructive, practiced on the plaintiff by the county treasurer in connection with plaintiff's efforts to pay taxes on the four tracts of land which are the subject of this appeal. It is strongly argued, however, by the plaintiff that statutory authority existed for the treasurer to comply with the request made on him to correct the descriptions, and thus meet the condition interposed in the asserted offer of plaintiff to pay the taxes. 1953 Comp. §§ 72-4-6 and 72-8-3 are cited in support of this claim.

It is true that under section 72-4-6 obvious clerical errors may be corrected by the treasurer under certain language reading:

> "The tax roll when delivered to the county treasurer, properly verified by the affidavit of the county assessor, and properly certified by the county commissioners, as required by law, shall constitute his authority to collect the taxes therein set forth and he shall not be held liable for any irregularity or illegality in any of the proceedings prior to his receiving said assessment roll *and the amounts to be paid as taxes as shown by said assessment roll shall not be altered, reduced or in any manner changed, except by direction of the district or Supreme Court; but this prohibition shall not extend to the correction of obvious clerical errors in name, description of property or computation of amount of taxes.* If the treasurer shall discover any errors of other kinds in said assessment roll by which any injustice would be done to any taxpayer, it shall be his duty to report the same to the district attorney; * * *." (Emphasis ours.)

And, again, under section 72-8-3 the treasurer is authorized, upon finding any property upon which taxes have become delinquent to be erroneously described or omitted from tax rolls, to "correct any errors of description and assess any omitted property," etc.

The trouble with this argument is that the errors, such as existed, would scarcely classify as "obvious clerical errors" under section 72-4-6. How could the fact that the lands in Tract No. 8, assessed to "Teofilo Lopez Heirs," was the property of M. A. Trujillo, the plaintiff, appear as an "obvious" clerical error, or, necessarily, as an error at all—and the same as to Tract No. 10, assessed to Abelino E. Lovato, Tract No. 11 to Manuel Lovato and No. 12 to Manuel Vallejos? Nor could the provisions of section 72-8-3 be invoked by the treasurer to warrant him in assessing any of these four tracts as "omitted" property for any of the years sold for delinquency since they appeared on the rolls, correctly described, as the trial court found with substantial evidence to support the finding, for at least one of the years for which sold.

[redacted] Not only has the plaintiff (appellant) sought to nullify the tax deeds by reason of claimed fraud on the part of the county treasurer but by reason of claimed fraud on the part of state tax commission. In both instances, the trial court found against him. We have recited at some length certain of the facts relied upon as constituting fraud at the county treasurer level and have held the evidence substantial in support of the trial court's findings touching the charge. The evidence put forward as proof of fraud at the state tax commission level is even less persuasive.

Concerning such evidence counsel for the appellees (counter-claimants) assert "that it does not show either clearly and convincingly, or clearly and conclusively, or clearly and satisfactorily, that Mr. Trujillo made application to repurchase, or to purchase, this property prior to the receipt and acceptance of a third party bid," etc. The trial court expressly found that neither the plaintiff, nor any predecessor in interest or title, made a timely application to the state tax commission to purchase or repurchase the properties involved, or any of them. It has support.

Testimony relied upon by plaintiff in this behalf rests on a visit to the state tax commission in 1945 by the plaintiff and what then transpired between him and two female employees in the office, serving in a clerical capacity, and the testimony of these three parties concerning same. Even if plaintiff's testimony be accepted at its face, it would certainly be of doubtful sufficiency to constitute a valid tender of funds to purchase, or repurchase, any of these tracts. It was the function of the trial court to appraise plaintiff's testimony along with that of the only two employees contacted by plaintiff, for evidences of fraud. Each of the two clerical assistants gave testimony of an uncertain and indefinite character. Indeed, the testimony of one of them left the distinct impression it was not until after March, 1946, when she first was assigned duties of this character, that Mr. Trujillo visited the office. We do not feel warranted in overturning the findings of the trial court in this behalf.

[redacted] We are not unmindful that fraud on the part of the county treasurer, either actual or constructive, will suffice to avoid a tax title and save property from forfeiture. 1953 Comp. § 72-8-20. Kershner v. Sganzini, 45 N.M. 195, 113 P.2d 576, 134 A.L.R. 1290, and Scudder v. Hart, 45 N.M. 76, 110 P.2d 536. But as held in Lile v. Lodewick, 53 N.M. 511, 212 P.2d 422, one seeking to set aside a tax title on the ground of fraud, actual or constructive fraud, in giving out erroneous information, has the burden of establishing such fact by clear and convincing evidence, a mere preponderance will not suffice. See, also, Greene v. Esquibel, 58 N.M. 429, 272 P.2d 330; and Lamb v. Manley, 58 N.M. 292, 270 P.2d 706. Compare Lumpkins v. McPhee, 59 N.M. 442, 286 P.2d 299. So it is that we must sustain the trial court's findings against

fraud at either level, that of the county treasurer and, as well, at the state tax commission level.

But it is said the tax titles involved are all bad, null and of no effect because no tax sale was ever held, or completed, in Rio Arriba County in December, 1942. Unfortunately, for plaintiff's contention on this score, the trial court found against him on the issue. There is substantial evidence to sustain its finding in the testimony of the then county treasurer, Garcia, who held the sale. Incidentally, this same claim of invalidity was made and denied concerning the identical tax sale in Rio Arriba County in the cases of Greene v. Esquibel, supra; McMillan v. Meharg, 55 N.M. 556, 237 P. 2d 359, and Brown v. Gurley, 58 N.M. 153, 267 P.2d 134.

Finally, it is strongly urged by counsel for plaintiff that, as to Tract No. 8, the purported sale is invalid and wholly ineffective by reason of the fact that the property was *in custodio legis* when sold, thus rendering the tax proceedings as against the property a nullity. The facts out of which this claim arises are that in April, 1942, more than two months after Tract No. 8 had been sold for delinquency in the payment of taxes for 1937, 1938, 1939 and 1940, a suit was filed in the district court of Rio Arriba County to sell this land for the specific purpose of raising money with which to pay certain obligations, viz., expenses of administration on the estate of the former owner, the decedent, including taxes.

The plaintiff, Trujillo, discharged the purchase price, $1,550, and it was ordered paid into court by the judgment in the suit. The property was sold subject to taxes, but for the express purpose of satisfying the taxes. After paying the expenses of administration, there remained on hand $1,349.32 which the judgment ordered the clerk to retain in her hands "subject to the further order of the court." Unfortunately, this money was never employed to redeem the property from the tax sale which had been held some eight months prior to the administrator's deed and the plaintiff insists this nullified the tax sale and rendered ineffective the expiration of the equity of redemption against the property.

Both parties cite and rely upon our decision in Hood v. Bond, 42 N.M. 295, 77 P.2d 180. Undoubtedly, each of them can find comfort in certain portions of the language to be found in our opinion in that case. Actually, we were spared the necessity of speaking decisively on the question now discussed. It is our considered judgment, however, that our decision in the Hood case, more especially the language of cases we there quote approvingly, speaks more persuasively in favor of the position of defendants and counter-claimants on the precise issue involved on the present facts. We so hold. The trial court did not err in ruling as it did on this question.

In conclusion, let us say this has been a most difficult appeal to comprehend and reduce within permissible bounds to a clear

statement of the factual issues with a declaration of controlling legal principles applicable thereto. The task has been made more difficult by lengthy briefs aggregating nearly 300 pages in extent, two volumes of transcript comprising 425 pages, plus a mass of original exhibits consisting of innumerable photostatic copies of assessment rolls, tax certificates and tax deeds, abstracts, etc., all in such numbers that one becomes lost in endeavoring to encompass them, mentally, in their relation to the vital issues sought to be placed before us in reviewing the judgment complained of. There is always the danger, in such circumstances, of becoming so enmeshed in the mass of documents that, to speak figuratively, one "can not see the forest for the trees."

We sincerely trust, however, we have centered on the vital issues involved and that we have correctly determined them. We believe we have. After all, very largely the major issues turn on the sufficiency of the evidence to sustain the trial court's findings. While unquestionably the plaintiff-appellant, Trujillo, gave direct and affirmative testimony, of efforts on his part to pay his taxes, corroborated in some respects by that of the then county treasurer, Frank Garcia, the truth or not of their testimony was for the trial court to determine. Certainly, there was ample evidence in the record, if believed, to sustain the trial court's findings that there was no fraud, actual or constructive, either at the level of the county treasurer, or that of the state tax commission, and that the plaintiff, Trujillo, pursued a separate and deliberate plan to evade payment of the taxes on the lands involved for the years material thereto.

There may be some ancillary questions presented on this appeal which we have not expressly determined. We think any such are resolved by what we have said. Either they are so resolved, or we have found them to be without merit.

The judgment will be affirmed.

It is so ordered.

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

298 P.2d 938

Alex DEMOPOULOS, Plaintiff-Appellee,

v.

THE TITLE INSURANCE COMPANY, a Foreign Corporation, Defendant-Appellant.

No. 6051.

Supreme Court of New Mexico.

June 21, 1956.

Rodey, Dickason, Sloan, Mims & Akin, John P. Eastham, Albuquerque, for appellant.

William J. Torrington, Albuquerque, for appellee.

McGHEE, Justice.

The defendant appeals from judgment rendered against it in an action on a policy of title insurance. The facts out of which the controversy arose are not in dispute. A mortgagor (not a party in this case) represented to the plaintiff-mortgagee that he was mortgaging an improved piece of real estate worth approximately $15,000, when in fact he mortgaged an adjoining unimproved lot worth $1,200. The amount loaned under the mortgage by plaintiff was $8,500 and such was the amount of the title insurance policy issued by defendant to plaintiff insuring plaintiff's interest under the mortgage.

The mortgagor had purchased the vacant lot on a real estate contract. He forged the name of the grantors to a warranty deed which was placed of record and also forged his wife's name to the mortgage. At the time the insurance policy was issued

there was a good record title. Some months later, a valid deed from the former owners of the vacant lot was filed for record.

Only $7,500 of the money which the plaintiff had loaned on the lot was received by the mortgagor, $1,000 having been retained by a former attorney for the plaintiff as protection against mechanic's liens, etc., which might later be filed. This sum was returned to the plaintiff. Judgment was entered against the defendant for $7,500.

The issue here is whether the insurance company is liable for $7,500, the amount due on the note and mortgage securing it, or for the sum of $1,200, the agreed value of the lot covered by the mortgage and insurance policy. The defendant has at all times been ready to pay the latter sum.

The policy insured the plaintiff-mortgagee against loss or damage not exceeding $8,-500,

> "which the Insured shall sustain by reason of any defect in the execution of said mortgage or deed of trust, but only insofar *at* such defect affects the lien or charge of such mortgage or deed of trust upon the said land, or by reason of the invalidity of the lien thereof upon said land, or by reason of title to the said land being vested at the date hereof otherwise than as herein stated, or by reason of unmarketability of the title of the mortgagor or trustor, or by reason of any defect in, or lien or encumbrance on said title at the date hereof, or by reason of any statutory lien for labor or material which now has gained or hereafter may gain priority over the lien upon said land of said mortgage or deed of trust, other than defects, liens, encumbrances and other matters set forth in Schedule B, or by reason of the priority thereto of any lien or encumbrance at the date hereof except *at* shown by Schedule B."

We think the measure of plaintiff's damage is the value of the real estate. The policy did not guarantee the mortgaged property was worth the amount of the mortgage lien. If the plaintiff had received a valid mortgage and foreclosed it, all he would have been able to realize would have been the value of the property. The defendant has offered to pay the plaintiff the agreed value of the mortgaged property, and we are of the opinion that is all he may recover, keeping in mind the fact there is no claim of negligence on the part of the defendant insurer.

Such is the universal rule. See: 9 Appleman, Insurance Law and Practice, § 5217; 29 Am.Jur. (Insurance) § 1238; 45 C.J.S. Insurance, § 966. See also the annotation in Ann.Cas.1914D, 643, where it is stated:

> "An insurer of a mortgagee against loss by reason of defects in the title of the mortgaged property is liable only to the amount of the value of the land, though it is less than the amount of the mortgage."

The cases of First Nat. Bank & Trust Co. v. New York Title Ins. Co., 1939, 171 Misc. 854, 12 N.Y.S.2d 703; Narberth Building & Loan Ass'n v. Bryn Mawr Trust Co., 1937, 126 Pa.Super. 74, 190 A. 149; and Whiteman v. Merion Title & Trust Co.,

1904, 25 Pa.Super. 320, support the above texts and are in accord with our views in this case.

The judgment of the District Court is reversed and the cause remanded with instructions to vacate the judgment from which the appeal was taken and to enter another in favor of the plaintiff for $1,200, the amount defendant had offered to pay in satisfaction of its liability on the policy. The defendant will also be allowed its costs.

It is so ordered.

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

298 P.2d 939

Betty Jean WALL, Administratrix of the Estate of Sterling H. Wall, Deceased, Plaintiff-Appellant,

v.

Hilton W. GILLETT, Defendant-Appellee.

No. 6058.

Supreme Court of New Mexico.
June 21, 1956.

Mears & Mears, T. E. Mears, Jr., J. Fred Boone, Portales, for appellant.

Heidel & Swarthout, Lovington, Smith & Smith, Esther L. Smith, Clovis, for appellee.

McGHEE, Justice.

The question for decision is whether the 1953 amendment allowing three years for

the bringing of suit under our wrongful death statute, Laws 1953, ch. 30, § 1, being § 22–20–2, N.M.S.A.1953, effective June 12, 1953, controls in the case of death occurring in 1952 instead of the one-year period theretofore allowed, N.M.Comp.St.1929, § 36–103.

On August 30, 1952, plaintiff's intestate was injured in an automobile accident and was taken to the office of the defendant in this case, who is a doctor and was practicing in Lovington, New Mexico. The complaint alleges death occurred on September 4, 1952, because of the failure of the defendant to diagnose and treat the patient and instead having him put in jail.

Suit was filed on March 9, 1955; a motion to dismiss on the ground the action was barred by the statute of limitations was sustained and the complaint was dismissed with prejudice.

The plaintiff (appellant) urges the 1953 amendment protected her cause of action and gave three years from the date of death in which to file suit. Such is the rule under our general limitation statutes, which deal only with remedial procedure; but the limitation provision applicable to actions for wrongful death is not only a limitation on the remedy but also on the right to institute such action, as we have held in Hogsett v. Hanna, 1936, 41 N.M. 22, 63 P. 2d 540; State ex rel. De Moss v. District Court, 1951, 55 N.M. 135, 227 P.2d 937; and Natseway v. Jojola, 1952, 56 N.M. 793, 251 P.2d 274.

This is our first case where a change has been made in the limitation provision of our wrongful death statute and a party has claimed the benefit of the change because of a death occurring prior to the effective date of the amendment.

In an action under the Workmen's Compensation Act brought under circumstances identical with this case, that is, where a change had been made in the time within which suit could be brought, Wilson v. New Mexico Lumber & Timber Co., 1938, 42 N. M. 438, 81 P.2d 61, we held the limitation statute in effect at the time of the injury controlled. The claim was barred under the six months' limitation statute in effect at the time of injury, N.M.Comp.St.1929, § 156–113, but would have been timely made if the 1937 Act, Ch. 92, § 7, had governed.

The authorities were thoroughly reviewed in that case by Justice Sadler and it would not serve any useful purpose to repeat them here. The decision is bottomed on the rule that where not only the remedy is involved, but also the right to maintain such action, such an amendment is given only prospective effect. While that case arose under the workmen's compensation act, one of the authorities most relied upon was Bretthauer v. Jacobson, 1910, 79 N.J.L. 223, 75 A. 560, which was in turn an action under the New Jersey wrongful death act, and the limitation statute in the act had been enlarged between the time of death and the filing of the action. There, as here, the suit was filed too late if the act in effect at the time of death controlled,

but timely filed if the amendment governed. It was held the limitation in effect at the time of death governed the right to prosecute the action and that the defendant was exempt from all claims after the expiration of the time fixed.

There is nothing in the 1953 amendment which evidences any intention that it should be given retroactive effect. We must, therefore, give it only prospective effect in accordance with the general rule and hold the one-year statute of limitations applicable in this case.

The judgment will be affirmed.

It is so ordered.

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

298 P.2d 941

STATE of New Mexico, Plaintiff-Appellee,

v.

Clarence Curtis ARMSTRONG, Defendant-Appellant.

No. 6037.

Supreme Court of New Mexico.

May 24, 1956.

Rehearing Denied July 19, 1956.

Edwin L. Felter, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., Santiago E. Campos and Paul L. Billhymer, Asst. Attys. Gen., for appellee.

Willard F. Kitts, Santa Fe, amicus curiae.

COMPTON, Chief Justice.

Appellant was convicted by a jury of Hidalgo County of the crime of voluntary manslaughter in the unlawful killing of Ruby Cardenas, and he appeals.

It is first argued that there was no proof of the corpus delicti. This argument must be rejected. In homicide cases the corpus delicti is established upon proof of the death of the person charged in the information or indictment, and that the death was caused by the criminal act or agency of another. State v. Griego, 61 N.M. 42, 294 P.2d 282; State v. Lindemuth, 56 N.M. 257, 243 P.2d 325; State v. Dena, 28 N.M. 479, 214 P. 583. Admittedly, Ruby Cardenas is dead. She and appellant were living together in a trailer house belonging to appellant at the time she was killed. On the night of August 21, 1954, they visited the Blue Moon Bar in Lordsburg, where she drank considerable intoxicating liquor. Following arguments in the bar, they returned to the trailer house, where they engaged in an altercation which resulted in her death. The next day her body was found buried in a shallow grave covered by a rug identified as having been taken from the trailer house occupied by them. The body showed multiple bruises, swelling, and discoloration, particularly about the face. Dr. Spriggs testified that he found an oval shaped depression in the region of her left temple "about two inches in length and one inch in width." The post-mortem examination disclosed the presence of blood in the spinal fluid. It was his opinion that death was caused by means of a hard blunt instrument. Plastic casts made of automobile tracks found at the grave, compared favorably with the tracks made by appellant's pickup truck. One witness testified, "seemed to be the exact duplicate." An inspection of the trailer house disclosed what appeared to be blood on a sheet. Blood was found on the floor mat of appellant's pickup. Also, blood was discovered on the "mop board" at the front of the trailer. Appellant's trousers were found in the house of a friend, which showed evidence of recent rinsing. At first appellant denied any knowledge of her death, claiming the last time he saw her was when she left with

some one in an automobile who had called for her during the night. After being placed in jail, however, he changed his story and took investigating officers to the place where he had hidden a shovel which had been used in digging the grave. He had also hidden the shoes he wore the night of her death. We think this evidence sufficiently establishes the corpus delicti. In addition to the cases supra, see Kugadt v. State, 38 Tex.Cr.R. 681, 44 S.W. 989; Commonwealth v. Webster, 5 Cush., Mass., 295, 52 Am.Dec. 711. Incidentally, appellant later made statements in which he claimed that the deceased attacked him with a knife, and that he kicked her in the necessary defense of himself. This defense, obviously, was disbelieved by the jury.

The information charged appellant with murder. Upon motion, the charge of murder in the first degree was withdrawn, and the jury was instructed as to the elements of murder in the second degree and manslaughter. Appellant insists that there is no evidence tending to establish this degree of homicide. Even so, it was not error to submit the issue of second degree murder, where the accused was convicted of a degree of crime properly within the evidence. State v. Horton, 57 N.M. 257, 258 P.2d 371; State v. Vargas, 42 N.M. 1, 74 P.2d 62. The evidence amply supports the verdict of voluntary manslaughter.

Assigned as error is the admission in evidence of photographs. Numerous photographs were taken of appellant to show cuts, bruises, and scratches appearing on his body. Some of "the film didn't turn out" well and failed to show all scratches on his body. It is asserted that since the photographs did not show all of appellant's injuries, they were inadmissible. We find no merit in this claim of error. There is evidence that the photographs fairly and correctly represented the object they purported to represent and as the witness saw it. This is all that is required. State v. Jones, 52 N.M. 118, 192 P.2d 559. See Scott on Photographic Evidence, pp. 493–495. The admissibility of this evidence was a matter addressed to the sound discretion of the trial court, and we find nothing in the record tending to show an abuse of discretion. State v. Johnson, 57 N.M. 716, 263 P.2d 282; Ingebretsen v. Minneapolis & St. L. R. Co., 176 Iowa 74, 155 N.W. 327.

The validity of the sentence is questioned. The penalty for manslaughter is not less than 1 nor more than 10 years. Section 41–17–1, 1953 Comp., in effect when the offense was committed, provides that the court, at its discretion, shall fix the *maximum* and *minimum* duration of the sentence, and the trial court imposed a sentence of not less than 8 nor more than 10 years. Prior to trial and sentence, however, Chapter 150, Laws 1955, commonly known as our Indeterminate Sentence Act, was passed which removed the discretionary

powers of the trial judges to fix minimum or maximum sentences, and required the court to "sentence the person for the term as prescribed by law for the particular crime of which he was convicted." The contention is made that appellant should have been sentenced under the 1955 Act. This contention presents a novel question, and we note a divergence in the decisions of other jurisdictions. People v. Roper, 259 N.Y. 170, 181 N.E. 88; Rogers v. State, 17 Ala. App. 175, 83 So. 359; Commonwealth v. Beattie, 93 Pa.Super. 404; People v. Guagliata, 362 Ill. 427, 200 N.E. 169, 103 A.L.R. 1035; Earl v. Commonwealth, 202 Ky. 726, 261 S.W. 239. To sustain this contention, we would have to hold that the parole act amended the penalty provisions, and we know this is not so. The latter act merely advances the eligibility date for parole. It does not change the punishment nor does it purport to do so. Indeed, the penalty remains the same, not less than 1 nor more than 10 years. Consequently, the sentence imposed must be sustained. Compare People v. Hartsig, 249 Ill. 348, 94 N.E. 525; People v. Norwitt, 394 Ill. 553, 69 N.E.2d 285; Commonwealth v. Kalck, 239 Pa. 533, 87 A. 61; Forbes v. State, 93 Neb. 574, 141 N.W. 197.

Before closing we should acknowledge the services of Willard F. Kitts, Esq., amicus curiae, in the filing of an able brief touching the validity of the Parole Act, however, due to our disposition of the appeal, it was found unnecessary to rule on that question.

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

LUJAN, SADLER and McGHEE, JJ., concur.

KIKER, J., being absent from the State, did not participate.

298 P.2d 943

Alfred Lee HARRIS, Plaintiff-Appellant,

v.

OLD EQUITY INSURANCE COMPANY, Defendant-Appellee.

No. 6031.

Supreme Court of New Mexico.

June 29, 1956.

R. F. Deacon Arledge, Roy T. Mobley, Lorenzo A. Chavez, Albuquerque, for appellant.

Shipley & Seller, Alamogordo, for appellee.

KIKER, Justice.

This appeal is from a judgment entered for defendant Old Equity Insurance Company following a motion for summary judgment. Attached to the motion were the deposition of plaintiff and three affidavits from doctors.

The facts, as shown by the motion supported by deposition and affidavits, and by the contract of insurance attached to plaintiff's complaint, are as follows.

On October 11, 1948, plaintiff-appellant, paid to Old Equity Insurance Company of Gary, Indiana, 25¢ and received therefor a contract of insurance protecting him under the conditions set out in the policy against both accident and illness. Beginning on November 11, plaintiff was required to pay premiums of $25 annually if paid annually, $6.50 per quarter if paid quarterly, or $2.25 per month if paid monthly.

There is no dispute that the policy was in effect until May 11, 1952, the date on which Old Equity Insurance Company claims the policy lapsed for nonpayment of premiums.

In February, 1952, plaintiff was stricken with illness and has never been well since that time, and will never be well. The affidavits of the doctors show that he has an

enlarged heart with other complications attendant thereon.

Plaintiff, realizing that he was ill, went to the office of a physician at Tularosa, New Mexico, where he then lived, seeking medical assistance. He has been treated by that physician and by others at El Paso, Texas, at various times, but never in his home. He has always gone to the office of the physician consulted, except for an operation which he had for other trouble about two years after his first heart disability, when he was hospitalized.

For two years before his deposition was given, he had lived with a son at El Paso. He stated that he occasionally tinkers about the yard where he lives, though he can't do much. He undertook to work for another person doing yard work for a period of about three weeks, but was not able to continue.

On the day his deposition was given, he drove his automobile from El Paso to Tularosa, a distance of about 100 miles; as he stated there was no one else to drive him. On other occasions, also, when neither his son nor his son's wife could drive him, he would drive his car from El Paso to Tularosa. He made this trip about once a month, though sometimes there would be a lapse of two months, to check up on a three-acre orchard he owned there and be sure that the man on the place was properly irrigating. He also transacted some other business at Tularosa when there and would occasionally see his Tularosa physician. On most of the trips, the driver would be either his son or his son's wife.

There was no period of time after the first attack of heart difficulty when it can be said that his activities were so restricted that he was "confined within doors and attended therein by a physician", in the meaning of the insurance contract.

Plaintiff wrote to Old Equity Insurance Company on February 27, 1952, notifying it of his illness. He asked for forms to be prepared by himself and his physician "for the total disability payment in part H of your Policy #LM 57.178." On March 22, 1952, plaintiff filed his claim. This claim does not show that plaintiff, during the 30 days since he was stricken, had been confined within doors and attended therein by a physician.

Two paragraphs of the insurance contract are controlling as to plaintiff's rights in this case. They are Part H and Part I of the contract and read as follows:

"Part H.
Confining Disability Benefits
—$50.00 Monthly For Life

If injury or sickness confines the Insured continuously within doors for one day or more and requires regular treatments therein by a legally qualified physician or surgeon, the Company will pay, commencing with the first

such treatment, benefits at the rate of $50.00 per month so long as such confinement remains continuous, provided said injury or sickness causes total disability and necessitates total loss of time.

"Part I.

Non-Confining Disability Benefits —$25.00 One Month

If injury or sickness does not confine the Insured continuously within doors, but causes continuous total disability and necessitates total loss of time, the Company will pay, commencing with the first treatment by a legally qualified physician or surgeon, benefits at the rate of $25.00 per month for a maximum period of one month."

As to this policy, an affidavit of plaintiff which was before the trial court states in part:

"I received an education to about the 9th grade, in the school at Mountain Park, New Mexico. When I applied for and received the policy of Insurance on which my suit is based, I was not able to read and understand all of the provisions of the policy, but relied on the statements made by the Insurance Company and its agents. They did not tell me that payment of benefits for disability would require that I be continuously confined within doors, but stated that I would be paid $50 per month for total disability as long as I lived."

After plaintiff applied for payment as above stated, he received from Old Equity Insurance Company a letter dated March 26, 1952, which reads in part as follows:

"Accordingly, we are enclosing herewith our check in the amount of $25.00 in full and complete settlement of this claim as provided for under Part I of Policy #LM 57.178."

It is easy to understand that plaintiff was greatly disappointed when he received the letter from Old Equity Insurance Company advising him that it owed him nothing more than $25; but though we regretfully say so, plaintiff had no other claim than for the $25, because of the facts stated at some length in this case and the parts of the insurance contract which we have quoted. There can be no question, we think, that plaintiff cannot recover in this suit. We cite the case of MacFarlane v. Pacific Mutual Life Insurance Company, 7 Cir., 192 F.2d 193, 29 A.L.R.2d 1403, and the exhaustive note appended thereto at 29 A.L.R.2d 1411. The general rule governing this case is set out at page 1439 of the annotation.

Under such circumstances as we have in this case, we would have to indulge far greater liberality of interpretation than has been done by any court in the country in order to sustain the plaintiff's claim. We must affirm the judgment of the trial court.

It is so ordered.

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

298 P.2d 945

Albert T. SWALLOWS, Plaintiff-Appellant,

v.

CITY OF ALBUQUERQUE, Employer; Mountain States Mutual Casualty Company, Insurer; Defendants-Appellees.

No. 6075.

Supreme Court of New Mexico.
June 27, 1956.

Joseph L. Smith, Henry A. Kiker, Jr., Albuquerque, for appellant.

Hannett, Hannett & Cornish, Albuquerque, for Mountain States Mutual Casualty.

Frank L. Horan, Albuquerque, for City of Albuquerque.

LUJAN, Justice.

This is an appeal from the district court of Bernalillo County dismissing claimant's action, and holding that it was barred by the statute of limitations. No doubt the trial court felt compelled by the legislative directive of § 59–10–13 of 1953 Compilation to dismiss the proceedings as not timely filed. The same compulsion forces us to a similar ruling.

Albert T. Swallows, an employee of the City of Albuquerque Police Department, was injured in the course of his employment in an accident on May 24, 1949. On March 20, 1953, claimant filed a claim against the defendant. On the trial of this cause the court entered a judgment upon the verdict of the jury in favor of claimant. On appeal to this court the judgment was reversed on the ground that the claim had been prematurely filed. Swallows v. City of Albuquerque, 59 N.M. 328, 284 P.2d 216. Judgment on the mandate of this court dismissing claimant's first action was filed on June 21, 1955. On June 30, 1955, over one year from the refusal and failure of the defendant to pay compensation, claimant filed his second claim against the defendant based upon the same alleged state of facts as in the original action.

The claim having been dismissed and not renewed within one year after refusal or failure of the employer to pay compensation, the question now presented is whether claimant in consequence thereof lost his rights by limitations.

It is claimant's contention that the superseding of a judgment pending an appeal, even in special statutory proceedings, tolls the running of the statute of limitations. We are unable to agree with this contention.

Where a statute grants a new remedy, and at the same time places a limitation of time within which the person complaining must act, the limitation is a limitation of the right as well as the remedy, and in the absence of qualifying provisions or saving clauses, the party seeking to avail himself of the remedy must bring himself strictly within the limitations. See, Wilson v. New Mexico Lumber & Timber Co., 42 N.M. 438, 81 P.2d 61. If one does not pro-

tect himself and his rights under the law as written it is his misfortune, and this court should not by judicial legislation, for the purpose of relieving that misfortune, write into the statute a provision that the legislature has not seen fit to enact. Vokovich v. St. Louis, Rocky Mountain & Pacific Co., 40 N.M. 374, 60 P.2d 356.

In 34 Am.Jur. § 281 at page 227, we find the following language:

> "In the absence of statute, a party cannot deduct from the period of the statute of limitations applicable to his case the time consumed by the pendency of an action in which he sought to have the matter adjudicated, but which was dismissed without prejudice as to him, and if, before he commences a new action after having become nonsuited or having had his action abated or dismissed, the limitation runs, the right to a new action is barred. And where a statute creates a right of action which did not exist at common law, and which does not obtain in the absence of such statute, the limitation prescribed therein, within which such action must be commenced, is a condition imposed upon the exercise of the right of action granted, and this time is not extended by the pendency and dismissal of a former action. * * *"

Workmen's compensation statutes are sui generis and create rights, remedies and procedure which are exclusive. They are in derogation of the common law and are not controlled or affected by the code of procedure in suits at law or actions in equity except as provided therein. Hudson v. Herschbach Drilling Co., 46 N.M. 330, 128 P.2d 1044; Guthrie v. Threlkeld Co., 52 N.M. 93, 192 P.2d 307. The remedy provided by the act being complete in itself and being a departure from the common-law remedy, the period of limitation for beginning suit which is named in the act controls, to the exclusion of the general act of limitations with respect to the time within which actions generally may be commenced.

It follows from what has been said that the time the plaintiff's first suit was pending in this court cannot be deducted from the limitation period. Consequently the trial court correctly held that the claim was barred at the time the present suit was instituted. The judgment should be affirmed.

It is so ordered.

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

KIKER, J., not participating.

299 P.2d 84

Genoveva MONTOYA, as next friend of Maria Olivia Portillo, dependent of Jose Salvador Portillo, Deceased, Claimant-Appellant,

v.

KENNECOTT COPPER CORPORATION, Chino Mines Division, Santa Rita, New Mexico, Employer-Appellee.

No. 6035.

Supreme Court of New Mexico.

June 25, 1956.

Hannett & Hannett, Albuquerque, Edison C. Serna, Silver City, for appellant.

Ben Shantz, Silver City, H. Vearle Payne, Lordsburg, I. M. Smalley, Deming, for appellee.

SADLER, Justice.

The plaintiff below, the appellant in this Court, suing as next friend for Maria Olivia Portillo, the minor child and dependent of Jose Salvador Portillo, her father, sought recovery of the extra compensation of 50 per cent. provided by 1953 Comp. § 59–10–7, for the alleged violation of its terms in the failure to provide a safety device required by law. Such failure it is said was responsible for an explosion resulting in the death of the minor's father while in the course of his employment by the defendant employer. The trial court having sustained a motion to dismiss the amended complaint as failing to allege facts upon which relief could be granted as to the claim for the extra compensation, this appeal followed.

The decedent was employed by the defendant as foreman of a blasting crew. While so employed, he suffered an injury on March 31, 1954, from an explosion arising out of and in the course of his employment, resulting in his death. His average weekly earnings were $125. Basis for the claim of the fifty per cent. extra compensation for failure to provide a safety device required by law rests on the fact that the defendant (appellee) stored detonators and fuses together with explosives, in and on a certain truck, contrary to and in violation of 1953 Comp. § 63–25–13, which violation was responsible for the decedent's death.

The facts hereinabove recited were alleged in plaintiff's amended complaint. Leave was subsequently granted the plaintiff to add by interlineation as a part of the amended complaint certain specific allegations intended to support her claim for the added fifty per cent. compensation by setting out the respects in which it was claimed there was a failure to provide a safety device required by law. The defendant already had answered, prior to the filing of the amended complaint, admitting decedent's death had resulted from an injury arising out of and in the course of his employment and alleging further, that it was paying him base compensation, as provided by law, but denying liability for the 50% extra compensation. It was agreed that this answer should stand as an answer to the amended complaint as further amended by interlineation.

Subsequent to the interlined addition to the amended complaint mentioned above, the defendant moved to dismiss the same upon the ground that it failed to state a

claim upon which relief could be granted, (a) in failing to show the decedent's death resulted from defendant's failure to provide a safety device required by law; and, (b) in failing to identify the specific safety device which it is claimed the employer had failed to provide.

Following argument, the trial court entered an order sustaining the motion to dismiss the amended complaint, as amended by interlineation, with the further proviso that the dismissal should be without leave to amend further. It is from such order that the present appeal is prosecuted.

The basic question for our determination is presented under one point, divided into four sub-headings for purposes of argument. They are thus stated by counsel for the plaintiff, to-wit:

Point I

That Claimant's First Amended Complaint, As Amended By Interlineation, States A Claim Upon Which Relief Can Be Granted.

A. That the separate storage of detonators and other explosives is a safety device required by law.

B. That the separate storage of fuses and other explosives is a safety device required by law.

C. That magazines for the separate storage of detonators and explosives are a safety device or devices required by law.

D. That a "reasonably safe" place of employment is a "safety device" required by law.

The statutory provisions, the violation of which it is charged caused the death of decedent are 1953 Comp. §§ 63–20–1, 63–25–3, and 63–25–13. They will be set out herein in the order just listed.

"Every mine employer shall furnish such employment and such place of employment as shall be reasonably safe for the employees therein, and shall furnish and use safety devices and safeguards, adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees." § 63–20–1, 1953 Comp.

"Detonators or blasting caps shall not be stored with other explosives but in separate magazines." § 63–25–3, 1953 Comp.

"Detonators and fuse shall not be stored with explosives." § 63–25–13, 1953 Comp.

The so-called "safety statute," 1953 Comp. § 59–10–7, upon which the recovery here sought by the plaintiff must stand or fall, as it existed at the time of decedent's injury and death, reads as follows:

"In case an injury to, or death of a workman results from his failure to

observe statutory regulations appertaining to the safe conduct of his employment, or from his failure to use a safety device provided by his employer, then the compensation otherwise payable under the Workmen's Compensation Act shall be reduced by fifty (50) per centum. In case an injury to, or death of a workman results from the failure of an employer to provide safety devices required by law, or prescribed by the labor industrial commission of New Mexico as hereafter provided, then the compensation otherwise payable under the Workmen's Compensation Act shall be increased by fifty (50%) per centum. 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 surety of said employer under the Workmen's Compensation Act, except that this shall not be construed to prohibit an employer from insuring against such additional liability.

"And Provided further, that no employee of such employer shall file a claim for such additional fifty (50%) per centum compensation under the Workmen's Compensation Act on the basis of an injury, nor shall a dependent of a deceased employee file a claim on the basis of the death of a workman, suffered because of the lack of a safety device, unless said claim shall identify the specific safety device which it is claimed was not furnished by the employer; and the employer shall be under a like duty to specifically allege the specific safety device which it is claimed an employee failed to use before the employer may claim a reduction of fifty (50%) per centum as herein provided."

A reading of the sub-headings into which counsel for plaintiff have divided their Point I for purposes of argument readily suggests that all may be encompassed into a single discussion taking notice, nevertheless, of the several sub-points presented. "To come to grips" with the problem before us, as counsel for defendant, the employer, prefer to introduce their argument, the record presents a widely variant appraisal of the true meaning of the governing statute. That statute is 1953 Comp. § 59-10-7. The fundamental difference in the views of opposing counsel as to the true meaning of this statute may best be stated by saying that counsel for defendant would confine the "safety device" intended by it to something tangible—a thing which can be seen, felt and "provided."

On the other hand, the plaintiff's counsel would broaden the meaning of the phrase to include a "rule of conduct," as the doing of an "act," calculated to promote safety, or prevent accidents. A reading of the

briefs of opposing counsel demonstrates, we think, that the thinking of counsel proceeds in directly opposite directions on this decisive question.

Thus it is that we have the plaintiff's counsel presenting as its initial contention for a ruling by us that (a) the separate storage of detonators and other explosives is a safety device required by law, and (b) that the separate storage of fuses and other explosives is likewise a safety device required by law. They quote 1953 Comp. §§ 63–25–3, 63–25–13 and 63–20–1. They are cited, supra, and quoted as well. In as much as the plaintiff's complaint as finally amended charged a violation by defendant of all three sections mentioned, or attempted to do so, we may assume a violation of them for purposes of testing whether such violation invokes an award of the 50% extra compensation.

The pertinent section of plaintiff's complaint, as finally amended, reads as follows:

"That at the time of the decedent's death the employer furnished to the decedent and other employees one truck, which was used as a magazine for the storage of detonators, fuses and explosives, the same being all stored together and contrary to the provisions of Sections 63–25–3, 63–25–13 and 63–20–1, New Mexico Statutes, 1953 Compilation; and that the employer failed to provide decedent with a separate magazine for the storage of detonators and fuses separate and apart from a magazine for the storage of explosives, which violation of statutory duty and failure to provide said safety devices resulted in the explosion causing decedent's death."

It is strongly urged by counsel for plaintiff that the cases of Neeley v. Union Potash & Chemical Co., 47 N.M. 100, 137 P.2d 312, and Jones v. International Minerals & Chemical Corporation, 53 N.M. 127, 202 P.2d 1080, support their claim that an "act," or course of conduct, constitutes a safety device within the meaning of the statute in question. We do not so view the holding in either case. We shall discuss the last mentioned case first. The instruction quoted by plaintiff in her brief from our opinion in Jones v. International Minerals & Chemical Corp., supra, rather than lending support to plaintiff's position on the question discussed, supports correctness of the appraisal given the statute by defense counsel. Plaintiff's counsel claim the instruction, which we shall quote presently, is given approval by us in our opinion in the Jones case. If so, it in no manner aids the plaintiff. The instruction mentioned reads:

"10. You are instructed that the term 'safety device' as used in the Workmen's Compensation Act of this State means and includes all things which will lessen danger or secure

safety. It may mean a device attached to or a part of or connected with a machine or industrial unit or one not necessarily physically attached to or a part of the machine or industrial unit causing injury. The term is intended to include and does include any instrumentality provided by an employer for use by an employee in the operation or repair of a machine or the performance of his duty which in the operation or repair of a machine or in performance of his duty reduced danger or hazard to the employee."

It is readily observed from a reading of this instruction that it interprets the "things" mentioned which "will lessen danger or secure safety," as something tangible, concrete, that can be seen, touched or felt—an "instrumentality"—as opposed to a rule or course of conduct. The instruction uses the word "things," "device attached to," "instrumentality provided," all suggestive of concrete, tangible gadgets—or let us say "devices." We see nothing in plaintiff's sub-points A and B to merit a holding that a safety device is anything other than what the phrase implies—a visible article designed to promote safety and avoid accidents.

In Neeley v. Union Potash & Chemical Co., supra [47 N.M. 100, 137 P.2d 317], we dealt with a factual situation which involved two methods for effecting "grounding" of machinery against electrical current—(a) one by using a grounded cable consisting of four wires, one of which was a ground wire; and (b) the other the attaching of a ground wire to the frame of the machine and running it into the ground. The employment of either method constituted a providing by employer of something tangible, a "thing," or device, capable of being identified, to be employed by the workman for his own safety. This falls far short of establishing that an "act," or "course of conduct," is a safety device.

A careful reading of our opinion in the Neeley case leaves one fairly impressed that the language: "We hold that the statute requires the grounding of the machinery in question, as a 'safety devices required by law' * * *," comprehends the physical use or employment of the ground *wire,* not the scientific result which the act or practice placing it in the earth—"grounding"—entails. Significantly, such a meaning is emphasized by the constant use of the term "grounding device," as found throughout the opinion.

So considered, we see no inconsistency between our present holding and our decision in the Neeley case. To whatever extent that case may be viewed as holding a "rule of conduct," or "specific safety practice," enjoined by law (dissociated from the use of a tangible safety device likewise required by law) will support imposition against an employer of the penalty award, we decline to follow it as a precedent.

Significantly, there is not a case in New Mexico, including the Neeley case, that does not tie the safety device mentioned to something "tangible"—in the Neeley case a "wire" for grounding; in Pino v. Ozark Mining and Smelting Co., 35 N.M. 87, 290 P. 409, it was "goggles" to protect the workmen's eyes from flying particles; in Thwaits v. Kennecott Copper Corporation, 52 N.M. 107, 192 P.2d 553, it was a hand rail on a platform to protect the workman from falling; and, in Apodaca v. Allison & Haney, 57 N.M. 315, 317, 258 P.2d 711, it was a gas indicator to give notice of the presence of deadly gases,—to cite some typical cases.

In their third sub-point counsel for plaintiff carry the argument a step further by advancing the claim that the magazine mentioned in 1953 Comp. § 63–25–3, is a safety device within the statute in question. Recognizing, however, that the explosives responsible for decedent's death were not at the time in any building or structure meeting the popular conception of a "magazine," the contention is made that by placing the detonators and blasting caps in a truck where explosives also were at the time carried, the truck itself was being employed as a "magazine" for transport of the explosives and separate trucks, treated as "magazines," not being provided, a violation of § 63–25–3 ensued, thereby invoking the so called safety statute for plaintiff's benefit.

It requires some refinement of reasoning to contemplate a "truck" as a "magazine," and equally as much to visualize an ordinary building or structure as the "magazine" mentioned in the statutes quoted and thus a safety device within the meaning of the safety statute. Here, as in the sections of the statute mentioned in plaintiff's subpoints A and B, it being the "storing" that is proscribed by § 63–25–3, we find a certain course of conduct condemned by the statute. It is the doing of a certain act that is outlawed, not the providing of a named safety device.

We might very well agree that where an omission to employ the "safety device" enjoined by 1953 Comp. § 63–25–1 (not here one of the sections whose violation is specifically charged against defendant), results in injury or death to the employee, benefit of the safety statute may be claimed by him. While, generally, the complaint, or claim, charges a violation of §§ 63–25–3, 63–25–13 and 63–20–1, when it begins to particularize it is only a violation of § 63–25–13 prohibiting the "storage of detonators and fuses with explosives" and the failure to provide a separate magazine for storage of said detonators and fuses "separate and apart from a magazine for storage of explosives," that is specifically charged in the complaint.

We invite a reading of 1953 Comp. Article 25 of chapter 63, on "mines and mining."

Article 25 deals with "Explosives for mines other than coal". We defy anyone to read this Article 25 *from beginning to end* and find any justification whatever for converting by judicial construction the "magazine" of which the legislature is speaking in this chapter into a "truck" on the way to work with a group of employees and their equipment. Note the language of 1953 Comp. § 63–25–1, reading:

> "*Storage of explosives—Magazines.* —Explosives shall be stored on the surface only, except as hereinafter provided, in magazines located at safe distances away from all mine openings, mine buildings, or inhabited dwellings, these distances to correspond so far as possible with recommendations as set forth by explosive manufacturers."

Other sections, each with appropriate headings follow, such as "Construction of magazines—Lights", § 63–25–2; "Detonators," § 63–25–3; "Location of magazines—Safety requirements", § 63–25–4; "Magazine to be locked—Smoking and inflammable material prohibited", § 63–25–5; "Auxiliary magazines—Location—Amount of explosives stored", § 63–25–7, and so on and on. Of course, there are to be found in the chapter numerous statutory regulations to be observed by the employee whose violation will, if causing injury or death to him, decrease his compensation by 50 per cent. simply *because the safety statute so provides.* Likewise, there are to be found in the chapter numerous statutory regulations, shall we call them "*specific safety practices,*" enjoining upon the employer the doing or refraining from doing of certain *acts* looking to the safety of the employee, but delinquency of the employer with respect to these *acts* of omission or commission do not subject the employer to imposition of the penalty award simply because the *safety statute does not so provide.*

Finally, plaintiff's counsel seize upon the language of 1953 Comp. § 63–20–1 enjoining upon the employer the duty to provide a place to work that is "reasonably safe," as providing for a "safety device" required by law. The statute mentioned reads:

> "Every mine employer shall furnish such employment and such place of employment as shall be reasonably safe for the employees therein, and shall furnish and use safety devices and safeguards, adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees." 1953 Comp. § 63–20–1.

The claim that the requirement of a "safe place to work" is a "safety device" within the meaning of safety statute is confronted by all the defects of intangibility encountered in a consideration of the claims already discussed and disposed of. Counsel

for defendant place some reliance on a withdrawn opinion in the case of Thwaits v. Kennecott Copper Corporation, 52 N.M. 107, 192 P.2d 553, in which the majority opinion first filed did hold, as counsel state, that failure to provide a "safe place to work," represented a legislative effort to provide a safety device within the intendment of the safety statute. The writer along with Mr. Justice McGhee registered a vigorous dissent to that conclusion and, upon rehearing, the opinion so holding was withdrawn and abandoned when it was pointed out to us by amicus curiae that there was a specific statute requiring a railing to be placed around the platform in question as a safety device. As counsel state, not much satisfaction is to be had by either party from the Thwaits case but, if either party is to profit by it, the defendant may claim the greater comfort, it now seems to us, since a holding that would easily have supported the conclusion reached, if sound, was expressly abandoned in favor of a more certain and solid foundation.

If further proof were needed to establish the correctness of defendant's position on the question before us, namely, that the safety device contemplated by the statute in question is something tangible and concrete, which can be seen, touched and described, it is to be found in the closing paragraph of the statute, to-wit:

> "And Provided further, that no employee of such employer shall file a claim for such additional fifty (50%) per centum compensation under the Workmen's Compensation Act on the basis of an injury, nor shall a dependent of a deceased employee file a claim on the basis of the death of a workman, suffered because of the lack of a safety device, *unless said claim shall identify the specific safety device which it is claimed was not furnished by the employer; and the employer shall be under a like duty to specifically allege the specific safety device which it is claimed an employee failed to use before the employer may claim a reduction of fifty (50%) per centum as herein provided.*" (Emphasis ours.) 1953 Comp. § 59-10-7.

The legislature was talking about *tangible things* that could be seen and described, when it enacted the italicized language as a condition to stating a cause of action for recovery of the extra compensation, or for reducing as against a claimant the amount of the base compensation. How, may we ask, can the pleader describe the failure to furnish a safety device claimed to consist of conduct amounting to negligence, in purported compliance with this statute? And, by the same token, how is the employer, seeking a reduction in base compensation, to describe the "safety device" which it is said the claimant (workman) failed to use, if only his act of omission was one amounting to negligence?

This language in the closing paragraph of the governing statute, quoted above, seems to us absolutely conclusive of the correctness of the interpretation counsel for defendant have given the statute which the trial court adopted and we approve.

It follows from what has been said that the judgment of the trial court is correct and should be affirmed.

It will be so ordered.

COMPTON, C. J., and C. ROY ANDERSON, District Judge, concur.

LUJAN and McGHEE, JJ., dissenting.

299 P.2d 457

Mildred Wallene MENDENHALL and Stanley Mendenhall, *her husband*, Appellants,

v.

H. P. VANDEVENTER, d/b/a Yellow-Checker Cab Company, Appellee.

No. 6073.

Supreme Court of New Mexico.

June 27, 1956.

Joseph L. Smith, Henry A. Kiker, Jr., Albuquerque, Waldo Spiess, Las Vegas, for appellants.

Iden & Johnson, Richard G. Cooper, Albuquerque, for appellee.

LUJAN, Justice.

Appellants, as plaintiffs, sued appellee for $28,575, for personal injuries and property damages, alleged to have been caused by a collision between the automobiles of appellants and appellee, and for medical and hospital expenses. Appellee answered by a general denial, contributory negligence, and set up a release, executed by appellants one month and nine days after the collision, in which appellants acknowledged the receipt of $1,353.75, in full settlement for all injuries and property damages resulting from the accident.

Appellants by reply admitted the execution of the release, but sought to avoid the effects thereof by certain allegations respecting mutual mistake.

After joinder of issues, defendant moved for a separate and prior trial on the issues raised by appellants' reply to the affirmative defense, under the provisions of Rule 42(b) of the Rules of Civil Procedure, to the effect that "The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim * * * or of any separate issue * * * or issues." The motion was sustained and trial was had on the issue of the validity of the release. At the close of all of appellants' evidence, motion was made by the defendant for a

directed verdict, which was sustained by the court, and appellants have appealed.

Appellants predicate their appeal upon four alleged errors which they argue under two points: (1) That the court erred in granting defendant's motion for a separate trial on the validity of the release executed by them and in trying the issues separately from the remaining issues; and (2) that the court erred in directing the jury to return a verdict in favor of the defendant and against plaintiffs.

The granting of a motion for a separate trial on the issue of the validity of a release is a matter resting within the sound discretion of the trial court, and will not be disturbed unless there is a clear abuse of such discretion shown. There was no abuse of this discretion in the instant case.

In Moore's Federal Practice, Vol. 5, p. 1217, § 42.03, it is said:

> "A separate trial may be appropriate where defendant in a negligence action pleads a release, if the court believes the jury may be prejudiced by trying the issue as to the existence and validity of the release with the issues on the merits."

Inasmuch as the issue arising upon an affirmative defense, and the reply thereto, is properly an issue in an action to recover for personal injuries, if the reply states facts sufficient to avoid a release which a plaintiff admits he executed and delivered, receiving the money consideration named therein, this would seem to us peculiarly a case where a separate issue as to the validity of a release should be first tried. The danger which may result from attempting to try all of the issues at one time is that the evidence upon the defendant's negligence, or plaintiff's freedom from contributing negligence may create an atmosphere which will produce an unconscious influence upon the triers of fact as to the entirely disconnected and distinct issue of the validity and sufficiency of the release. The rule above referred to has useful application to an issue which, if determined in one way, will end the litigation and render a trial upon the merits unnecessary.

The facts of the case at bar made it clear that the issue of the validity of the alleged release should be tried separately. It is appellants' own conduct in signing the release and accepting the $1,353.75 which created the release issue. In view of this action of appellants, they are hardly in a position to complain of the granting of the motion. In furtherance of the convenience of the parties and also of the court and to avoid any prejudice which may arise by trying all of the issues at one time, the issue of the validity of the release was correctly tried first. See, Larsen v. Powell, D.C.1954, 16 F.R.D. 322; Bowie v. Sorell, 4 Cir., 1953, 209 F.2d 49, 43 A.L.R.2d 781; Kiloski

v. Pennsylvania R. Co., D.C.1952, 103 F. Supp. 390; Bedser v. Horton Motor Lines, 4 Cir.; 1941, 122 F.2d 406.

On December 7, 1952, the appellant, Mildred Wallene Mendenhall, was injured in an automobile accident while driving the family car. There was a collision between it and a car driven by defendant's employee. Her injuries consisted of lacerations on the lower lip and multiple contusions and abrasions, with none of which we are now concerned. She also sustained a comminuted fracture of the right ulna which required surgery. On December 8, 1952, Dr. David G. Clark, appellants' own physician performed an operation on the arm and at that time inserted an intermittenary pin to form a union of the bones. He estimated that it would take from four to six weeks for recovery.

Several weeks after the accident a claim adjuster for the defendant called at the Mendenhall home to determine its liability and the feasibility of a settlement. Prior to the settlement the adjuster talked to appellants' physician, on two or three occasions, relative to Mrs. Mendenhall's injuries. The doctor informed him that she would recover in a matter of four or six weeks and that she would have the wire (intermittenary pin) removed from her elbow. On January 16, 1953, the appellants executed the following instrument:

Release of All Claims

"That the Undersigned, being of lawful age, for the sole consideration of Thirteen Hundred Fifty Three and 75/100 Dollars ($1353.75) to the undersigned in hand paid, receipt whereof is hereby acknowledged, do/does hereby and for my/our/its heirs, executors, administrators, successors and assigns, release, acquit and forever discharge Yellow Checker Cab Company and John H. Webb Jr. and his, her, their, or its agents, servants, successors, heirs, executors, administrators and all other persons, firms, corporations, associations or partnerships of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting or to result from the accident, casualty or event which occurred on or about the 8th day of December, 1952, at or near Intersection of Fifth Street and McKinley Ave. in Albuquerque, New Mexico.

"It is understood and agreed that this settlement is the compromise of a

doubtful and disputed claim, and that the payment made is not to be construed as an admission of liability on the part of the party or parties hereby released, and that said releases deny liability therefor and intend merely to avoid litigation and buy their peace.

"The undersigned hereby declare(s) and represent(s) that the injuries sustained are or may be permanent and progressive and that recovery therefrom is uncertain and indefinite and in making this Release it is understood and agreed that the undersigned rely (ies) wholly upon the undersigned's judgment, belief and knowledge of the nature, extent, affect and duration of said injuries and liability therefor and is made without reliance upon any statement or representation of the party or parties hereby released or their representatives or by any physician or surgeon by them employed.

"The undersigned further declare(s) and represent(s) that no promise, inducement or agreement not herein expressed has been made to the undersigned, and that this Release contains the entire agreement between the parties hereto, and that the terms of this Release are contractual and not a mere recital.

"The undersigned has read the foregoing release and fully understands it.

"Signed, sealed and delivered this 16 day of January, 1953.

"Caution: Read Before Signing Below

(sgd.) Mrs. Wallene Mendenhall LS

(sgd.) Stanley Mendenhall LS

"(Sgd.) Mrs. Guido Del Frate
Witness
Mrs. Joyce B. Clahorn
Witness"

It will be noted that the release is, in its terminology, sufficient to indicate that what the parties sought to accomplish by its execution was to end, once and for all, any contention between the parties as to compensation for personal injuries, property damages and possible litigation. It was a compromise of all claims of complaint against the defendant growing out of the accident.

If the release is a full settlement and satisfaction of appellants' claim, and it was not obtained by fraud and deceit, the trial court did not err in granting defendant's motion for a directed verdict and in directing a verdict in his favor.

The appellant, Mildred Wallene Mendenhall, did not recover of her injury as anticipated by her doctor within four or six weeks, and a second operation was performed on February 18, 1955, at which time the pin was removed from her arm. In this connection the doctor testified:

"Q. And was there anything, Doctor, prior to January 16, 1953, to lead you to believe that recovery would be complicated in this case, or that additional surgery would be necessary? A. No, sir. If I had been forced to give a guess at this time, I would say that the alignment was good and it looked like we were going ahead to an uncomplicated union, and I did not expect any further complications."

So far as releases from personal injury claims are concerned, it is generally held that "where the parties are regarded as having contracted with reference to future possibilities, and there is no fraud or other inequitable conduct by the release," a release "cannot be avoided on the ground of mistake merely because the injuries prove more serious than the releasor at the time of executing the release believed them to be." Pom.Eq.Jur., 5th Ed., § 871d. See, also, Annotation in 48 A.L.R. at page 1464. There is no contention of fraud in the instant case.

In Farrington v. Harlem Savings Bank, 280 N.Y. 1, 19 N.E.2d 657, it is said:

"* * * No doubt the plaintiff had a perfect right to agree to settle for the injuries which were known and for all other injuries which might result, and such an agreement would be binding upon him no matter how serious the result of the injuries might thereafter turn out to be, provided the agreement was fairly and knowingly made."

We find the following language in 53 C.J. § 29, p. 1212:

"* * *. But a mistake in prophecy, or in opinion, or in belief relative to an uncertain future event, such as the probable developments from, quickness of recovery from, and the permanence of, a known injury, is not such a mutual mistake as will avoid the release. * * *" See, also, 76 C.J.S., Release § 25, p. 646.

Applying the rule of law, as above laid down, to the facts in the instant case, it seems to us that any mistake that may have been made by appellants' doctor was not as to a known injury, to wit, a fractured ulna. That was an observable injury which subsequently failed to clear up during the time anticipated by the doctor. He erred in his prognosis. It was with reference to this injury that settlement was effected and whatever mistake was made was not as to the injury as it manifested itself on Mrs. Mendenhall's limb, but as to what might happen in the course of the attempted cure. Mrs. Mendenhall knew she had a broken ulna; the doctor knew it and so did the adjuster. There was no mistake as to that particular injury, but merely an incorrect prognosis and not diagnosis.

Particularly applicable to the question before us is the language of Judge Sanborn, in the case of Chicago & N. W. Ry. Co. v. Wilcox, 8 Cir., 116 F. 913, 914, where he points out the difference between prognosis and diagnosis and said, after so doing:

"* * * Again, it is not every mistake that will lay the foundation for the rescission of an agreement. That foundation can be laid only by mistake of a past or present fact material to the agreement. Such an effect cannot be produced by a mistake in prophecy or in opinion, or by a mistake in belief relative to an uncertain future event. A mistake as to the future unknowable effect of existing facts, a mistake as to the future uncertain duration of a known condition, or a mistake as to the future effect of a personal injury, cannot have this effect, because these future happenings are *not facts,* and in the nature of things are not capable of exact knowledge; and everyone who contracts in reliance upon opinions or beliefs concerning them knows that these opinions and beliefs are conjectural, and makes his agreement in view of the well-known fact that they may turn out to be mistaken, and assumes the chances that they will do so. Hence, where parties have knowingly and purposely made an agreement to compromise and settle a doubtful claim, whose character and extent are necessarily conditioned by future contingent events, it is no ground for the avoidance of the contract that the events happened very differently from the expectation, opinion, or belief of one or both of the parties." (Emphasis ours.)

We are abundantly satisfied that the following pronouncement in the case of Moruzzi v. Federal Life & Casualty Co., 42 N.M. 35, 75 P.2d 320, 326, 115 A.L.R. 407, rules this case.

"The check as tendered Moruzzi clearly states the purpose for which the same is tendered, and the release clearly sets forth the conditions under which Moruzzi signed the check and received the money. Though the amount paid Moruzzi appears ridiculously small, considering the maximum liability under the terms of the insurance policy, yet it is not the province of this court to make the contract for the parties, or guide them in their business affairs. In the absence of fraud, undue influence, or mutual mistake, we cannot set aside or avoid the release.

"The general rule is that in order to set aside or avoid a written release, the evidence must be clear and con-

vincing and beyond a reasonable controversy. See 53 C.J., Release, 1283 et seq., §§ 103 to 109, inclusive.

"There is nothing in the record before us showing fraud or undue influence. There is likewise no showing of any mistake in the legal sense. Moruzzi knew that he had been injured. He did not know that the future effects and results of the injury would be death. The effects of the injury might have been temporary total disability or permanent total disability. * * *

"It is the theory of the appellee that because Moruzzi did not know he was going to die as a result of the injury, therefore the release which he executed is void or voidable for mistake. Moruzzi may or may not have foreseen death. Unforeseeability, however, is not a '*mistake*' in the legal sense." See, also Tocci v. Albuquerque & Cerrillos Coal Co., 45 N.M. 133, 112 P.2d 515.

It follows from what has been said that the judgment of the trial court should be affirmed.

It is so ordered.

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

KIKER, J., not participating.

299 P.2d 462

Milnor A. RUDOLPH, Plaintiff, Ivan Davis and Charles Mayfield, Interveners,

v.

Everet V. GUY, Defendant, Cross-Complainant and Appellee,

O. C. McCallister, Defendant, Cross-Defendant and Appellant.

No. 6070.

Supreme Court of New Mexico.

June 22, 1956.

Rehearing Denied Aug. 10, 1956.

Marron & McRae, Joseph Phil Click, Albuquerque, for appellant.

Hannett, Hannett & Cornish, Albuquerque, for appellee.

COMPTON, Chief Justice.

This appeal is from a judgment awarding damages for breach of contract. Cross-complainant Guy and cross-defendant McCallister only are involved.

Initially, plaintiff Rudolph filed suit against both Guy and McCallister on an account. McCallister joined issue; Guy, after making certain admissions, cross-claimed against McCallister, in which he alleges that McCallister agreed to sell him three trucks for a consideration of $26,250 on time and to finance him in the performance of a certain contract with the Atomic Energy Commission at Los Alamos, New Mexico. The trial court awarded damages of $12,076 on Guy's cross-claim, from which cross-defendant appeals.

Appellant first challenges the sufficiency of the evidence to support the finding that McCallister agreed to finance the contract. This contention must be rejected. There was evidence that Guy was awarded a contract by the Atomic Energy Commission to deliver 7,500 cubic yards of fertilizer at a price of $3.50 per cubic yard. Relying on the contract, Guy engaged fertilizer from plaintiff, Milnor Rudolph, and others. Being without sufficient funds and equipment,

he contacted McCallister of the McCallister Auto Company, with whom he signed a purchase order for three trucks and one passenger car to be used by him in the performance of the contract. He executed notes therefor and chattel mortgages securing the purchase price. Guy offered to assign the contract which he had with the government as additional security and to secure money to be advanced him by McCallister, but found that it could not be so assigned. Guy, McCallister and McCallister's attorney discussed the amount necessary to handle and finance the contract. McCallister thought $3,000 was sufficient. Guy was of the opinion it would require $5,000 but McCallister's attorney thought they should arrange for $10,000. So the latter sum was acceptable to all. They went to a local bank in Albuquerque where Guy executed a note to the bank for $10,000, which was endorsed by McCallister. As additional collateral, the contract was assigned to the bank and the bank immediately advanced $3,000, which was placed to McCallister's account and used in the performance of the contract. Guy testified that McCallister stated to him "that he would finance it, that he would not have to have payment on the trucks for forty days" and that the balance of $7,000 would be available to Guy when needed. This evidence being substantial, we will not concern ourselves with the quantum. Thereafter, McCallister refused to finance the balance and the Atomic Energy Commission cancelled Guy's contract. Meanwhile, Guy had become indebted to Rudolph for fertilizer in amount of $400. He had also become indebted to intervener Davis for trucking in amount of $1,676. This evidence is ample to sustain the finding.

Following a controversy between the parties here involved, McCallister took the government contract over and sought to perform it. He rented equipment, hired all personnel, and exercised exclusive control of the employees. He now claims that he advanced the sum of $4,234.17 of his own money in its performance and that the court erred in failing to allow an offset of this amount. It is sufficient to say the trial court heard the testimony, pro and con, and found against McCallister in this regard. The finding that McCallister breached his contract, settles this point.

The trial court based its finding and judgment as to the item of $10,000 loss of profit principally on the testimony of Guy. He testified that he would have made a profit of $10,000 if McCallister had not breached the contract. It is urged that this evidence forms no basis as a measure of damages. We cannot agree. Not only were the claimed damages of the kind and character susceptible of proof, but the amount allowed was subject to reasonable ascertainment. Guy testified from his knowledge of this type of operation as to the cost of fertilizer, the delivery price, etc., consequently, proof of damages was certain. Uncertainty as to the amount of damages does not preclude recovery.

Nichols v. Anderson, 43 N.M. 296, 92 P.2d 781.

Assigned as error is the refusal of the court to adopt certain requested findings. The rule is well established that where the findings made are supported by substantial evidence, error is not to be found in the refusal of the court to make findings to the contrary. Rasmussen v. Martin, 60 N.M. 180, 289 P.2d 327.

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

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

299 P.2d 464

NEW MEXICO STATE BOARD OF PUBLIC ACCOUNTANCY, Appellant,

v.

Joseph B. GRANT, as State Treasurer, and J. D. Hannah, as State Auditor, of the State of New Mexico, Appellees.

No. 6042.

Supreme Court of New Mexico.

July 19, 1956.

Paul E. Keefe, Albuquerque, for appellant.

Richard H. Robinson, Atty. Gen., Fred M. Standley, Asst. Atty. Gen., W. R. Kegel, Asst. Atty. Gen., for appellees.

SADLER, Justice.

The plaintiff below, who is appellant in this Court, presents for review on appeal a judgment of the district court of Santa Fe County denying a permanent injunction against the defendants, Joseph B. Grant, as State Treasurer and J. D. Hannah, as State Auditor, restraining them from transferring on their books to the credit of the general fund in the state treasury the balance remaining on hand to the credit of the plaintiff on said books at the close of the 1954–1955 fiscal year.

The plaintiff is known as the New Mexico State Board of Public Accountancy created and functioning under the authority of L. 1947, c. 115, 1953 Comp. §§ 67–23–1 to 67–23–29. The trial court found that all funds collected by plaintiff under authority of the act are public funds which had to be and had been deposited with the State Treasurer. The balance to the board's credit at end of the 1954–1955 fiscal year was $1,800.-96, which amount under express mandate of the 1953 General Appropriations Act the defendants were about to transfer to the general fund on their books and unless restrained, as plaintiff's complaint alleged and the proof established, the defendants would make the transfer indicated as called upon by the governing act to do.

It appeared in the proof that of the funds standing to the credit of plaintiff on the books of the defendants at the end of the 1954–1955 fiscal year, $740 had been contributed by individual accountants to assist in the operations of plaintiff's board for the current year. As and when received these contributions were deposited with the State Treasurer and became commingled with all other funds standing to credit of the board on the books of defendants.

Additional findings were that the plaintiff board submitted a requested budget to the

1955 session of the legislature and was granted an appropriation in the exact amount requested; that plaintiff board had failed to show that the appropriation so made is so small in amount as will hinder its operations or impair the functions and duties granted and imposed by the act under which it operates.

The court concluded that the plaintiff board depended upon biennial appropriations of the legislature for its operation and enjoyed no continuing appropriation of funds collected, as in State ex rel. Prater v. State Board of Finance, infra, by it for the payment of its expenses. The court further concluded that the fees collected by the plaintiff board under authority of its enabling act, L. 1947, c. 115, 1953 Comp. § 67–23–1 et seq., are not "miscellaneous revenues" within the purview of L.1953, c. 156, § 9, of General Appropriations Act for that session of the legislature. And, finally, the court concluded the General Appropriations Act just mentioned was not constitutionally bad upon any of the grounds urged in Section 5 thereof because it required the reverter to the general fund of balances remaining to the credit of any of enumerated boards, except two named, at the end of the fiscal year.

Counsel for the plaintiff board places his greatest reliance in seeking a reversal of this judgment upon the California case of Daugherty v. Riley, 1 Cal.2d 298, 34 P.2d 1005. We did not permit this case to go unnoticed in our recent decision in the case of State ex rel. Prater v. State Board of Finance, 59 N.M. 121, 279 P.2d 1042, 1046. We were there dealing with the same General Appropriations Act for the 1953 session of the legislature with which we are here concerned, with a difference to be noted. In the Prater case, we considered the same section of the Act mentioned in its effect on the State Board of Barber Examiner's Act seeking to compel the State Board of Finance by mandamus to grant it a supplemental budget that would render available to it the amount remaining to its credit at the end of the current fiscal year. In our opinion in the Prater case, we noticed the California case of Daugherty v. Riley, supra, by citing it to support the following statement in our opinion:

> "There can be no question that but for the restraining influence of Const. Art. 4, § 16, or like provisions in the Constitution or laws of sister states, the appropriation on which administrative boards such as the Barbers' Board depend for existence and operation could be so reduced in a general appropriations bill as to put it out of business as effectively as if repealed. If it has this effect, it violates this constitutional proviso. See Daugherty v. Riley, 1 Cal.2d 298, 34 P.2d 1005."

But neither in the Prater case nor here was there any such calamity impending as threatened in Daugherty v. Riley, supra. Here the trial court actually found on substantial evidence that plaintiff board had failed to show that the appropriation made in covering its requested budget for the current biennium would not suffice to meet its requirements, and thus permit it to function without hindrance to, and impairment of, any of its duties. Furthermore, and as pointed out in the opinion in the Prater case, if in submitting their budget, the plaintiff board under-estimated the cost of administration, a way out was suggested. We said:

> "* * * It may have under-estimated the costs of administration of the board for the biennium in setting them at the figure it did and the evidence is pretty strong that it did. If so, the only relief for the remainder of the biennium would be a deficiency appropriation, a matter to be taken up with the legislature. It is not within our province to grant relief."

Indeed, a careful study of the grounds of challenge here interposed to the legislation challenged is so convincing that our decision in State ex rel. Prater v. State Board of Finance, supra, completely answers the contentions made in the case at bar that we feel satisfied to rest an affirmance on it, except to mention two matters which perhaps should be noticed. It thus is not at all strange the plaintiff board should seize upon and endeavor to bring itself within the only loophole left open to it in our reference in the Prater case to the California case of Daugherty v. Riley. This it fails to do as we have just shown and for the reason stated.

We now notice the claim of counsel for the plaintiff board that, even though we sustain validity of the challenged section of the General Appropriations Act for 1953, viz., section 5 thereof, we may not apply the mandate therein found to so much of the balance on hand to credit of the board as represents voluntary contributions by its member accountants to enable the board to carry on its operations for the current year. This amount it is said aggregates the sum of $740. It is not questioned that these voluntary contributions were deposited in the state treasury and became commingled with other funds standing to the credit of the board.

Counsel point out no language in the act creating it, nor in the General Appropriations Act, conferring upon the board authority to solicit members of its profession to make these contributions. Be that as it may, and even granting the propriety of so doing, once they deposited them in the state treasury, where they became com-

mingled with other funds of the board, they could only be withdrawn in a single manner, that is through appropriations made by the legislature upon warrants drawn by the proper officer. See, Const. Art. IV, § 30; McAdoo Petroleum Corp. v. Pankey, 35 N.M. 246, 294 P. 322.

It is also argued that to permit what is here attempted amounts to double taxation and violates Const. Art. VIII, § 1, requiring equality and uniformity of taxation upon subjects of taxation of the same class. We fail to see wherein there is any double taxation, however viewed. Even if it were otherwise, there exists no constitutional inhibition against double taxation. State ex rel. Attorney General v. Tittmann, 42 N.M. 76, 75 P.2d 701; Amarillo-Pecos Valley Truck Lines, Inc., v. Gallegos, 44 N.M. 120, 99 P.2d 447; Fowler v. Corlett, 56 N.M. 430, 244 P.2d 1122.

There is no point to continuing further our consideration of this case. Any issues or contentions not expressly resolved either have been fully determined against the plaintiff board in State ex rel. Prater v. State Board of Finance, supra, or are found not to merit special treatment. The judgment of the trial court is correct and should be affirmed.

It is so ordered.

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

299 P.2d 467

STATE of New Mexico, Plaintiff-Appellee,

v.

Joe Leandro GARCIA, Jr., Defendant-Appellant.

No. 6059.

Supreme Court of New Mexico.

June 20, 1956.

Dean S. Zinn, Frank B. Zinn, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., J. A. Smith, Hilario Rubio, Asst. Atty. Gen., Santa Fe, for appellee.

McGHEE, Justice.

The appellant (hereinafter called defendant) was convicted of murder in the second degree for the killing of his first cousin, Leopoldo Adolfo Garcia, following a Saturday night carousal in Espanola, New Mexico, and vicinity.

On Saturday night, June 12, 1954, the defendant, together with the state's principal witness, Gerson Amos Lucero, a minor, and in company with two young girls (one a niece of the defendant), went to a dance in Pojaque, New Mexico. Before going to the dance the deceased was with the party at his home. He rode with the group to Espanola where he got out of the car and the remaining four proceeded to the Adobe Club in Pojaque where they danced for a considerable time. After leaving the dance the girls were returned to their homes in Santa Cruz, New Mexico.

While the defendant, Lucero and the two girls were attending the dance at Pojaque, the deceased met Porfiria Benavidez and Mary Martinez and told them the defendant was out with another girl. After returning the two girls who had attended the Pojaque dance to their homes, the defendant and Lucero returned to Espanola and went to the Swan Club. The defendant entered the club and returned shortly with Porfiria Benavidez and Mary Martinez. The girl Porfiria was quarreling at the defendant for his being out with another girl and the defendant then learned the deceased had told her the news. The defendant, Lucero and the two women then went to a bar in Riverside, New Mexico, where they remained until closing time,

2:00 a. m. They went to two other bars but found them closed.

At approximately 1:30 a. m., June 13, 1954, two of the town policemen were at Lola's Bar in Espanola when it was closing and there saw the deceased in a drunken condition. They put him in the back seat of a police car and carried him with them while they patrolled the streets of town until 3:00 a. m., when they drove to police headquarters, turned their car over to the Chief of Police and told him before they went off duty that the deceased was in the rear of the car and of his condition. Some thirty minutes or more later the Chief of Police drove to the home of the deceased's father and let deceased out of the car. The deceased stated he would remain at a truck in front of the home until he sobered up more and he would then take off his shoes so his father would not be aroused when deceased went into the house. The deceased was standing at the side of the truck when the Chief of Police left.

Some time thereafter the brother of deceased who was asleep in the house of the father was awakened by a noise at the truck and looked out the window and saw the deceased approaching the house, whereupon a car stopped in front of the house and a voice the brother recognized as belonging to the defendant called the deceased, Leo, to come back and they would get a drink, or words to that effect. The deceased got in the car with the defendant, Lucero and the two girls, Porfiria and Mary, and drove with them to Lola's Bar where it was testified the deceased got out of the car and the defendant drove to a cafe, turned around and came back to where they had left the deceased and parked the car just inside an alley. We will now quote the testimony of Gerson Amos Lucero, reminding the reader that Joe is the defendant and Leo the deceased:

"Q. Then did Leo talk to Joe, or did Joe talk to Leo? A. Joe spoke to him.

"Q. Where was Leo when you got back? A. He was there in front on the sidewalk.

"Q. Will you describe Leo's condition? A. He was drunk.

"Q. And what did Joe say to Leo? A. Joe told Leo 'let's go and take a drink.'

"Q. And then what did they do? A. Joe got off the car and they walked in front of the car, and I guess they drank, and they started to argue.

"Q. And what was the argument about? A. Joe told Leo 'why was he messing into his business.'

"Q. What were his exact words, as close as you can recall? A. Joe told Leo '*cabron,* why are you messing up into my business.'

"Q. And what did Leo say? A. 'It is the truth,' he told him 'it is the truth.'

"Q. And what did Joe say? A. 'You want me to fix you with a bunch of blows?'

"Q. And what did Leo say to that? A. 'If you can do so.'

"Q. And then what was said or done? A. They walked a little farther into the alley.

"Q. And then what happened? A. There is where they started fighting.

"Q. And what were you doing? A. I was inside of the car with Maria.

"Q. In the front or back seat? A. I was in the back seat.

"Q. How long did they continue to fight? A. No, I don't know how long they were there.

"Q. Did you watch the fight? A. Not all of it, just part of it.

"Q. Was it dark or light in the alley at that time? A. It was dark but not very dark.

"Q. Could you hear any noise? A. Yes.

"Q. Could you see whether both of them were standing up at all times or not? A. Once I saw them but they were standing up.

"Q. Was that at the beginning? A. Yes.

"Q. And then what happened? A. I guess they continued fighting, I didn't pay much attention.

"Q. What were you doing? A. I was with Maria in the car.

"Q. What were you and Maria doing? A. There we were embraced.

"Q. You were more interested in Mary than the fight? A. Yes, sir.

"Q. And about how long did you continue there until Joe came back, if he did? A. It was about twenty or twenty-five minutes, I believe.

"Q. Now describe the condition of the night at that time, as to whether it was daylight, beginning to be daylight or whether it was still completely dark? A. It was starting daylight.

"Q. Then did the defendant, who we refer to as Joe, whose full name is Jose Leandro Garcia, return to the car? A. Yes, sir.

"Q. Did Leo return with him? A. No, Joe came back by himself, alone.

"Q. Could you see Leo? A. No, I didn't pay any attention that way.

"Q. What did Joe say then when he returned? A. 'We exchanged a lot of blows.'

"Q. Was anything else said? A. Not that I remember."

The defendant, Lucero and the two women then drove up the Chama Valley to the home of the father of one of them where a package was obtained and they then returned to the home of one of the women

where they spent the remainder of the night.

At about 8:00 or 8:30 Sunday morning the witness Vigil saw the deceased in the alley near Lola's Bar. The deceased was bloody, dirty and barefooted. Vigil went for an officer who returned and took deceased to the home of his father. Later that morning the defendant, accompanied by his daughter, the witness Lucero, and others, started on a picnic but went by the house where the deceased had been carried. The brother of deceased was trying to wash the blood and dirt from deceased's body. The defendant went inside the house, observed the deceased and advised that he go to the hospital immediately, saying he was in bad condition. The defendant took the deceased to the hospital and went on to the picnic. The deceased died the following day from the injuries which had been inflicted upon him.

The first point relied upon for a reversal is that the evidence is insufficient to support a conviction of murder in the second degree in that there is no proof of premeditation or intent to kill and that malice may not be implied from the proof.

The defendant states in his brief:

"It would be absolutely illogical and nonsensical to infer from the facts as presented that the defendant had formed an intent to kill the deceased and had undertaken to do so by challenging him to a fist fight."

Let us have a look at the record and consider what was disclosed by the autopsy which Dr. Yordy performed on the body of the deceased, as well as other testimony in the case.

Dr. Merle E. Yordy performed an autopsy on the body of deceased. We quote from his testimony:

"Q. What did you find as a result of performing this autopsy? A. That he died as a result of multiple injuries, the chief of which were as follows: rupture of the large vein called the vena cava at the location where the vein joins with the left kidney with a massive loss of blood internally. Also, a rupture of his small bowel with generalized peritonitis or inflammation of the covering of the bowel.

"Interpreter: What?

"A. Of the intestine. He also had a fracture of the fifth through the tenth ribs on the right side. He also had multiple bruises over the entire body, being most prominent on the right hip, right chest, arm, abdomen and scalp. He also had small minute hemorrhages of the brain covering.

"Q. What effect could those hemorrhages have had on his orientation before he died? A. Well, they are similar in effect to somebody who has been a boxer who is punch drunk so that he, while he is not unconscious,

and while they can talk, yet they lack judgment of finer reasoning, etc.

"Q. Doctor, based upon your experience, do you have an opinion as to what sort of blows or occurrences could cause these injuries that you have described? A. They were caused by some blunt instrument. As to what it was I cannot say. The most likely three would be either a kick with a heavy shoe—(Objection overruled.)

"A. It could also have been caused by a smooth board or stick, like a baseball bat, or could have been a smooth rock or something like that welded in the hand.

"Q. About how many separate injuries did you note on his body? A. They were so multiple—there were between thirty and forty major ones.

"Q. How intense or how much force would have to be applied to cause an injury such as a rupture of the large vein which joins the left kidney? A. It would take a force larger than a man using his fist. It has been done by professional fighters but it is very rare.

"Q. And what about the type of blows that would cause to rupture the intestine like you have testified? A. That does not require—it depends on the circumstances in that situation. If a man is fully conscious, has his muscles tensed, it would take a terrific force to do it. If he was unconscious, it would not take nearly as great a force.

* * * * * *

"Q. Doctor, based upon your autopsy and examination, will you state what in your opinion was the approximate and efficient cause of the death of Leo Garcia? A. The proximate cause of death was rupture of the vena cava, with extensive internal hemorrhages, the multiple bruises of the brain and the multiple rib fractures. The efficient cause of death was the rupture of the small bowel, the inflammation of the abdomen and the multiple severe bruises and abrasions. I might also add on the proximate cause that shock due to the blood loss and the multiple injuries was actually the major reason he died.

"Q. Doctor, taking all of the injuries together that you have testified about, just how serious were these injuries taken as a whole? A. They were fatal—period."

The defendant had been upbraided by the woman who was evidently his regular girl friend (and who was described as being very pregnant) for being out with another woman earlier. It is evident defendant was angry with the deceased for having told on him. In addition, we have the defendant going to the home of the deceased at 3:30 a. m. or later and inducing the

deceased in his drunken condition to go for another drink. Defendant put or let deceased out at Lola's Bar, went on up the road a distance, turned around and came back to deceased, provoked a fight and inflicted the grievous wounds described. There may be cases in the books where more brutal assaults were committed, but our attention has not been called to them.

There are two rules with reference to intent in these fight cases. The first is that since death is not the natural or probable result of a blow with the hand, it seems that no intent to kill will, under ordinary circumstances, be inferred, although death results from an assault thus committed. See Annotation, 22 A.L.R.2d 857, where the cases in support of the rule are collected. The second rule is that an assault by blows without a weapon may be attended with such circumstances of violence and brutality that an intent to kill may be inferred. The cases supporting that rule are collected in the above annotation at page 861.

Malice raising the grade of a homicide from manslaughter to murder will ordinarily not be inferred from a blow with the fist. See cases collected at page 868 of 22 A.L.R.2d.

There are many cases which hold although the assault from which death resulted was inflicted with hands, fist or feet, yet if defendant used excessive force or was guilty of extreme brutality, malice may be inferred. These cases are collected beginning at page 871 of above annotation. Oliver v. State, 1937, 234 Ala. 460, 175 So. 305; Ray v. State, 1954, 160 Tex.Cr.R. 12, 266 S.W.2d 124.

The defendant used only two witnesses. The first was his daughter who told of the defendant stopping at the home of deceased on Sunday morning and taking him to the hospital. The second was Mary Martinez, the companion of the state's witness, Gerson Amos Lucero, at the time of the fight. She testified the party did not make the last stop at Lola's Bar and that the defendant and deceased did not engage in a fight. She had previously made a written statement to the District Attorney telling a different story. She was so effectively impeached and confused on cross examination that she, for all practical purposes, became a witness for the state and corroborated the material portion of the testimony of Lucero.

It hardly seems possible the wounds shown by the autopsy could have been inflicted with hands or feet, or both, but whatever the means used, a consideration of the evidence in this case satisfies us it is sufficient to support a finding of premeditation, intent to kill and malice.

The defendant also claims error was committed in submitting the issue of voluntary manslaughter to the jury. He was not convicted of manslaughter and

hence may not complain of the instruction. State v. Horton, 1953, 57 N.M. 257, 258 P. 2d 371; State v. Ochoa, 61 N.M. 225, 297 P. 2d 1053.

The defendant complains of the refusal of the trial court to give his requested instruction No. 5 reading:

> "You are instructed as a matter of law that in the absence of direct proof of the cause of death in a homicide case such as this, if such cause of death can be accounted for upon any reasonable theory other than that of the defendant's guilt, then you should find the defendant not guilty."

As we view the case, there was plenty of proof of the cause of deceased's death, so the instruction was based on a false premise. There was no error in the refusal to give the tendered instruction.

Complaint is also made of the giving of the following instruction on circumstantial evidence:

> "20: You are instructed that while you must be convinced of the guilt of the defendant from the evidence beyond a reasonable doubt in order to warrant a conviction, still the proof need not be by direct evidence of persons who saw the offense committed. The acts constituting the crime may be proved by circumstances. And by circumstantial evidence is meant the proof of such facts and circumstances connected with or surrounding the commission of the crime charged, as tend to show the guilt or innocence of the accused. And if such facts and circumstances are sufficient to satisfy the jury of the guilt of the defendant beyond a reasonable doubt, then such evidence is sufficient to authorize the jury in finding a verdict of guilty. But you are instructed that before you would be authorized to find a verdict of guilty against the defendant where the evidence is circumstantial, the facts and circumstances shown in the evidence must be incompatible upon any reasonable hypothesis with the innocence of the defendant and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the defendant."

Instruction 20 is an old stock instruction which has been given in this state for many years, and we are unable to follow the defendant in his argument it is confusing and could not be understood by the jurors. The judgment will be affirmed. It is so ordered.

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

299 P.2d 472

John S. HILL, Plaintiff-Appellee,

v.

W. R. LONG, Defendant-Appellant.

No. 5990.

Supreme Court of New Mexico.

July 14, 1956.

Shipley & Seller, Alamogordo, for appellant.

Frazier, Cusack & Snead, Roswell, for appellee.

KIKER, Justice.

This suit was for foreclosure of a mechanic's lien.

Long, defendant-appellant herein, as seller, and one Wheeler, as purchaser, entered into a verbal agreement whereby Wheeler was to purchase certain real estate from Long. Wheeler paid $400 down on the purchase price and was let into possession of the property for the purpose of making such changes, alterations or additions to the building thereon as would make it suit his purposes. Wheeler, being in possession of the property, employed plaintiff, a carpenter, to do the work of alteration or addition.

The agreement between Long and Wheeler was such that Wheeler was to make another payment on July 1, 1953, that date apparently being within a month of the making of the agreement. Plaintiff began work on the property on June 21, 1953, and continued working thereon until July 11, 1953. During the time plaintiff was engaged in work, Long was on the property frequently and made some suggestions as to the manner in which the work should be done. Wheeler failed to make the July 1 payment and Long ordered him, on July 11, to stop work, which he did, so plaintiff ended his work on that date.

The legal title remained in the defendant at the time the contract was made and has been in his name at all times. Notwithstanding that Long held the legal title at the time the work began and at all times thereafter, and that he knew that work was being done on the building, he did not post notice that he would not be liable for any work done or materials furnished.

Plaintiff filed his claim of lien November 5, 1953. One of the findings of fact is that the lien was *"timely filed"*. (Emphasis supplied.) The court also found that Wheeler "abandoned" work on the building on July 11, 1953.

Much is said in the briefs about the statute, 1953 Comp. § 61–2–6, which allows to those working under original contractors 90 days in which to file a lien for default in payment of that which they have earned; and it is much argued as to when the work was abandoned, in the meaning of the law, and as to the date when the 90 days began to run. We think it is wholly unnecessary to give any consideration as to any abandonment.

Wheeler was let into possession of the real estate in question for the very purpose of making such changes, alterations or additions as would make the property suit his purposes. He was therefore authorized to make arrangements with a workman or workmen for the purpose of making such changes; and he so employed the plaintiff.

Mr. Wheeler, at the time he employed plaintiff, was an owner, subject to defeas-

ance, of the real estate involved, notwithstanding that the legal title was in the name of defendant. This court has held that one who is employed by an owner of real estate to do such work as plaintiff was doing is an original contractor. The statute does not run against original contractors before 120 days.

In Gray v. New Mexico Pumice Stone Co., 15 N.M. 478, 110 P. 603, 604, the lien claimant appeared to have been a laborer who also worked to some extent as a foreman of laborers and as a caretaker of property and equipment. The court adopted the construction placed upon an identical statute in Idaho:

> "* * * that every person who deals directly with the owner of property and who, in pursuance of a contract with him, performs labor or furnishes material, is an original contractor within the meaning of the statute."

The laborer was held to be an original contractor.

The question of interpretation of the term "owner" came up in the case of Freidenbloom v. Pecos Valley Lumber Co., 35 N.M. 154, 290 P. 797, 798, where it was argued that a conditional vendee in possession was not an owner within the meaning of the statute and that therefore one who dealt directly with the conditional vendee in possession could not be an original contractor. The court disposed of this argument, saying:

> "In the Gray Case we used the word 'owner' in the same sense as it is used in our mechanic's lien statute. It does not necessarily refer to the holder of the legal title to the property improved. It may have reference to one whose interest is less than a fee-simple estate, such as a lessee or a conditional vendee in possession. It means the party in interest who is the source of authority for the improvement. One who deals with such a party directly is contracting with the 'owner,' and is not a subcontractor, but is an 'original contractor.'"

The facts found by the trial court show that Wheeler had paid a part of the purchase price for the real estate and had taken possession thereof in the month of June for the purpose of making improvements. It was then expected that he would remain permanently in possession, making the payments which would fall due later, beginning July 1. He was, as said above, "owner" at at the time plaintiff began work and, at least until July 11, such an owner as made him "the party in interest who is the source of authority for the improvement."

At all times the defendant Long held legal title and knew the work was being done and, as was said above, went upon the

property while work was being done and at times made suggestions as to the method of doing the work. It was his duty under the statutes of this state, if he wished to protect his interest in the real estate against the possibility of lien claims, to post notice upon the property that he would not assume any responsibility for any work done or materials furnished. § 61-2-10, N.M.S.A.1953; Albuquerque Lumber Co. v. Montevista Co., 39 N.M. 6, 38 P.2d 77; Petrakis v. Krasnow, 54 N.M. 39, 213 P.2d 220; Skidmore v. Eby, 57 N.M. 669, 262 P.2d 370.

After the defendant stopped Wheeler from working on the property as above stated, no further payments were made by Wheeler, and defendant has retained the legal title and has been in possession of the property since that time.

Plaintiff, as we have shown, was an original contractor and so, as held by the trial court, his lien was filed within the time allowed by law.

The trial court was correct, therefore, in foreclosing plaintiff's lien. The judgment of the trial court should be and is hereby affirmed; and plaintiff is allowed the additional sum of $100 for attorney's fees in this court. It is so ordered.

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

299 P.2d 774

Joseph CHUBA and Kathryn J. Chuba, his wife, et al., Plaintiffs-Appellees,

v.

W. H. GLASGOW et al., Defendants-Appellants.

Parkland Hills, Incorporated (No Stockholders' Liability), a corporation, et al., Defendants.

No. 6060.

Supreme Court of New Mexico.

July 17, 1956.

Rehearing Denied Aug. 10, 1956.

[redacted]

Grantham, Spann & Sanchez, Albuquerque, for appellants.

W. W. Atkinson, Albuquerque, for appellees.

COMPTON, Chief Justice.

Appellees, plaintiffs below, are seeking a declaratory judgment cancelling building restrictions on property owned by them in Heights Reservoir Addition to the City of Albuquerque. The subdivision involved consists of Blocks 23 and 24, containing 24 lots each; the blocks are separated by Truman Street. The subdivision is bounded by Roma Avenue on the north, San Mateo Boulevard on the east, Marquette Avenue on the south, and Manzano Drive on the west. Appellees are the owners respectively of Lots 13, 14, 17, and 19, Block 24, abutting San Mateo Boulevard. Appellants, and numerous others who are made defendants as a class, are the owners of the remaining lots in Block 24 and all lots in Block 23 to which the restrictions apply.

It is alleged that because of changed conditions within the area surrounding the subdivision, appellees' property is no longer suitable for residential purposes and that its value as such had been destroyed. It was further alleged that benefits of restrictions had been thus defeated. Issue was joined and following a hearing, the court found (a) that no uniform building plan had been established for the subdivision, (b) that the benefits originally intended by restrictions to the dominant property can no longer be accomplished by the continued enforcement of restrictions, and (c) that the original purposes of the restrictive covenants have been defeated. The court then lifted the restrictive covenants and replaced them by permitting certain commercial uses of the premises.

On appeal, appellants challenge the sufficiency of the evidence to sustain the findings. In 1948, Parkland Hills, Inc., filed an

instrument in the office of the County Clerk of Bernalillo County entitled "Declaration of Building Restrictions", which embraces the subdivision in question except 5 lots in Block 24 abutting San Mateo Boulevard, 5 lots in Block 23 abutting Manzano Drive, and 1½ lots in Block 23 abutting Truman Street, and which provided that "said restrictions and covenants are hereby declared to run with the land hereinafter described and be binding on all parties and all persons claiming under them until January 1, 1968, at which time said restrictions and covenants shall be automatically extended for successive periods of ten years unless by vote of the majority of the owners of the lots it is agreed to change said covenants in whole or in part * * * All lots in the tract shall be known and described as residential lots."

While certain lots were specifically exempted by the Declaration, obviously restrictions were a part of a general plan of the common owner, pursuant to which the subdivision was sold. The evidence discloses that a residence has been constructed on each lot thus restricted. It is also clear that no part of the subdivision has ever been used in violation of the restrictions; and certainly there has been no intention manifested to waive them. Consequently, the original purpose and intentions of the parties have been accomplished. The covenants inure to the benefit of the owner of each lot and so long as they remain of substantial value to the dominant property, equity will restrain their violation. Alamogordo Improvement Co. v. Prendergast, 45 N.M. 40, 109 P.2d 254; Barton v. Moline Properties, 121 Fla. 683, 164 So. 551, 103 A.L.R. 725; Tindolph v. Schoenfeld Bros., 157 Wash. 605, 289 P. 530.

Admittedly, there have been many changes in the surrounding area due to the progress of the city. San Mateo Boulevard is now a major arterial boulevard of four lanes with a heavy flow of traffic which unquestionably renders appellees' property less suitable for residential purposes. The area to the north, east, and south is unrestricted and businesses of various kinds have been established thereon; but these changes, outside the restricted area, do not defeat the purposes of the restrictions. Cases cited, supra.

In Alamogordo Improvement Co. v. Prendergast, supra, we said [45 N.M. 40, 109 P.2d 257]:

> "It, no doubt, was contemplated by the parties to the original deeds that the town would 'grow in population,' as the evidence indicates it was open prairie and uninhabited at the time it was platted. The inevitable result of the town's growth was the platting of new additions. As the plaintiff could not own all adjacent property, however extensive its holdings might be, it must necessarily have been in contemplation of the parties that there might

be adjoining property without restriction. * * * If such fact alone was sufficient to make it inequitable to enforce the rights of plaintiff and interveners, then all such plans are necessarily failures from the start."

Compare Gorman v. Boehning, 55 N.M. 306, 232 P.2d 701, 26 A.L.R.2d 868; Neff v. Hendricks, 57 N.M. 440, 259 P.2d 1025.

The trial court found that appellees' property had been zoned by the City of Albuquerque as C–1, Commercial. This finding lends no support to the court's conclusion. The zoning ordinance does not impair the restrictions imposed on the subdivision; the restrictions remain paramount. Magnolia Petroleum Co. v. Drauver, 183 Okl. 579, 83 P.2d 840, 119 A.L.R. 1112; Abrams v. Shuger, 336 Mich. 59, 57 N.W.2d 445; Sorrentino v. Cunningham, 111 Ind.App. 212, 39 N.E.2d 473.

Viewing the evidence in a light most favorable to appellees, we are forced to the conclusion that the findings have no substantial support in the evidence and should be set aside.

It should be stated, however, that where changes in the surrounding area are so radical as to frustrate the original purposes and intention of the parties to such restrictions, that they can no longer be carried out, and this without fault or neglect of him who seeks to be relieved by a court of equity from their observance, such restrictive covenants should be extinguished. In such instance the doctrine, as expressed in the maxim lex non cogit ad impossibilia, would apply; but the case under consideration is not a proper one for its application. Alamogordo Improvement Co. v. Prendergast, supra; Welshire, Inc., v. Harbison, 32 Del.Ch. 362, 88 A.2d 121; Swain v. Maxwell, 355 Mo. 448, 196 S.W.2d 780; Ault v. Shipley, 189 Va. 69, 52 S.E.2d 56.

The judgment should be reversed, and it is so ordered.

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

299 P.2d 776

W. D. CURTIS, Plaintiff-Appellee,

v.

SCHWARTZMAN PACKING COMPANY, a corporation, and Willie Gutierrez, Defendants-Appellants.

No. 5976.

Supreme Court of New Mexico.

July 24, 1956.

McAtee & Toulouse, Wm. C. Marchiondo, Albuquerque, for appellants.

W. W. Atkinson, Albuquerque, for appellee.

KIKER, Justice.

The plaintiff, W. D. Curtis, was attempting to pass a Schwartzman Packing Company truck. The truck made a left turn and the car and truck collided. Plaintiff brought suit for $6,000 against Schwartzman Packing Company and its truck driver.

The complaint alleged the collision was due to the negligence of defendant's truck driver failing to signal for a left turn; failing to make such a signal continuously in the manner provided by law; failing to ascertain whether the turn could be safely made; and turning left while plaintiff was attempting to pass defendant's truck, whereupon the vehicles collided; also that the defendant's truck was not equipped with a rear vision mirror.

The items of damage having been attacked in several respects, we set out in full Paragraph V of plaintiff's complaint:

"As a proximate result of the negligence of the defendants, plaintiff has been damaged as follows:

"(a) The said passenger automobile of plaintiff was damaged in the amount of $450.00.

"(b) Plaintiff lost the use of his car, to his damage in the amount of $200.00.

"(c) Plaintiff suffered numerous and severe wounds, contusions, bruises, lacerations, abrasions, shock, and other painful and serious injuries, and experienced great physical and mental pain and anguish, and has required medical attention and treatment and will require further such medical attention and treatment, the total cost of which will be approximately $250.00.

"(d) Plaintiff was disabled and incapacitated, and was thereby prevented from transacting and attending to his business, to his damage in the amount of $2,500.00.

"Wherefore, plaintiff prays judgment against the defendants, and each of them, in the amount of $6,000.00, together with costs, and for such other and further relief as he is entitled in the premises."

Defendants' answer denied all but formal allegations and set up as affirmative defenses the following: (1) That the plaintiff was negligent in that he operated his vehicle at an unlawful rate of speed, recklessly and without due care or caution for the safety of others, disregarded a left-hand turn signal by the truck driver, and attempted to pass the truck without giving an audible horn signal; (2) that the plaintiff violated certain statutory provisions concerning rules of the road; (3) that the plaintiff was contributorily negligent; (4) that the accident waas unavoidable; and (5) that plaintiff assumed the risk.

The issues were tried to a jury which returned a verdict in the amount of $3,000 for plaintiff. Defendants appeal from the judgment thereon.

Appellants have presented in the brief seventeen assignments of error which are argued under six points.

The first of these points states: "Defendants were entitled to a directed verdict as contributory negligence was established as a matter of law." Under this point

defendant relies upon his assignments of error 8, 9 and 16.

Assignment of error No. 8 asserts error in the refusal of the court to direct a verdict upon the motion of defendant at the close of plaintiff's evidence. Assignments of error Nos. 9 and 16 are in substance the same as assignment No. 8.

The motion for directed verdict was in the following language, quoted in the assignment of error:

> "We have a motion at this time requesting the Court to direct a verdict for and on behalf of the defendants and state our grounds as follows: First, that the plaintiff has failed, substantially, to prove that he was free of negligence, sole negligence of the defendant's agent; and, we feel, as a matter of law, it is quite obvious there is contributory negligence that the Court should rule upon, that the man is contributorily negligent, as a matter of law. Therefore, we ask that the Court at this particular time to direct a verdict."

The motion, in the language just quoted, was properly overruled by the court.

This court has held repeatedly that the question whether a plaintiff is guilty of contributory negligence is for the determination of the jury. This court said in Williams v. Haas, 52 N.M. 9, 189 P.2d 632, 635, that even if a negligent violation of statute on the part of plaintiff is shown, "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. * * * He was entitled to have it [trial court and jury] 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."

No burden rested upon plaintiff to show that he was free from negligence.

Point One is ruled against appellants.

Under appellants' Point Two it is claimed that the court erred in admitting the "Blue Book" to establish the value of plaintiff's car, and in admitting testimony as to total loss, rental value, and loss of use of car, and in submitting its instruction No. 12; and that the admission of such testimony and the giving of said instruction created a situation that could have had no other effect than to confuse the jury. Defendants-appellants objected to some of the testimony listed in the statement of the point, but as to some of the other testimony, defendants consented thereto and asked many questions.

The first attack is upon the admission of the "Blue Book". It is clear that, in the opinion of plaintiff, who had spent many years of his active life as an automobile mechanic, his automobile, after the collision, could not be placed in such state of

repair as would restore it to its former condition. He therefore sold it for salvage for $100. The record shows no contest as to this amount being a reasonable salvage value for the automobile. The complaint alleged damage to the automobile to the extent of $450. The determination as to whether the car had no value except for salvage after the collision was a matter for the jury. It was therefore necessary that testimony of some kind should be given to the jury as to the value of the car before the collision. For the purpose of doing this, the "Blue Book" was admitted in evidence, over the objection of defendants-appellants.

This book, generally used in the automobile field as a price list and guide to used car values in designated territories, is distributed widely to those engaged in the purchase and sale, and the insuring and financing of new and used automobiles, and it is generally relied upon by dealers in the trade. This is a matter of common knowledge and the admissibility of such general market reports and price lists as this was long ago recognized in New Mexico as an exception to the hearsay rule. California Sugar & White Pine Co. v. Whitmer Jackson & Co., 33 N.M. 117, 263 P. 504. Compare Fulwiler v. Traders & General Ins. Co., 59 N.M. 366, 285 P.2d 140.

Plaintiff's allegation in his complaint as to damage to his car was a general allegation which would admit proof of either the loss of the value of the car, except for salvage value, or the cost of repairs and loss of use of the car while being repaired. There was evidence in the record upon which the jury could have found total loss, less salvage, or, if the damage to the car was reparable, cost on account of repairs and the value of the loss of use of the car. Restatement of Torts, Sec. 928; 5 Am.Jur. 905, § 745, "Automobiles"; Tremeroli v. Austin Trailer Equipment Co., 102 Cal.App. 2d 464, 227 P.2d 923; Johnson v. Central Aviation Corp., 103 Cal.App.2d 102, 229 P.2d 114.

The instruction complained of was intended by the court to inform the jury, if it should be found that plaintiff was entitled to recover from defendants for the damage to plaintiff's car, and if the car after the collision had no value except for salvage, in that event plaintiff would be entitled to the difference between the reasonable market value of the car immediately before the collision and its reasonable value immediately after the collision, but that if it should be found that the plaintiff's car could have been restored to its former condition by repairs, and if the jury should find for plaintiff, then his damages should be in such amount as would afford the plaintiff the reasonable cost of repairs and a reasonable amount for the loss of use of the car during the time necessary to make the repairs.

There is nothing about the instruction which could have been confusing to the jury as appellants insist; and there

is nothing about it which could have led the jury to believe that it might award the plaintiff damages for practically total loss and also for loss of any other amount. We think the attack made upon the instruction is not well taken. Industrial Supply Co. v. Goen, 58 N.M. 738, 276 P.2d 509.

Point Three of defendants' brief raises the following: (1) That the court erred in instructing that the plaintiff would be entitled to compensation for diminution of future earning capacity as there was no substantial evidence to justify such an instruction; (2) that it was error to instruct concerning the plaintiff's life expectancy based on mortality tables as there was no substantial evidence of permanent injury; and (3) that these instructions created an issue not alleged in the pleadings or justified by the proof.

We agree with defendants that the court fell into error in giving the instructions complained of in the statement of Point Three.

The testimony offered in support of the propositions that the plaintiff was permanently injured and that there would be consequent diminution of his earnings throughout the remainder of his life is that of the plaintiff and of Dr. Schultz, plaintiff's witness.

The plaintiff testified that at the time of trial he suffered pain in the lower part of his back; that after long hours of sitting or driving, his leg would become numb, he tended to drag his leg as he walked, and he had recently discovered that the heel of his shoe would wear off on the side, throwing his left foot sideways; that he would feel pain when climbing up or down stairs, more noticeably when going down, but that this was not exactly a pain, but a pulling sensation, a tightness; that he could not sleep comfortably and was compelled to sleep in one position, in which he would turn on his left side on a pillow and stretch his left leg and foot in a straight position, but that his leg would then become numb and his back would pain him.

There is nothing in the testimony of plaintiff as given in the trial court which does more than describe a condition existing at the time. Plaintiff is an uneducated man and could not, of course, speak as to the future.

Plaintiff's testimony shows that he suffered the injury complained of on November 22, 1953. On November 23, 1953, Dr. Schultz began treating plaintiff, who then complained of pain in the lower part of his back and in his left lower ribs and of some pain in his left shoulder and the left side of his neck. The doctor caused X-ray films to be made of plaintiff's back, but they showed no injury such as can be discovered by the use of the X-ray.

When he was discharged on March 4, 1954, he stated to the doctor that he had never felt better in his life. He was engaged in operating a merchant police busi-

ness, and had lost considerable time from his work during part of the time he was under treatment.

The trial of this case came on in about 14 months after plaintiff's injury and during that period he had been in two other car accidents. He stated, however, that he was not hurt in either of these accidents, though his statement was that he was considerably shaken up in one of them and suffered some pain for a day or two.

Dr. Schultz testified in the case as to the beginning of his treatment of plaintiff; that he discharged him on March 4, 1954, as cured; and that plaintiff had stated that he felt particularly well when he was discharged. He testified that he examined plaintiff again a few days before trial began; that this examination was for the purpose of enabling him to testify as a witness at the trial.

The doctor testified as to an atrophy of the calf of plaintiff's left leg, saying that he had measured both legs in November 1953 and again at the time of his latest examination, and found atrophy of the calf of the left leg to the extent of ¾ inch.

All other testimony of the doctor, as will be seen, was based upon statements made to him by plaintiff and upon answers to questions asked by him.

The doctor testified that plaintiff had some diminution of sensation along the outside of his left leg and foot and that sensory loss, together with the atrophy, is indicative of some type of nerve root pressure in the back; that the most common cause of such pressure would be a ruptured disc in the spinal column; that "inasmuch as you don't see the disc on X-ray, you can't tell anything about a ruptured disc strictly from normal bone films"; and that diagnosis of the existence of a ruptured disc must depend upon other symptoms and clinical findings.

The doctor further testified: "The findings are highly suggestive of nerve root pressure from a disc. They are not conclusive, I just say they were suggestive, that is all."

He further testified: "I don't think his leg, the leg in itself will alter his activity because he has no symptoms as far as his leg is concerned." He testified that the atrophy would be permanent.

On cross-examination, the doctor testified that there were only two symptoms indicating disc injury, the atrophy of the left leg and the sensory loss in the left leg; that all other tests made for disc injury were negative; that there are 15 or 20 other tests that are usually made in the diagnosis of a disc injury; that the examination made by him a short time before the trial was for the sole purpose of enabling him to testify properly at the trial as to the existing condition of plaintiff. He testified that there was no particular significance in the atrophy. He made no diagnosis of a ruptured disc, but declared that the two symptoms of

atrophy and sensory loss were highly suggestive of nerve root pressure.

On redirect examination, the doctor testified about the test for sensory loss; that this was done by pricking with a pin along the outer side of the leg and foot; that he first tested as to both legs and feet in November 1953 and again at his latest examination and that there had been some sensory loss and some difference in result of the examination between the right and left legs where none existed formerly.

On recross-examination, he testified, as to the sensory symptoms, that the basis for his diagnosis of sensory loss by pin-pricking was in the answers given to him by plaintiff; that is, he would stick the pin against the leg or foot and make some such remark as, "Now, does that feel as sharp as it does on the other leg?" This he called a subjective symptom, the measurement of the calf of the leg being an objective symptom.

On redirect examination he was asked if he had observed any flinching on the part of plaintiff while making such a test and answered, "If you stick them hard enough you can make them flinch, but I was not testing the man's veracity. The only way I can make a diagnosis is to believe the patient; * * *".

The doctor testified that there might be several different causes for such symptoms as he found in plaintiff.

We do not think that the testimony outlined above is sufficient as to a permanent injury resulting from the automobile collision out of which this case arose; but if it could be taken as substantial evidence of permanent injury, there is not one word of testimony by which the jury could make any allowance to plaintiff for any life-long injury.

The evidence does show loss suffered by plaintiff for a time following the collision, but there is no attempt to show what loss, if any, plaintiff will suffer in the future on account of any possible injury suffered by him.

The jury could do no more than merely speculate about the plaintiff's future loss, and in order to justify the giving of the instructions as to permanent injury and future loss of earning power and the mortality tables, there must be some evidence which directly gives the jury a means by which to measure damages on that account.

We think the situation in this case is much like that in the case of Dominguez v. Albuquerque Bus Co., 58 N.M. 562, 273 P.2d 756, 758. In that case the court stated:

> "These cases indicate the admissibility in evidence of the life expectancy tables in a proper case, but indicate that there must be a showing of permanent injury to constitute a proper case."

We quote again from the court in the Dominguez case, supra:

> "The testimony in the instant case, heretofore quoted, is not substantial

evidence of permanent injury and, for that reason, it was error on the part of the trial court to permit the introduction of the life expectancy tables over the objection of appellants."

Bearing in mind that the testimony of the doctor was that the atrophy was "highly suggestive" of nerve root pressure from a ruptured disc, though he stated there might be other causes for the appearance of such symptoms; and further bearing in mind that the doctor testified that, while no improvement of the atrophy could be expected, still that condition was believed by him to be insignificant, and that he also testified that there might be an improvement as to the plaintiff's back condition, whatever caused it, without stating to what extent the improvement might go, his testimony, as showing permanent injury, would seem to be worthless. It should be noted also, as to the showing of future loss, the record shows that at the time of trial plaintiff's earnings had increased since the date of his injury. This was attributed to the growth of his business. Not only is evidence lacking to show definite permanent physical injury but a possibility of future increased earnings is made clear.

We think it evident that the instructions with reference to future loss of earning power, mortality tables, and future pain and suffering, were erroneous.

The verdict was for $3,000 in plaintiff's favor, with no indication as to how the jury arrived at the verdict. Under such circumstances, a considerable portion of the amount allowed may be on account of future loss of earning power and future pain and suffering. The error is prejudicial.

Defendants' fourth point submits that the court was in error in instructing the jury that it might return any verdict not in excess of $6,000.

We think the point not well taken. Plaintiff alleged special damages on account of damage to his automobile in the sum of $450; that he was damaged by the loss of use of his car in the sum of $200; that he had required medical attention and treatment and would require further medical attention, which would amount to approximately $250; that he was incapacitated to the extent that he could not attend to his business, in the sum of $2,500. It is true that these amounts, added, do not aggregate $6,000; but plaintiff alleged that he had "suffered numerous and severe wounds, contusions, bruises, lacerations, abrasions, shock, and other painful and serious injuries, and experienced great physical and mental pain and anguish, * * *". The items so declared in the complaint were such as to make the defendant respond in damages if plaintiff was entitled to recover at all, and the jury was

entitled to make an award of a reasonable amount on account of the injury suffered, if any, as stated in the quotation just above set out. The prayer for damages being in the amount of $6,000, there was no error in instructing the jury as to the verdict not exceeding that amount.

Defendants present the argument, under Point Five, that the refusal of the trial court to submit requested special interrogatories to the jury was an abuse of discretion. The interrogatories requested dealt solely with the amount awarded by the jury for each of several items, to wit, damage to automobile, loss of time and wages, loss of use of automobile, injuries, and medical expenses. Cases previously before this court have held that the giving of special interrogatories to the jury, concerning questions of fact that arise in the case, is within the sound discretion of the court. Larsen v. Bliss, 43 N.M. 265, 91 P.2d 811; Madsen v. Read, 58 N.M. 567, 273 P. 2d 845. The allegations of the pleadings and the proof submitted, however, are such that we believe the defendants were entitled to have the jury's expression as to what items of damage for which allowance was made; and how much was given for each item for which allowance was made. In no event could an allowance be made for any of the items alleged in excess of the amount stated in the complaint as that sustained.

The sixth point relied upon by defendants is that the verdict of the jury was excessive. Since the judgment must be reversed for reasons above stated, it is unnecessary to consider the point.

The judgment of the lower court should be and is hereby reversed and the case is remanded for new trial. It is so ordered.

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

LUJAN, J., concurs in the result.

299 P.2d 1090

Cirilio RIVERA, also known as Cirilo Suniga Rievera, Plaintiff-Appellee,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant-Appellant,

The A. T. & S. F. Hospital Association, Intervener.

No. 6034.

Supreme Court of New Mexico.

July 31, 1956.

B. G. Johnson, E. L. Mechem, W. F. Kitts, Albuquerque, for appellant.

Lorenzo A. Chavez, Arturo G. Ortega, Albuquerque, Tibo J. Chavez, Belen, for appellee.

PER CURIAM.

Upon consideration of motion for rehearing, the original opinion is withdrawn and the following is substituted therefor.

COMPTON, Chief Justice.

This is an action for damages brought under the provisions of the Federal Employers' Liability Act, as amended, 45 U.S. C.A. § 51 et seq., in which it is alleged appellant negligently failed to provide appellee a safe place to work. The pertinent provisions read:

> § 51. "Every common carrier by railroad while engaging in commerce between any of the several States * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, * * * for such injury * * * resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its * * * appliances, * * * track, roadbed, works, * * * or other equipment.
>
> "Any employee * * * any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce * * * shall be considered as entitled to the benefits of this chapter."

Issue was joined and a jury returned its verdict for $68,500 in favor of appellee. Appellant on appeal is seeking a review of alleged errors.

The decisive questions are: (a) whether appellee was engaged in employment in furtherance of, or which directly, or closely and substantially affected interstate commerce, and (b) whether appellant was negligent in failing to provide appellee a safe place to work as contemplated by the Act.

Both questions require an affirmative answer. Appellee was an extra gang laborer employed by appellant in the repair and replacement of its tracks in the vicinity of Vaughn, New Mexico. As a condition of his employment, appellant furnished him board and sleeping quarters on its work train. The work train was made up of some 25 cars, consisting of bunk cars, work cars and cars in which meals were served appellee and others. On these facts, there can be no question that appellee's employment was in furtherance of interstate commerce. Delaware, L. & W. R. Co. v. Mostyn, 2 Cir., 160 F.2d 15; Id., 332 U.S. 770, 68 S.Ct. 82, 92 L.Ed. 355; Atlantic Coast Line R. R. v. Meeks, 30 Tenn.App. 520, 208 S.W.2d 355; Id., 333 U.S. 827, 68 S.Ct. 453, 92 L.Ed. 1112; Atlantic Coast Line R. Co. v. Smalls, 4 Cir., 216 F.2d 842; Small v. Atlantic Coast Line R. Co., 348 U.S. 946, 75 S.Ct. 439, 99 L.Ed. 740; Id., 349 U.S. 907, 75 S.Ct. 579, 99 L.Ed. 1243.

Compare Atchison, T. & S. F. R. Co. v. Wottle, 10 Cir., 193 F.2d 628.

Bearing upon the question of negligence, the work train was moved into Vaughn in February, 1954. The cars were spotted immediately north of an abandoned roundhouse, on a track paralleling and immediately south of the east and west main line track. Located about 35 feet south of the work train, 6 or 7 outdoor toilets were spaced along for the convenience of employees. On February 21, 1954, appellee and various other employees occupied one of the cars as sleeping quarters. On that day, however, other occupants were away. Appellee visited for a while with occupants of other cars, after which he returned to his own quarters around 8:00 P.M. He retired shortly thereafter, but about 9:00 P.M. found it necessary to go to one of the outside toilets. It was dark and the area was unlighted. As he returned to his car, he was approached by two men, presumably hobos, who had gotten off a freight train which he had observed coming into Vaughn from the west just previously. They first asked him for a smoke and money, and being advised that he had neither, they grabbed him by the arm, began twisting it, and at the same time pushed him toward the train which had just come to a stop. One of the men said, "I will throw him under the tracks" and "I will kill him." They assaulted him further and as a result, he was rendered unconscious. When he regained consciousness, the freight train was gone. Its wheel had evidently rolled over his left hand, causing the loss of all but two fingers. The skin of the hand was missing from the wrist down, except from the ring and little finger.

While the Act does not make the employer the insurer of the safety of its employees, plainly, it is the duty of the employer to furnish the employees a safe place to work. A review of the record convinces us that the evidence warranted the jury in reaching its conclusion that appellant was negligent in the respect charged. There is evidence that the abandoned roundhouse was more or less a rendezvous for hobos. They frequented it at will as a place to make coffee, eat their meals, and for other purposes. Previously, a guard in the area had been disarmed, presumably by hobos. But, at the time of the incident in question, the area was unattended by guards and had been for several months. The presence of suspicious characters was such that appellant's yardmaster had requested and was given an official commission to carry side arms for his protection. Lillie v. Thompson, 6 Cir., 173 F.2d 481; Smalls v. Atlantic Coast Line R. Co., supra; Delaware, L. & W. R. Co. v. Mostyn, supra. Also compare Schulz v. Pennsylvania Railroad Co., 76 S.Ct. 608.

Finally, a twofold attack is made on the verdict; first, passion and prejudice; second, it is attacked as excessive. In this respect, judicial control of the verdict is primarily a matter of consideration of the trial court, and both on motion in

arrest of judgment and motion for a new trial, these questions were reviewed and decided against appellant. Cienfuegos v. Pacheco, 56 N.M. 667, 248 P.2d 664; Lopez v. Atchison, T. & S. F. Ry. Co., 60 N.M. 134, 288 P.2d 678. At first glance the verdict does seem over liberal, but we cannot say it is so arbitrary as to show passion or prejudice nor can we say as a matter of law that the verdict is excessive. Padilla v. Atchison, T. & S. F. Ry. Co., 61 N.M. 115, 295 P.2d 1023; Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507; Hall v. Stiles, 57 N.M. 281, 258 P.2d 386; Turrietta v. Wyche, 54 N.M. 5, 212 P.2d 1041.

Viewing the evidence in an aspect most favorable to appellee, we think the verdict has substantial support in the evidence and consequently should not be disturbed. At the time of his injury appellee had a life expectancy of 15.77 years and was earning approximately $250 per month. Appellant argues that had he worked continuously thereafter, his total earnings would not exceed $48,000. Be that as it may, the argument fails to account for pain and suffering. On regaining consciousness, he first noticed a burning pain in his hand which was bleeding freely. He ran to one of the bunk cars screaming "some tramp beat me up." He was given first aid and sent to the Sante Fe Hospital in Albuquerque, where he remained until April 14, 1954. At first it was felt that the remaining fingers could be saved. He returned to his home in Ballenger, Texas, where he received treatment from local physicians, and during which time he continued to suffer great pain. Later, an amputation of the hand was deemed advisable, and some 6 weeks later he was furnished transportation back to the Santa Fe Hospital at Albuquerque. The morning following his readmission, he was asked to leave without the amputation as he had used his hospital allowance. He was told to go to a county hospital if he felt the need of an operation. He left the hospital and again returned to his home in Ballenger and sought help from the Welfare Department of Texas. He continued to suffer great pain. At the trial, some 15 months later, it was necessary to carry his hand in a sling. Medical experts corroborated him as to his suffering and also testified as to future pain and suffering he may yet reasonably expect. Dr. Boyd testified that appellee's remaining fingers had deteriorated, leaving the skin drawn taut over the bony structure. It was his opinion that an amputation was necessary. The exact amount of damages as would compensate him for loss of earnings, is not reflected by the verdict, nevertheless, the jury is given a free hand in determining the extent of the award for pain and suffering, for which there is no fixed standard of measurement.

In Padilla v. Atchison, T. & S. F. Ry. Co., supra [61 N.M. 115, 295 P.2d 1026], in dealing with excessiveness of verdicts, we said:

"The members of this Court participating in the opinion agree the damages are excessive, but, like the members of the Third Circuit Court of Appeals in Scott v. Baltimore & O. R. Co., 1945, 151 F.2d 61, 64, 65, there is nothing we can do about it, in view of the federal decisional law on the subject and the lack of anything in the record indicating the verdict was the result of passion or prejudice. * * *"

Upon a further consideration of the question, we believe that in cases arising in State Courts under the Federal Employers' Liability Act, 45 U.S.C.A. § 51 et seq., all procedural matters, including review of verdicts for excessiveness, are governed by the law of the forum and not by the Federal Decisional Law. This view finds support in nearly, if not all jurisdictions. The cases are so numerous, we will not list them; they are cited for the first time in appellant's brief on motion for rehearing. Had they been brought to our attention in the Padilla case or in the brief in chief in this case, we would not have held that we could not go into the question of excessive verdicts, absent a showing of passion or prejudice. In this respect, there is no conflict between the Federal and the State Courts. The right to review damages in an appellate federal court is denied because of the Seventh Amendment to the Constitution of the United States, which reads:

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

But this limitation does not extend to State Courts.

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

LUJAN, McGHEE and KIKER, JJ., concur.

SADLER, J., dissents.

SADLER, Justice (dissenting in part).

Taking notice of the attack made on the verdict as being excessive and the result of passion and prejudice, the prevailing opinion states:

"At first glance the verdict does seem over liberal, but we can not say it is so arbitrary as to show passion and prejudice nor can we say as a matter of law that the verdict is excessive."

First, let me say at the outset that what is said in the prevailing opinion touching our right to consider the presence of passion and prejudice in the verdict, notwithstanding the trial judge may have given it his approval in denying a motion for new trial, meets with my entire approval. It seems plain, for reasons so well stated in the majority opinion, that we went too far in Padilla v. Atchison, T. & S. F. Ry. Co.,

61 N.M. 115, 295 P.2d 1023, in accepting the federal decisional law on the subject as binding upon us in this class of cases.

I must disagree, however, with the conclusion announced in the quotation from the majority opinion, set out above, that we cannot say as a matter of law this verdict is excessive. It impresses me that it is. Under our Workmen's Compensation Law, the plaintiff would have received for the complete loss of an arm at or near the shoulder 160 weeks' compensation at $30 per week, or $4,800. This is not to say the present plaintiff should be confined to that sum, or to an amount even approximating it.

Nevertheless, the discrepancy between the amount so allowed by the legislature for the complete loss of an arm in an industrial accident and the present verdict cannot fail to contrast in the mind either the miserliness of the one award or the excessiveness of the other. It may even generate in the mind a thought the one is as excessive as the other is niggardly.

At all events, giving due weight to different factors to be considered, it impresses me there is common ground between the two extremes which, occupied by the jury in its deliberations, will be more in line with reason and fairness, and tend to eliminate the showing of passion and prejudice noticeable in this verdict. It is to enable a jury to arrive at that happy medium that I favor reversing the judgment reviewed and remanding this case for a new trial. Compare, Turrietta v. Wyche, 54 N.M. 5, 212 P.2d 1041; Hisaw v. Hendrix, 54 N.M. 119, 215 P.2d 598, 22 A.L.R.2d 285; Frei v. Brownlee, 56 N.M. 677, 248 P.2d 671; Boydston v. Twaddell, 57 N.M. 22, 253 P.2d 312; Thompson v. Anderman, 59 N.M. 400, 285 P.2d 507; Stoll v. Galles Motor Co., 60 N.M. 186, 289 P.2d 626.

The majority concluding otherwise, I dissent.

300 P.2d 476

TRANSPORT TRUCKING COMPANY, a Corporation, Plaintiff-Appellant,

v.

FIRST NATIONAL BANK IN ALBUQUERQUE, a Corporation, Defendant-Appellee.

No. 6067.

Supreme Court of New Mexico.

July 23, 1956.

Quincy D. Adams, James H. Foley, Albuquerque, for appellant.

Richard G. Cooper, Iden & Johnson, Albuquerque, for appellee.

GALLEGOS, District Judge.

At the close of the plaintiff's case, and after admission of some evidence in behalf of the defendant by stipulation of counsel for the parties, the defendant moved that the case be dismissed and the District Court announced that it found the issues

in favor of the defendant and dismissed the case. The plaintiff has appealed.

The plaintiff, appellant herein, Transport Trucking Company, a Corporation, brought suit in the District Court of Bernalillo County against appellee herein, a defendant below, First National Bank in Albuquerque, and one Ray P. Craig, seeking to recover $2,911.80. Craig defaulted and judgment was entered against him for the full amount. It is admitted that Craig has paid to the plaintiff $950 on the judgment.

The Transport Trucking Company was engaged in the business of transporting automobiles for dealers from points in Missouri and Kansas to points in New Mexico. The President of the plaintiff corporation, Jack Barton, lived in Oklahoma City. Craig was vice-president and general manager of the corporation, living in Albuquerque and transacting the corporation business there such as soliciting and collecting freight accounts owing to the plaintiff.

There was a bank account in the name of the plaintiff in the defendant bank. Craig and his wife also had a joint personal account with the defendant bank. Craig, in the course of plaintiff's business, collected from time to time sums due to the plaintiff represented by checks payable to the plaintiff. The sum in controversy was deposited by Craig, during various periods of time, in the defendant bank in his personal joint account which he had with his wife. To deposit the checks, Craig endorsed plaintiff's firm name, Transport Trucking Company, by him. In many instances, Craig would draw a draft from the money deposited to his personal account, which was a joint personal account with his wife, and send the draft to the plaintiff's office in Kansas City. Barton, the president of plaintiff corporation, testified that Craig had been instructed to get a cashier's check or draft payable to the company upon collecting from customers or dealers whose financial standing might be considered risky. Craig appropriated to his own use money belonging to the plaintiff which he had deposited with the defendant bank in the personal joint account mentioned, a small sum was checked out by Craig's wife. Craig became personally indebted to the defendant bank and gave defendant a note on his debt and a portion of this debt was paid by Craig to the defendant out of money belonging to the plaintiff which Craig had deposited in the personal joint account which he and his wife had with the defendant.

From the time that plaintiff was organized in 1948, Craig had been collecting for the trucking company and in April 1948, a signature card was left with the defendant bank signed by the then officers of the plaintiff company, including Craig, addressed to the defendant bank stating "Below please find duly authorized signatures,

which you will recognize in the Payment of funds or the transaction of other business on our account", the plaintiff corporation name "Transport Trucking Company" appearing at the top of the card, although no formal action had been taken by the Board of Directors of plaintiff's corporation to authorize the signing of the signature card.

Barton, who bought all of the stock of plaintiff in 1953, was not connected with the corporation in 1948, however, the signature card mentioned which was left with the defendant bank had not been withdrawn or revoked.

Barton became aware in January 1954 that Craig had misappropriated money belonging to the corporation and he, Barton, loaned Craig $2,400 or $2,500 to pay the company for the defalcations and for some five or six months thereafter Barton permitted Craig to work for the corporation in the same capacity as previously.

Barton stated that he had a conversation with Woodward, an officer of the defendant bank, and had told Woodward what Craig had been doing but Barton did not testify as to any details concerning the conversation with Woodward, and Barton did not instruct Woodward to not accept checks payable to the plaintiff which might be presented to the bank by Craig and did not request Woodward that Craig's name be taken out of the signature card. Barton was not even sure as to when he talked to Woodward and all of Barton's testimony on this line was indefinite and unsatisfactory.

The Court made the following findings:

"That Transport Trucking Company, plaintiff herein, had during all times material to the issues of this case, a checking account at the First National Bank in Albuquerque, New Mexico.

"That Ray P. Craig, co-defendant in this action, was an officer of the Transport Trucking Company, a corporation, at all times material to the transactions complained of in plaintiff's complaint, up to July 1, 1954, and at all times material to the transactions complained of, had authority in connection with plaintiff's checking account at the First National Bank In Albuquerque to sign checks for and in behalf of plaintiff, Transport Trucking Company, a corporation, and to endorse checks by third parties payable to Transport Trucking Company, a corporation.

"That the defendant, Ray P. Craig, had a personal checking account at the First National Bank in Albuquerque during all times material to the transactions complained of in plaintiff's complaint, which account was a joint account with his wife.

"That the defendant, Ray P. Craig, acting in a fiduciary capacity, made

deposits in the First National Bank in Albuquerque, to his personal credit, of checks payable to his principal and endorsed by him, at which time the defendant, Ray P. Craig, was empowered to endorse such checks.

"That the evidence adduced by the plaintiff, Transport Trucking Company, a corporation, was insufficient to establish the fact that the defendant, First National Bank In Albuquerque, had actual knowledge that the fiduciary, Ray P. Craig, was committing a breach of his obligation as fiduciary in making such endorsements and deposits, and such evidence adduced by plaintiff was insufficient to establish the fact that the defendant, First National Bank In Albuquerque, had knowledge of such facts that its action in receiving the deposits and paying the checks amounted to bad faith.

"That there was no evidence introduced by the plaintiff that the checks payable to the Transport Trucking Company were endorsed by Ray P. Craig as fiduciary and delivered and transferred to the defendant, First National Bank In Albuquerque by the said Ray P. Craig as fiduciary of the Transport Trucking Company, plaintiff, in payment of, or as security for a personal debt of the fiduciary to the actual knowledge of the First National Bank In Albuquerque, nor were any such checks transferred to said bank in any transaction known by said bank to be for the personal benefit of the fiduciary."

The Court concluded that the plaintiff had failed to sustain the burden of proof and since the conclusions of the Court are brief, we will quote them:

"It is immaterial that the defendant, Ray P. Craig, had a joint checking account with his wife in the First National Bank In Albuquerque to which he deposited checks payable to the Transport Trucking Company and endorsed by him, since such account is considered a personal account of the defendant, Ray P. Craig.

"The plaintiff has failed to sustain the burden of proof in this case, and at the conclusion of plaintiff's evidence the Court, as a matter of law, finds that judgment for the defendant, First National Bank In Albuquerque, a corporation, should be and is hereby entered, dismissing this action as to the defendant, First National Bank In Albuquerque, a corporation, and awarding to it costs."

Section 33-1-9, 1953 New Mexico Statutes Annotated of the Fiduciary Act provides:

"If a fiduciary makes a deposit in a bank to his personal credit of checks drawn by him upon an account in his

own name as fiduciary, or of checks payable to him as fiduciary, or of checks drawn by him upon an account in the name of his principal if he is empowered to draw checks thereon, or of checks payable to his principal and endorsed by him, if he is empowered to endorse such checks, or if he otherwise makes a deposit of funds held by him as fiduciary, the bank receiving such deposit is not bound to inquire whether the fiduciary is committing thereby a breach of his obligation as fiduciary; and the bank is authorized to pay the amount of the deposit or any part thereof upon the personal check of the fiduciary without being liable to the principal, unless the bank receives the deposit or pays the check with actual knowledge that the fiduciary is committing a breach of his obligation as fiduciary in making such deposit or in drawing such check, or with knowledge of such facts, that its action in receiving the deposit or paying the check amounts to bad faith."

And, Section 33–1–1(2) of the Act provides:

"A thing is done 'in good faith' within the meaning of this act, when it is in fact done honestly, whether it be done negligently or not."

The sections of the Fiduciary Act mentioned and other sections of the Act indicate exculpation or the relieving of a bank when it is sought to be charged by a fiduciary's principal. The Act provides that the bank may be chargeable when its action in receiving the deposit or paying the check amounts to bad faith, such action of the bank must be willful and even though there be suspicious circumstances, the failure to make inquiry does not constitute bad faith on the part of the bank. The purpose of the Uniform Fiduciary Act was to facilitate banking transactions by relieving a depository, acting honestly, of the duty of inquiry as to the right of its depositors, even though fiduciaries, to check out their accounts.

Roswell State Bank v. Lawrence Walker Cotton Co., Inc., 56 N.M. 107, 240 P.2d 1143; Davis v. Pennsylvania Co., 337 Pa. 456, 12 A.2d 66; Colby v. Riggs National Bank, 67 App.D.C. 259, 92 F.2d 183, 114 A.L.R. 1088.

The appellant complains and assigns as error:

(a) That the Court erred in dismissing the action upon motion of the defendant.

(b) That the Court committed error in not making certain specific findings and conclusions requested by appellant.

We will answer the second question first. The trial court made sufficient and proper findings of ultimate facts and this is all that is required. Rules of Civil Procedure 21–1–1(52) (B) (2).

As to the first question, we agree with the appellant that it is the law that on

a defendant's motion to dismiss at the close of plaintiff's case, the evidence must be considered in a light most favorable to the plaintiff.

There is also the rule of law that every presumption is indulged in favor of the correctness of the judgment. Consolidated Placers v. Grant, 48 N.M. 340, 151 P.2d 48.

In this case, the record fails to show that the bank acted dishonestly, or that it received the deposits or paid the checks with actual knowledge that the fiduciary was committing a breach of his obligation, or that the bank had knowledge of such facts that its action in receiving the deposits or paying the checks amounted to bad faith.

We have carefully examined the evidence and the record in this case and we are convinced that the trial court was correct in dismissing the case as the plaintiff did not submit sufficient competent evidence to support a judgment in its favor.

The conclusion reached makes it unnecessary to discuss other points argued by the appellant.

Finding no error the judgment of the trial court should be affirmed.

It is so ordered.

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

300 P.2d 480

J. C. WILLIAMS, T. S. Parks, J. W. Sabino and Parks Food Market, a Partnership, Plaintiffs-Appellees,

v.

P. D. MILLER, Mortis W. Smith and Miller and Smith, Contractors, a Partnership, Defendants-Appellants.

No. 6056.

Supreme Court of New Mexico.
July 25, 1956.
Rehearing Denied Aug. 27, 1956.

See also, 58 N.M. 472, 272 P.2d 676.

Moise & Sutin, Albuquerque, for appellants.

Rodey, Dickason, Sloan, Mims & Akin, Albuquerque, for appellees.

LUJAN, Justice.

On October 1, 1950, at approximately 1:30 o'clock in the morning, an explosion occurred in the commercial building of plaintiff-appellee J. C. Williams and leased by T. S. Parks and J. W. Sabino, plaintiffs-appellees, doing business under the name of Parks Food Store, resulting in the complete destruction of said building and its contents.

On December 31, 1952, appellees instituted this action against defendants-appellants, to recover the value of the building and its contents. According to the allegations of the complaint, on or about August 1, 1950, the appellants, by their agents and servants, negligently and carelessly dam-

aged the gas service line leading to J. C. Williams' building from the main along Harwood Avenue by wrenching the same with a backhoe, or ditcher, causing the same to leak. Appellees further alleged that, as a proximate and foreseeable consequence of the negligence of the appellants, their agents and servants aforesaid, an explosive quantity of gas was introduced into said building of plaintiffs on or about October 1, 1950, and became ignited, causing an explosion and fire which totally demolished said building and the contents therein.

The record discloses that the building in question was located at the S. E. corner of the intersection of North Fourth Street and Harwood Avenue in Albuquerque, New Mexico. It faced west on Fourth Street which runs north and south. Harwood Avenue runs east and west and is north of the premises. It was a dirt street fifty feet wide. The gas meter was at the rear and center of the building. From this meter a ¾ inch pipe, eighteen inches east of the foundation, ran north to the gas main on Harwood Avenue. There was a sewer service line parallel to this gas line, four feet back of the building, which was installed shortly after August 1, 1950. Prior to the installation of this service sewer line, appellees used a cesspool. The gas service line was between two and one-half and three feet deep at the connection in Harwood Avenue and about eighteen to twenty inches deep at the dresser coupling and the property line, and four to six inches above the footings of the building. The main gas line was about eight feet south of the north property line of Harwood Avenue.

In the building there was a walk-in meat box, two meat counters, a coca cola box, and an ice cream freezer. The meat cases were operated by two electric motors behind the partitions. They were one horsepower and uncovered. There were air conditioners on the windows. There was a space heater hung from the ceiling, a hot water heater, and a two burner hot plate. They were all connected with a gas line from the meter. The gas line up to the space heater was hung by plumbing tape.

The case was tried by a jury which returned a verdict in favor of appellees. From a judgment predicated upon the verdict the appellants appealed.

The case was prosecuted by appellees on the theory that the explosion which occurred in the building in question was caused by gas which seeped from a leak in the dresser coupling of the service line and which found its way through sandy soil into the building through cracks in the floor and there ignited by a spark from the electric motors.

Appellants' theory was that the explosion was not caused by any seepage of gas from the dresser coupling of the service line but that the explosion was caused by gas seeping through a defective gas pipe line which was connected to the space heat-

er and ignited by a spark from the electric motor used in the building.

Under point two appellants contend that the court erred in refusing to allow in evidence proof of the amount of gas which flowed through plaintiffs' meter on the night of the explosion. We agree with this contention.

They proposed to lay a proper foundation for the introduction of secondary evidence by offering to prove by J. C. Randolph, the supervisor or manager of the record department of Southern Union Gas Company that he had made a search of the records of the company to locate the meter readings as of October 1, 1950, the date of the explosion, but was unable to find the same in his office or anywhere within his control. On objection made by appellee the court refused to receive any evidence on this phase of the case. This was error. Nu Car Carriers, Inc., v. Traynor, 75 U.S. App.D.C. 174, 125 F.2d 47.

Where it is sought to prove the contents of any writing or business record by secondary evidence, a preliminary inquiry should be presented to the trial court as to whether the party offering such secondary evidence has, in good faith, exhausted, to a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest, and which were accessible to him. See, Jones on Evidence, 2d Ed., Vol. 2, § 818.

Thereafter appellants offered to prove by E. M. Perry and Clarence B. Folsom, Jr., both of whom had seen the meter readings for the day of the explosion, at the office of the Southern Union Gas Company, that 593 cubic feet of gas, an explosive mixture, had gone through the meter into the building between eight o'clock the night of September 30, 1950 and one thirty o'clock the morning of October 1, 1950, and was ignited by a spark from the unprotected electric motors in the building. The court refused to admit such testimony on objection made by the appellees.

While it is true that secondary evidence as to the contents of an alleged lost record should not be admitted until it is shown that the original cannot be produced at the time of trial, yet proof of its contents may be proved by any witness who has seen the record and has personal knowledge of what it contains. Williams v. Selby, 37 N.M. 474, 24 P.2d 728. See, also, United States v. Mortimer, 2 Cir., 118 F.2d 266; Cecil v. Montgomery, 95 Okl. 184, 218 P. 311; Gus Dattilo Fruit Co. v. Louisville & N. R. Co., 238 Ky. 322, 37 S.W.2d 856; Grayson v. Lynch, 163 U.S. 468, 16 S.Ct. 1064, 41 L.Ed. 230. Under these principles, and the circumstances surrounding this case, we conclude that the court committed prejudicial error in excluding the proffered evidence as to the contents of the alleged lost record.

It follows from what has been said that the judgment reviewed is erroneous and should be set aside. Accordingly, it will be reversed and the cause remanded to the district court with a direction to set aside its judgment and award a new trial. Reversal of the case being required as stated above, it is unnecessary to discuss the other errors complained of.

It is so ordered.

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

300 P.2d 482

Henry W. MATHIS, Plaintiff-Appellee,

v.

The ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, Defendant-Appellant.

No. 6068.

Supreme Court of New Mexico.

Aug. 10, 1956.

B. G. Johnson, Edwin L. Mechem, Albuquerque, for appellant.

Joseph L. Smith, Henry A. Kiker, Jr., and P. H. Dunleavy, Albuquerque, for appellee.

LUJAN, Justice.

This is a suit for damages brought under the provisions of the Federal Employers' Liability Act, § 1 et seq., as amended, 45 U.S.C.A. § 51 et seq., and the appeal is taken by defendant from the judgment entered upon the verdict of a jury awarding damages to the plaintiff in the sum of $43,000, for injuries incurred by him while in the discharge of his duties as switchman.

On this appeal defendant attacks the verdict and judgment solely upon the ground that it is excessive and shows the result of passion and prejudice on the part of the jury.

The facts as disclosed by the record are substantially as follows: On July 21, 1953, the appellee was seriously injured while attempting to throw on a switch in appellant's railroad yard, which was not in good operating condition, and as a result thereof he was compelled to undergo surgery. Immediately upon trying to throw on the switch appellee felt a sharp pain in his left groin. He did not, at that moment, believe it to be serious so he continued to work until midafternoon of that day at which time he quit work on account of pain. The next day appellee went to see appellant's doctor who told him that he was ruptured but that he would not be able to treat him as he was leaving on his vacation, but told him to apply hot pads which would relieve him of pain. The pain did not subside, on the contrary his left testicle and leg began to swell and the pain increased. On July 27, 1953, he went to appellant's hospital in Albuquerque where he was administered opiates to relieve the pain and placed in ice packs to bring down the swelling. He remained in the hospital until September 7th at which time he was released and told to go home and stay there for two weeks, but before the two weeks were over he returned to the hospital as he could not stand the pain any longer. On September 15th he was again admitted to the hospital and again placed in ice packs

to bring down the swelling. During all of this time he was administered opiates to relieve the pain. On September 30th the epididymis was removed from his left testicle. On October 15th he was operated on for hernia. On October 23rd he was released and allowed to return to his home in Belen. During the early part of December 1953, his right testicle and leg began to swell which caused him excruciating pain. On December 9th he was again admitted to the hospital for treatment. On December 11th the epididymis from his right testicle was removed. Sterility resulted from the two operations of his testicles. On June 7, 1954, appellee was again hospitalized after having been placed in traction for severe back pain which had troubled him since his release from the hospital in January 1954.

The plaintiff testified in his own behalf and stated as follows:

* * * * * *

"Q. And then, Mr. Mathis, after that how did you feel, did you improve or remain the same—did you have any pain? A. There was pain all the time and after the swelling had all started in here, it was severe and at times I'm telling you, I wished I was dead.

"Q. Did you lay down in bed? A. Yes, sir, I was packed with ice bags from here.

"Q. Did you lay on your stomach at times with your feet up, or were you straight up in bed? A. No, I was laying on my back most of the time—until I would get to hurting so bad I had to change positions and I'd kinda turn over on my side, then take my hand and hold these ice packs."

* * * * * *

"Q. Then did you get better or did you have to go back to the hospital? A. Well, in December I got worse—my right testicle went to swelling and hurting me an awful lot and so I told my wife 'let's go back up there and see what they say,' and I came back to the hospital in December.

* * * * * *

"Q. That was in June of fifty four? A. Yes, sir. And, so I called Dr. Levins and he came out there and he examined me and he said 'you had better go to the hospital.' And Mr. Clevenger, a friend of mine there in Belen got me and my wife and brought me to the hospital, brought me up here and they put me in bed and they called the doctor there and I don't know who it was now that came in to see me that afternoon—that was on a Sunday afternoon, and they gave me a shot—well Dr. Levins gave me a shot there at Belen, I was suffering that bad—and they gave me another shot when they

put me to bed in Albuquerque and on Monday—I'm trying to think of the doctor's name, that bone specialist.

* * * * * *

"Q. Where does your back bother you? A. From right along there to right along there.

"Q. It starts right along the belt line and up—to up along the shoulder blade? A. Yes.

"Q. Is that a constant pain? A. Yes, sir, and in my hip is a constant pain.

"Q. How about sitting still—I notice you moving around in the chair. A. I can't sit still very long.

"Q. How about walking? A. Well, when I first start out to walk—it hurts me an awful lot, but after I kinda get it limbered up a little bit, it doesn't hurt as bad as usual as when I first start out, but it hurts me all of the time in there to a certain extent.

"Q. Would you be able to hold down a job, even at bleeding cars, if you were not working with men that knew you for twenty or twenty-five years and did a great part of your work? A. It would be an awful task to do, it.

* * * * * *

"Q. How about your general condition—are you normal, are your nerves okay? A. No, sir, I'm awful nervous and shaking—shake all through my body at all times, practically at all times.

"Q. Is it something that's with you all the time, is that right? A. Yes, sir."

Mr. Charles M. Lee, testified as follows:

* * * * * *

"Q. Under what circumstances did you meet Henry W. Mathis? A. I met Mr. Mathis on July the 27th, on his entering the hospital, and entering my room, when he entered my room.

"Q. Oh, you were placed in the same room? A. Yes, sir, we were in the same room.

"Q. What year was that, '53? A. 1953.

* * * * * *

"Q. And what was Mr. Mathis' condition, as you observed it, on July the 27th, 1953? A. He was suffering, and seemed to be in great pain.

"Q. What do you mean by that? A. Well, he was moaning, and there was perspiration running off of him, and he said he had hurt himself, and I asked him about his injury, and he said he had ruptured himself.

* * * * * *

"Q. Did you examine any part of his body? A. I did, but not on that date. I did a few days after that. I

didn't have an opportunity that day, because he was laying prone, face down, with his hands underneath his stomach, or thereabouts.

"Q. And you state that he was moaning, or groaning. Now, what did you mean by that? A. Like he was in pain, or in agony.

"Q. What was his facial expression, or his general appearance? A. His facial expression was drawn, and at times, he shed tears perspiration breaking out on his face like he was under terrible strain, or stress.

"Q. How long did he remain in that condition, as you observed him, Mr. Lee? A. I don't remember the exact date; the word would be for several days.

"Q. That is quite O.K. You don't remember the exact number of days, you stated? A. I was in the room with him July the 27th until—I am going to have to study a minute, I am going to have to think back—September 7th, continually over those periods. He was permitted, as I remember, about September 7th, to leave the hospital for a few days, but he told me when he left that he was under pain, and he showed me a swollen condition.

"Q. Now, you stated earlier in your testimony that you saw his body. When, if you recall, did you physically examine, or see Mr. Mathis' body? A. I can't give you the exact date, but the time was about 7:00 P.M. It was two or three days after he entered the hospital. I did examine his body.

"Q. And what did you see? A. I seen his swollen condition.

"Q. And what part of his body was swollen? A. His testicle was swollen that big, if you can describe that size, greatly swollen.

"Q. That is as large as your two hands together? A. Together, like that, yes, sir, and the cord from the testicle to the prostate gland, I would say, was almost as big as a water hose, narrow water hose, and was all red and inflamed, and he was in great pain and agony. I asked him—

"Q. (Interrupting) Why do you state that he was in pain, or agony, Mr. Lee? A. Well, a man that is his age, that is holding himself like that, and crying, perspiration running all over him, and you standing over him mopping him with a wet cloth, ice cloth—

"Q. Did you do that? A. Yes, sir, I did, and in the meantime, I re-examined his ruptured condition, that is, not the ruptured condition, because I can't

say that was ruptured, I don't know what it is, but what caused that.

"Q. Do you mean the swelling? A. The swelling in the testicle and in the cord.

"Q. Well, now during this period of time, was he visited by any nurses or orderlies? A. Yes, sir; yes, sir.

"Q. What, if anything, was done for him, in your presence? A. He was given several hypos.

"Q. And what, if any, effect did the medicines have on him? A. When he was in great pain, it was just so much water, because it had no effect on him whatsoever, apparently, from what I could tell, because his pain didn't lessen. It was day and it was night, all day.

* * * * * *

"Q. What was his condition on the following day—A. His condition—

"Q. (Continuing)—as you saw it? A. He lay in bed all day, stayed in bed. He was instructed by his doctor to remain in bed and not go to the bathroom. His feet remained elevated, and I again had an opportunity to observe his condition, and it was greatly swollen, the testicle, and all, and inflamed, red, and he was still under—well, a moan, or groan, whatever you call it. He couldn't move. He couldn't turn over.

"Q. Well, did he make any sounds, or— A. Yes, sir, he did make signs like he was in great misery, or great pain.

"Q. How? A. A moaning, you would call it.

"Q. And I believe you mentioned something about his having cried on some occasions. When was that? A. Absolutely. Not—several occasions he has cried, tears running down his cheeks, try to draw himself up, hold himself.

"Q. Well, was he lying on his back in bed, or in what manner? A. The majority of the time, yes, but when he would go into this great pain, he couldn't be still. He would turn over on his left side and try to take the weight off that testicle.

"Q. What did you do on those occasions? A. I would bathe his face in cold water, just as cold as they had out there, ice water, and try to keep the perspiration mopped off his face, and at various times, they gave him hypos, on as close intervals as they are permitted to give a narcotic to a patient for suffering. He would call for hypos for relief. They would say, "We have give you all we can give you. You have taken the limit."

Doctor Jose A. Revis testified as follows:

"* * * Q. Do you think then, Doctor, that all this difficulty that he is having came from this particular strain on July twenty-third, nineteen and fifty-three? A. Of his lower body, yes.

"Q. Now, Doctor, with reference to the permanency of his condition you have reviewed the charts of the two operations, the epididyectomy I understand is a condition, if you will just look these over, the sterility, the phlebitis of the hip and leg, and the skin and the pain that he now complains of and the condition of his skin—you say all of those are permanent or temporary? A. They are permanent, very permanent.

"Q. And do you think its progressive? A. Yes, his condition will cause all of this to be progressive.

"Q. Now Doctor, do you think that he has had any pain from all of this combination of affairs since July twenty-third? A. Phlebitis is very well known to be a very painful condition because it damages the nerve which runs along the side of the blood supply and when a nerve is injured either by removing it's blood supply or by actual traumatic injury—injuring it by hitting it, it is very painful yes."

At the trial, some 26 months later, he was still suffering constant pain in his back and hips.

Doctor David G. Clark testified as follows:

"Q. Well, now, do you think, Doctor, in your experience in treating cases of this kind, that he suffered much pain as a result of this swelling, or what would you tell us about that, both in the testicles and the legs? A. Well, of course the man himself, states that he had pain and that is the reason for going to the Doctor in the first place. He did not, himself, notice any lump, but the doctors did, he just had continuous pain, and he has not effected me as being a particularly sensitive type of individual, and I see no reason to doubt that he did have considerable pain. Epididymitis itself is quite painful, and it is no fun to have.

"Q. Well, now, his condition as we see him here in the court room, the limp and the pain in the lower back and leg, is that painful? A. Yes, he is having some pain as he walks, and in time during which I have been taking care of him, he has developed more pain and fatigue in this extremity during the time that he works, and the only chance we have had to try him out really without work was during a vacation period when he did stay indoors too and rested a lot and he improved, but then when he went back to work it popped a little worse than before."

The fact that a verdict appears to be excessive is not a ground for a mo-

tion for a new trial. It is only when the excessive damages appear to have been given under the influence of passion or prejudice that a new trial may be granted for that reason. There is no standard fixed by law for measuring the value of human pain and suffering. In every case of personal injury a wide latitude is allowed for the exercise of the judgment of the jury, and, unless it appears that the amount awarded is so grossly out of proportion to the injury received as to shock the conscience, this court cannot substitute its judgment for that of the jury. See, Rivera v. Atchison, Topeka and Santa Fe Railway Company, 61 N.M. 314, 299 P.2d 1090.

In the present case, the amount awarded was fixed by the jury and approved by the trial court. We find nothing in the record before us tending to clearly show passion or prejudice as actuating in any respect the award made.

The denial of a motion for a new trial is assigned as error. A new trial is not a matter of right. Whether a new trial should be granted or denied is a matter resting within the sound discretion of the trial court, and this court will not intervene unless there has been a manifest abuse of such discretion. See, Adams v. Cox, 55 N.M. 444, 234 P.2d 1043. No abuse of discretion is shown herein. We conclude that the trial court did not err in denying the defendant's motion for a new trial.

The judgment will be affirmed.

It is so ordered.

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

KIKER, J., not participating.

300 P.2d 791

Charlie LEWIS, Billie Lewis and Sibley Lewis, Plaintiffs-Appellees,

v.

Kirby LEWIS, Lois Lewis, Joyce Lewis, individually, and Wayne A. Lewis, Kirby Lewis, Lois Lewis, Joyce Lewis, Jewel Lewis, Maymie Lewis, Tommie Lewis, Mamie Lewis Adams and Ernest Herschell Lang, as representing as a class: all children and their successors (issue), and all heirs of such children and successors, and all heirs of each respective plaintiff-appellee, at each respective plaintiff-appellee's death, Defendants-Appellants.

Wayne A. LEWIS, Jewel Lewis, Maymie Lewis, Tommie Lewis, Mamie Lewis Adams and Ernest Herschell Lang, Defendants,

v.

H. Dillard SCHENCK and Albert C. Mounsey, Third-Party Defendants and Appellees.

No. 6119.

Supreme Court of New Mexico.

Aug. 15, 1956.

Paul W. Eaton, Jr., Roswell, for appellants.

Hervey, Dow & Hinkle, Lewis C. Cox, Jr., S. B. Christy, IV, Roswell, for appellees.

COMPTON, Chief Justice.

Appellants, defendants below, appeal from a judgment quieting appellees' titles in and to certain premises in Lea County.

The claim of the parties stem from a common source, the last will and testament of Tillie Lewis, the pertinent provisions of which read:

"Item II: I hereby declare that there have been born to me, six children, all of whom are now living and whose names are as follows: Ernest Herschel Lang, Charlie Lewis, Tommie Lewis, Mamie Lewis Adams, Billie Lewis and Sibley Lewis.

"Item III: For reasons which I deem sufficient, I leave no part of my estate to my children, Ernest Herschel Lang, Mamie Lewis Adams and Tommie Lewis, except that I hereby bequeath to each of them the sum of ten dollars.

"Item IV: All of the rest, residue and remainder of my estate, real, personal and mixed and wheresoever situate, I hereby give, devise and bequeath, share and share alike to my three sons, Charlie Lewis, Billie Lewis and Sibley Lewis and to the heirs of their body per stirpes. In the event either or any of my said last three named sons should predecease me, leaving no issue, the share or shares of my estate going to such deceased son or sons, I hereby give, devise and bequeath to the survivor or survivors of them."

Tillie Lewis, the testatrix, predeceased her children October 9, 1951, and her will

was admitted to probate November 24, 1951. At that time the son, Charlie Lewis, had four children, three of whom are minors, the appellants here. The sons, Billie Lewis and Sibley Lewis, have no issue and had none at the time the will was drawn.

Appellants, the minor children of appellee, Charlie Lewis, contend that the devise created fee tail estates, a life estate in Charlie Lewis, with a vested remainder in appellants and contingent remainder in his unborn children; life estates in Billie Lewis and Sibley Lewis and contingent remainders in their unborn children. Therefore, the appeal turns on a construction of the will, and the intent of the testatrix, as found within the four corners of the will itself, will conclude our inquiry.

Looking at the will, we cannot sustain appellants' contentions. Two major considerations are apparent. The testatrix intended to disinherit three of her children, except mere token gifts, and further, she intended to dispose of all the rest, residue and remainder of her estate; so much is certain. These declarations dispel appellants' theory and satisfy us she used the term "heirs of their body" as words of purchase and not words limiting the titles. However, the intent of the testatrix cannot be carried out under the will as written. Obviously, it provides for the contingency of her sons Charlie Lewis, Billie Lewis and Sibley Lewis surviving her and dying with issue, also for the contingency of the sons predeceasing her without issue, but it leaves open the question of Billie Lewis and Sibley Lewis surviving her without issue. In the latter circumstance, these bequests would lapse and the result would be partial intestacy. Two-thirds of the estate would revert to the estate of the donor, and there being no residuary clause in the will, such portion would descend equally to the sons and daughter of Tillie Lewis, contrary to her declared intention.

But by defining the word "and" disjunctively, and the context of the will requires it, so the phrase "and to the heirs of their body" will read "*or* to the heirs of their body", the primary intent of the testatrix can be given effect. She will then have provided that Charlie Lewis, Billie Lewis and Sibley Lewis, having survived her, with or without issue, receive a fee title to the residue of her estate. The words "and" and "or" are frequently used interchangeably to effectuate the testator's intention. See cases assembled at 3 Words and Phrases, page 603, relating to wills in general.

The judgment under review was entered February 9, 1956, and on March 13 thereafter, the daughter, Mamie Lewis Adams, was granted an appeal therefrom to this Court, however, no attempt to perfect the appeal appears in the record, and upon mo-

tion of appellees, the same is dismissed with prejudice.

The judgment will be affirmed, and It Is So Ordered.

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

300 P.2d 792

Ben P. SNURE, Jr., Plaintiff-Appellee,

v.

Jack SKIPWORTH, Denby Hoyle, Jack Hitson, The Clovis National Bank and The Citizens Bank, Defendants-Appellants.

No. 6077.

Supreme Court of New Mexico.

July 31, 1956.

Rehearing Denied Sept. 7, 1956.

Hartley & Buzzard, Clovis, for appellants.

Bean, Osborn & Snead, Roswell, for appellee.

SADLER, Justice.

The defendants below, who appear in this Court as appellants, complain of a judgment rendered against them, jointly and severally, in favor of the plaintiff for the aggregate amount of moneys taken from him in a night of gambling at Clovis, New Mexico, in the early morning hours of December 3rd, and continuing until midafternoon of December 4, 1954.

The plaintiff, a young cattleman residing at Apache, Arizona, arrived in Clovis, New Mexico, with four truckloads of cattle a day or two prior to the dates just mentioned. Soon after his arrival, having made disposition of his cattle to two different commission houses and received payment therefor, the plaintiff visited a place known as the Cattlemen's Club operated by one of the defendants, Jack Skipworth.

The plaintiff had begun drinking after selling his cattle and upon arriving at the club suggested he would like to get into a poker game. The defendant, Skipworth, showed a disposition to accommodate the plaintiff, but explained to him that he would have to get together some poker players before the game could start. What he did was to telephone the other two defendants,

Hoyle and Hitson, at Hobbs, New Mexico, some 110 miles away.

The two defendants mentioned, accompanied by a female acquaintance, left Hobbs around midnight, arriving in Clovis about 2:00 a. m. The young girl who had accompanied them from Hobbs was sent back there alone in defendant Skipworth's car before dawn of the 4th, starting soon after reaching Clovis. The game started at once following receipt of a new deck of cards sent for by plaintiff who seemed reluctant to play with any cards on the premises.

Shortly before midnight the plaintiff, growing restless, announced an intention to return to his hotel, but upon assurance by Skipworth that he had called the two other defendants who were then en route, prevailed upon plaintiff to wait. A little later, the plaintiff again showing his impatience, started to go back to his hotel but was reassured by Skipworth that the two players he had called would be there in a short time. The plaintiff had never previously met defendants Hitson and Hoyle and, following introductions, the game started immediately upon their arrival. There was never anyone in the game besides the plaintiff and these three defendants.

The game stopped once when one of the defendants left it, temporarily, and recessed two other times when the plaintiff left the game in search of more money. Except for these short interruptions the game proceeded unabated until three o'clock the afternoon of the day it had begun at 2:00 a. m., previously. The plaintiff continued drinking throughout the progress of the game and grew progressively drunker as the game proceeded. His total losses were $10,183 made up of three cattle commission checks totaling $8,183 given plaintiff by the purchasers of his cattle, all of which bear the endorsement of the defendant Skipworth and a $2,000 draft on plaintiff's Arizona bank procured in the early afternoon of December 3, 1954, when defendant Skipworth accompanied plaintiff to a Clovis bank in order that the latter could obtain that much cash in order to stay in the game.

The amount of money actually lost by plaintiff became a disputed question of fact at the trial. There was abundant evidence to permit the jury to find, however, that he lost the sum mentioned above, to say the least. The defendants themselves became confused and uncertain in their testimony each, at times, claiming to have won nothing and at other times admitting certain winnings. They contended plaintiff had lost only $750 in the game. The defendant, Skipworth, admitted that he knew other gamblers in Clovis, yet for this game he felt impelled to put in a call at midnight for two gamblers in far away Hobbs.

The matter was submitted to the jury on a general charge which returned a verdict in favor of the plaintiff and against the defendants, finding they were indebted to

him in the sum of $10,183, jointly and severally. The court rendered judgment accordingly. Hence this appeal.

In his first amended complaint filed in the cause below the plaintiff had joined as defendants Clovis National Bank and the Citizens Bank of Clovis, hoping to impound the proceeds of certain checks negotiated by plaintiff in this gambling transaction but after one day of trial, the counsel for plaintiff became convinced the banks were innocent parties in cashing the checks mentioned. They were, accordingly, dismissed out of the case. Prior to dismissal, however, the defendant banks had answered and filed cross-complaints against the three defendants.

After the filing of the first amended complaint the defendants filed a second motion to dismiss on the ground of insufficient allegations as to fraud. The motion was sustained and the allegations of fraud were stricken from the complaint on the ground that fraud was not pleaded with particularity. This left the plaintiff with his statutory action under 1953 Comp. § 22–10–1. When he rested, the defendants moved for a directed verdict which motion was renewed at the conclusion of the case. It was denied in each instance.

Subsequently, and following the return into court of a verdict in favor of the plaintiff, the defendants moved for judgment notwithstanding the verdict which motion was denied. At the hearing on their motion for judgment notwithstanding the verdict, the plaintiff made an oral motion to amend his first amended complaint to conform to the proof so as to allege a joint and concerted plan by defendants to win from plaintiff in gambling and share in the winnings. This motion was granted in the following form, to wit:

> "That the defendants Skipworth, Hitson and Hoyle participated in a joint and concerted plan and in unison to win said moneys from the plaintiff in said gambling game and to share in the moneys won from the plaintiff in said gambling game."

The basic theme of counsel for defendants in their effort to overturn the jury's verdict and secure a reversal is rested on the contention that, after dismissal from the case of the allegations of fraud contained in the first amended complaint, the plaintiff was confined to an action to recover under the statute, all allegations as to fraud, conspiracy and overextension having been stricken from plaintiff's complaint.

The plaintiff sums up his position on this point, as follows:

First, that no issues were presented to the jury that were not raised by the pleading; that questions of fraud or cheating on the part of the defendants were not submitted to the jury;

Second, that the questions of a joint and concerted plan among the defendants to win the plaintiff's money at gambling and an agreement to share in the money won from the plaintiff at gambling, were properly presented to the jury.

Third, that the admission of testimony without objection effected an automatic amendment of the pleadings, if necessary, on such questions, and the formal amendment allowed by the trial court was not necessary.

In other words, it is the position of plaintiff that the issues of fraud and cheating were never injected into the trial nor were they submitted to the jury; the issue of a concerted plan on the part of the defendants, together with an agreement on their part to share winnings, was in the case and properly submitted to the jury. Thus we have the contrasting theories of the parties at the trial and here.

The statute under which the plaintiff seeks recovery is of ancient vintage, appearing first in the Laws of 1856–1857, just one hundred years ago to be exact. It appears now as 1953 Comp. § 22–10–1, reading as follows:

> "Any person who shall lose any money or property at any game at cards, or at any gambling device, may recover the same by action of debt, if money; if property, by action of trover, replevin or detinue."

The statute has been before this Court directly or incidentally in several cases arising in territorial days and since statehood. See, Armstrong v. Aragon, 13 N.M. 19, 79 P. 291; Mann v. Gordon, 15 N.M. 652, 110 P. 1043; Farmers' State Bank of Texhoma, Okl. v. Clayton National Bank, 31 N.M. 344, 245 P. 543, 46 A.L.R. 952.

The defendants present three points upon which they rely for reversal, the first two relating to the pleadings and the issues properly to be litigated under them. The third point is a complaint of error with reference to the peremptory challenges allowed the defendants. The first two points relating to the pleadings, as they do, and the proof permissible under them, may be treated together. The two points just mentioned are set forth by counsel for defendants as follows:

"Point I

"After the order of dismissal affecting appellee's first amended complaint the complaint was confined to an action to recover under the statute. All allegations as to fraud, conspiracy and overextension were stricken from appellee's complaint.

"Point II

"Under the issues raised by the pleadings the appellee could not litigate the question of whether or not the appellants had entered into a conspiracy to defraud."

It is strongly urged upon us by counsel for defendants that no recovery against the defendants under the pleadings was permissible unless the plaintiff sustained the burden of showing just exactly how much he lost to each of the three defendants, separately; that the proof was wholly inadequate to sustain such burden; that after the motion to strike allegations of fraud and cheating from the amended complaint, there was no pleading left to support a finding by the jury that there was a concerted plan between defendants to engage plaintiff in the game of poker and share the winnings.

A careful review of the record in this case satisfies us that the jury was properly instructed on the law and was justified under the evidence in the case in returning the verdict it did. The mere fact that plaintiff himself first suggested a game of poker does not deny him the benefit of the statute involved.

It is more than passing strange that in order to accommodate the plaintiff with a game, the defendant, Skipworth, felt called upon to put in a long distance call near midnight for the other two defendants, then at Hobbs, New Mexico, more than 110 miles distant. Significantly, the plaintiff would have been led to believe, from all that was said, that Skipworth had simply notified some persons right in Clovis to come over for a game. Certainly, he did not divulge to plaintiff he had called players 110 miles away.

It is to be remembered that the gambling session with which we are here concerned lasted some 14 hours. There were some short breaks when one or another of the players was absent or asleep, as for instance when plaintiff and Skipworth left to cash a $2,000 draft on plaintiff's home bank and when Skipworth went alone to the bank to cash for plaintiff his cattle check for $6,942.15.

It is significant that the three cattle commission checks, aggregating $8,183, all bore the endorsement of the defendant Skipworth. The latter claims to have brought the proceeds of the $6,942.15 check to the gaming room in large denomination currency and delivered same to plaintiff at the gaming table. The defendants all admit they were playing for large stakes, one of them recalling several pots as high as $700 and, testifying, also, that the plaintiff had won a pot as high as $4,000. Several different kinds of poker were played during the session.

With stakes as high as those played it would not require long to take all a given player had, irrespective of its amount and leave him penniless. We think there was sufficient evidence before the jury to support its verdict that the defendants confederated to take plaintiff's money in a game of chance and share in the proceeds. Such

being the case, it was not necessary for him to establish just how much money he lost to each defendant. To uphold such a requirement would render it impossible, as a practical matter, to recover in any case where there were a large number of players. It was enough to show circumstances from which the jury might very well infer that the defendants did combine to clean the plaintiff of a large sum of money and share in the proceeds.

Necessarily, the plaintiff was compelled to rely on circumstantial evidence to establish much of his case. The fact defendants were engaged at poker for some 14 hours is undisputed. It is equally clear that all three checks aggregating more than $8,300 bore the endorsement of Skipworth, one of the defendants who the jury may very well have thought was the pay-off man.

The defendants, while unwilling to admit they were professional gamblers, could have left little doubt in the jury's mind about their skill at cards. And the fact that one of their number, possessed at the time of knowledge there were available gamblers and poker players in Clovis, saw fit to call the other two defendants at midnight some 110 miles away at Hobbs, in the light of what followed, exposed them all to deadly inferences at the hands of the jury.

There emerge in this case too many strange and unexplained incidents to deny the jury the right to render the verdict it did. Some have been mentioned. Still another has not been mentioned. It is significant that all three defendants stayed in the game until its end—that is, until the plaintiff's money ran out! One defendant even accompanied him to the bank to get more. It is common knowledge that a constant loser usually drops out of a game. Not so here, which is a pretty good sign all were winning, as a group, even though one may have been a loser, individually. If winnings were to be shared, all must lose, or none would. So long as they were winning as a group, it is readily understandable why none dropped out of the game. So the jury must have reasoned.

There can be no doubt that when two or more confederate to "shear a lamb" at gaming, they render themselves jointly and severally liable under statutes such as ours. 38 C.J.S., Gaming, § 38, pp. 103, 104; 24 Am.Jur. 458, § 83, "Gaming and Prize Contests"; Bynum v. Brady, 82 Ark. 603, 100 S.W. 66; Parsons v. Wilson, 94 Minn. 416, 103 N.W. 163; Silver v. Ford, 64 Ga. App. 679, 14 S.E.2d 132.

Finally, the defendants assert error in the trial court's action on the number of peremptory challenges allowed them. It will be recalled that the two banks were made parties defendant, and after answering and filing cross-complaints, they were dismissed out of the case when it had been on trial for one day. The judge announced at beginning of the trial that he would allow

the defendants as a group five peremptory challenges. Accordingly, on the record before us all five defendants, that is to say, the three defendants and the two banks who were dismissed from the case in the course of the trial, joined in the five peremptory challenges exercised by them without protest or objection of any sort. Counsel cite People v. Kassis, 145 Misc. 493, 259 N.Y.S. 339, holding, and properly we think, that a challenge made by one of several co-defendants must be regarded as a joint challenge, unless the other defendants dissent or object. In so doing, say counsel for the plaintiff, a waiver resulted, since upon no theory would the defendants, or any of them be entitled to a sixth peremptory challenge.

True enough, a motion for a sixth challenge was made by counsel for the two banks, joined in by one of counsel for the three defendants against a Mrs. Adolph E. Guthals. This motion was interposed when, so far as the record here shows, all defendants before us had already joined with the other two defendants below in exercising five peremptory challenges and the jury had been sworn. If they already had exercised five peremptory challenges, certainly, they were not entitled to exercise the sixth such challenge.

We have somewhat recently had occasion to construe our statute, 1953 Comp. § 19–1–36, dealing with the number of peremptory challenges permitted defendants in civil cases, namely, Morris v. Cartwright, 57 N.M. 328, 258 P.2d 719, and American Insurance Co. v. Foutz and Bursum, 60 N.M. 351, 291 P.2d 1081. Neither of these cases, however, settles the question before us now.

The plaintiff sums up his argument on this point, as follows:

> "That the defendants, by joining in the five peremptory challenges without protest or objection, have *each* exercised five challenges; that the five joint challenges are the challenges of *each* of them; and that the defendants, or any combination of them, are not entitled to a *sixth joint peremptory challenge*.
>
> "That, from the record before the Court, it is apparent that the verdict of the jury was unanimous, in which event the verdict could not have been different even if the trial court had permitted the sixth joint challenge sought by the defendants; thus there can not possibly be any prejudice to the defendants."

The proposition put forward in the second paragraph is to the effect that since this is a civil case in which ten of the twelve jurors could return a verdict, yet, it appeared to be unanimous. Certainly, there was no request by either side to poll the jury. Nevertheless, the trial judge in-

quired, specially, whether either side wished the jury polled and received no response from either side.

Thus it is, say counsel, that if the joint peremptory challenge of Mrs. Guthals had been allowed, it could in no manner have affected the result of the trial. They cite 5 C.J.S., Appeal and Error, § 1708 b, p. 902, to the proposition that a case will not be reversed by reason of error in ruling on a peremptory challenge where no harm results therefrom to the objecting party. Satisfied, however, as we are, that action of the trial court was correct on the first ground advanced by plaintiff's counsel, we see no occasion to pass upon the second ground.

Our right to settle this claim of error in accordance with the record showing is challenged by counsel for defendants. Both by affidavits and assertion they insist that their attempt to challenge peremptorily the sixth juror was made before the jury was sworn. Otherwise, it would be too late. State v. Leatherwood, 26 N.M. 506, 194 P. 600. We may add that recollection of plaintiff's counsel accords with this claim of defendants, supported as well by affidavits filed by the attorney for one of the banks and one of the attorneys for the present defendants. While we have no reason to doubt and we do not doubt the statements of counsel; nor do we question the veracity of the recitals in the affidavits filed; yet, we are bound by the record before us to the contrary in determining the appeal and the points raised on it. The record affirms the jury had been sworn. State v. Smith, 24 N.M. 405, 174 P. 740; Heron v. Gaylor, 49 N.M. 62, 157 P.2d 239. See, also, State v. Compton, 57 N.M. 227, 257 P.2d 915.

Finding no error, the judgment will be affirmed.

It is so ordered.

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

300 P.2d 934

Mac J. FELDHAKE and Andrew H. Feldhake, Plaintiffs-Appellants,

v.

The CITY OF SANTA FE, Defendant-Appellee.

No. 6038.

Supreme Court of New Mexico.

Aug. 22, 1956.

Gilbert, White & Gilbert, Sumner S. Koch, Santa Fe, for appellants.

Samuel Z. Montoya, Santa Fe, for appellee.

KIKER, Justice.

The suit of plaintiffs sought to set aside a determination of the City of Santa Fe to pave certain streets in Paving District 8, plaintiffs being abutting landowners liable to assessment therefor. Plaintiffs

prayed, in the alternative, that if the City should proceed, or threaten to proceed, with the paving in District 8, the court enjoin the City from so doing.

Plaintiffs' complaint was based upon alleged irregularities in the proceedings of the City and its engineers which led up to the order for paving the District.

The City followed what is known as the "provisional order" method in arranging for street improvements in District 8. This method, by statute, requires that the City, in the beginning, when of the opinion that the interest of the municipality requires that any streets, alleys, or parts thereof "be graded, graveled, paved, * * * or in any manner improved, * * *" shall, by resolution, direct the city engineer to prepare preliminary plans showing a typical section of the contemplated improvement, the type or types of material, approximate thickness and wideness, and preliminary estimate of the cost of such improvement. The resolution may also be directed to "some other competent engineer". Cf. § 14–37–16, N.M.S.A.1953.

The statute requires that the engineer shall submit an assessment plat showing the area to be assessed and the amount of maximum benefits estimated to be assessed against each tract or parcel of land in the assessment area, said estimate to be based upon a front foot zone, area, or other equitable basis which shall be set forth in the resolution.

The resolution of the governing body may provide for one or more types of construction. As to Paving District 8, there were three separate resolutions. The first of these resolutions was adopted August 12, 1953, and set forth the following as to type of construction:

> "Compacted subgrade, prime coat of asphaltic material, bituminous hot plant mix base course, and bituminous hot plant mix surface course."

The second of these resolutions was adopted September 30, 1953, and set forth the same language as to type of construction as quoted above. The third resolution was adopted by the City on July 14, 1954, and set forth the following as to types of construction:

> "1. Compacted subgrade, prime coat of asphaltic material, bituminous hot plant mix base course, and bituminous hot plant mix surface course.
>
> "2. Compacted subgrade, stabilized base course, prime coat of asphaltic material and bituminous hot plant mix surface course."

The statute requires that the engineer estimate benefits and costs of construction for each of the separate types provided in the resolution; and the engineer may make such estimate in the lump sum or by unit prices.

It is also required that the total estimate must include the advertising, appraisal, en-

gineering, printing, and such other expenses as in the judgment of the engineer would be necessary or essential to complete the work and pay therefor. After the engineer's plans, plat, typical section and preliminary estimate of the cost and estimate of maximum benefits have been filed with the clerk of the municipality, the governing body shall examine the same and, if found satisfactory, shall make a provisional order that the improvement work be done.

The provisional order must contain a time and place at which the owners of the property to be assessed and other interested persons may appear and be heard by the board as to the propriety and advisability of making such improvement, as to the cost thereof, and as to the manner of payment therefor and the amount to be assessed against each of the properties to be improved.

It is required that ten days notice in writing of the time and place of hearing be given to property owners and that service thereof may be made by mailing a copy of the notice to each of such property owners at his last known address. The names and addresses are to be taken from the records of the county assessor.

It is also required that this notice shall be published "once each week for three (3) consecutive publications, the last publication to be at least one (1) week prior to the date of the protest hearing." § 14–37–17, N.M.S.A.1953.

The complaint charges failure of the City in the doing or having done various things required by the statutes as above stated.

The defendant City joined issue by denying all irregularities and failures charged by plaintiff.

The trial court made findings of fact in which it held that the City had proceeded regularly in the establishment of Paving District 8, and stated conclusions of law based upon the findings of fact made. Judgment was entered in favor of the city and plaintiffs appeal therefrom.

Among the conclusions of law is that numbered 4 which reads:

> "That the Court cannot review or disturb a determination of matters left to the discretion of the City Council of the defendant in the absence of a showing of fraud, a flagrant abuse of its discretion, or an arbitrary conduct on the part of the said City Council."

Plaintiffs took exception to this conclusion of law and base their first point upon the claim that the court erred in making it.

Appellants state their point as follows:

> "Under the 'provisional order' law, in a civil action in District Court to 'correct or set aside' the determination of a city council, the actions of the council are entitled only to *prima facie* presumption of being correct."

Under this point appellants trace the history of the statutes which have been enacted with reference to the provisional order method of providing for street improvements showing the various changes which have been made between 1903 and the amendment appearing as Chapter 115 of the Session Laws of 1953.

In the argument it is stated to be highly significant that the 1953 law requires the governing body shall make the preliminary resolution provide for one or more types of construction, and the engineer shall prepare and file the following: (a) preliminary plans of the contemplated improvements; (b) preliminary estimate of the costs, with separate estimates for each type of construction provided for in the preliminary resolution; and (c) statement of maximum benefits estimated against each tract of land.

Appellants direct attention to other statutory provisions, that the city council shall hold a hearing at which protest may be made by any property owner affected by proposed paving or other improvement; that in no event shall the assessment exceed the estimated benefits to the property assessed; that after protest is made and the City orders the paving done a protestant who is dissatisfied and desires a test in court must file his suit within thirty days after the determination by the council.

It is asserted by appellants that if the procedure suggested is closely followed there will be no unjust assessment liens upon property.

In this state there are two methods of bringing about street improvements. One of these is known as the petition method, under which not less than 51% of the property owners in a given territory may petition the City to take action for improvements. The other is the provisional order method, under which action is initiated by the City, and with which we are dealing in this case.

Appellants insist that, under court attack, the City's determination is prima facie evidence only of compliance with the statutory requirements.

Appellants say the case of Francis v. Roberts, 58 N.M. 754, 276 P.2d 739, 742, "contains a dictum which is opposed to our contention under this point." They point out that the opinion compares the provisional order method with the petition method, and that the petition method was involved in Francis v. Roberts, supra. Appellants are somewhat critical of the opinion, saying the dictum was largely based on the statute making recitals in paving certificates conclusive evidence, whereas statutes relating to the petition method merely make such recitals prima facie evidence of the facts recited. The statements in Mr. Justice Seymour's opinion which have been criticized by appellants are:

"Without stating it as decided case law in New Mexico, since the issues are not here presented, it is safe to say generally that the Bateman case, the Ellis case and the Scheurich case stand for the following propositions under the provisional order method of paving: (a) that confiscation is a proper attack on or defense to a paving program; (b) that the judgment of the city council is conclusive in the absence of the showing of a flagrant abuse of discretion."

The opinion, as written, was concurred in by three of the remaining justices of this court, with Mr. Justice Sadler specially concurring.

Appellants have also made comment upon the following New Mexico cases: City of Roswell v. Bateman, 20 N.M. 77, 146 P. 950, L.R.A.1917D, 365; Ellis v. New Mexico Construction Co., 27 N.M. 312, 201 P. 487; City of Clovis v. Scheurich, 34 N.M. 227, 279 P. 876.

Appellants state that the Bateman case, supra, did not involve the provisional order statutes, and that the court held in that case constitutional due process was fulfilled by a hearing upon foreclosure of an assessment lien.

Appellants say of the Ellis case, supra, that the court, following the Bateman case, dismissed the suit, which attempted to enjoin the construction of a municipal paving project under the provisional order statute.

It is interesting to note, however, that the opinion in the Ellis case [27 N.M. 312, 201 P. 491] stated the purpose of the notice in the provisional order law is to afford opportunity for discussion of the proposal, "and any objection at the hearing by one interested against the advisability of paving, or the extent or character of paving is unavailing against the decision of the city to the contrary." It is further held in the case that "the extent or character of paving, as proposed in the provisional order, which forms the basis of the notice required, may be deviated from." It is also said that, if the order were not clearly tentative, discussion upon it would be futile.

In the Ellis case the court also said:

"It is after such provisional order is made and after hearing and discussion thereon that final decision is made by the city, which decision forecloses objection."

In the Ellis case, supra, it is pointed out that the provisional order method places in the discretion and judgment of the governing body of the municipality the decision as to paving streets, such decision being final.

A hearing is not a trial. The hearing under the law in effect at the time of

the Ellis case was certainly not a trial of the property rights of any individuals. The hearing is spoken of by the writer of the opinion as a discussion. This discussion might involve a question of pecuniary benefit or loss to some individual just as it might also involve the wisdom of paving the proposed district. This case makes it clear that the final determination as to whether the proposed paving project shall be undertaken rests solely with the city council.

In the Scheurich case, supra, it was contended that the assessment levied to pay for the improvements constituted confiscation of the property. The trial court found that the assessments were greatly in excess of the value of the property which, with the improvements, would be worth much less than the assessments and so dismissed the suit, which was one by the city to foreclose paving certificates. The judgment entered in the trial court was sustained in this court by the holding that the finding was supported by substantial evidence, and other defenses were not well taken. It was concluded that the city, in view of these facts, acted in abuse of its discretionary power by determining to proceed with paving, and its determination was arbitrary in character and amounted to confiscation of property.

In their brief, appellants set out at length quotations from Oliver v. Board of Trustees of Town of Alamogordo, 35 N.M. 477, 1 P.2d 116, 118. In doing so, they admit that the holding in the case is apparently opposed to the contention which they make here; but their comment about the Alamogordo case is that the attack there was upon the wisdom and propriety of a paving project because of economic conditions at the time. That is true. They point out then that the attack in the present case is concerned in large part with the city's noncompliance with statutory duties in the preliminary determination of the improvements to be considered. It is twice stated in the Alamogordo case that the municipal council, in matters of this kind, is exercising its discretion and that, in the absence of a showing of fraud or conduct so arbitrary as to be equivalent to fraud, its decision is conclusive.

In the Alamogordo case there was a broad general allegation that the enhancement in value to the abutting property of appellants, resulting from the paving, would not be commensurate with the estimated cost proposed to be assessed against such property. Justice Sadler, writing the opinion, said, with reference to this declaration:

> "This fact, if true, would not have warranted the lower court in setting aside the determination of the town board on the wisdom and propriety of paving and in enjoining it from prosecuting the paving program, as prayed for by appellants. The decision of the town board on these matters, absent

fraud or its equivalent, is controlling and conclusive. Ellis v. New Mexico Construction Company, 27 N.M. 312, 322, 201 P. 487."

The underlying reason for the court's taking the determination of the municipal council to be conclusive, in the absence of fraud or conduct so arbitrary as to be the equivalent of fraud, is that the council is a legislative body and has a right within the scope of its powers to legislate for the city. The courts cannot legislate and any legislative action by a duly constituted legislative body is final and binding as far as the courts are concerned except for the existence of fraud or such arbitrary conduct as amounts to fraud.

There is much authority to the effect that the city council in making a determination as to the creation of a paving district is acting in its legislative capacity. McQuillin in 14 Municipal Corporations, § 38.47, p. 157, says:

"The action of a municipal council in establishing such a district is legislative in character and has its origin in the taxing power of the state."

In Wolff v. City of Denver, 20 Colo.App. 135, 77 P. 364, involving a sewer district, this was said:

"A city council, in establishing a sewer district and determining its boundaries, is exercising a legislative power, having its origin in the taxing power."

See also Schaer v. City of Little Rock, 179 Ark. 68, 14 S.W.2d 237; City of Batavia v. Wiley, 342 Ill. 384, 174 N.E. 553; City of Springfield v. Owen, 262 Mo. 92, 170 S.W. 1118; Standard Inv. Co. v. Stephensmeier, Mo.App., 117 S.W.2d 620; Ricker v. City of Helena, 68 Mont. 350, 218 P. 1049.

McQuillin, op. cit., § 38.56, p. 172, says:

"It has been uniformly held that the action of the municipal legislature, in pursuance of statutory or charter powers, in establishing a district to be benefited by local public improvements so as to justify a special assessment against property lying within the district, is a legislative act which is conclusive in the absence of any evidence that it was procured by fraud, or proof that it is manifestly arbitrary or unreasonable, or that the assessment is palpably unjust and oppressive. Accordingly, the power of review of the courts is limited."

See also Fort Howard Paper Co. v. Fox River Heights Sanitary District, 250 Wis. 145, 26 N.W.2d 661; City of Marshall v. Elgin, Tex.Civ.App., 143 S.W. 670.

The propositions of law just above referred to seem to have practically the unanimous support of the courts throughout the country. We think the expressions of this court have several times

endorsed these propositions of law. If it has not already been made clear, we wish further to clarify the subject by declaring here that a city council in New Mexico, in establishing a municipal improvement district, is acting in its legislative capacity; and that its action in the absence of proof of fraud or such arbitrary conduct as amounts to fraud is conclusive. These declarations are certainly applicable to the first point stated by appellants in their brief.

These propositions of law existing, the burden of proof as to fraud or arbitrary conduct equivalent to fraud necessarily rests upon him who makes an attack upon the action of the city in determining that a municipal improvement district shall be established.

We rule Point One against appellants.

Under Point Two, appellants first complain that, under the preliminary resolution of July 14, 1954, the city called upon the city engineer for two types of paving, which were described in detail, without mention of curb and gutter.

Appellants further complain that the consulting engineer filed an estimate of cost on only one type of paving and including curb and gutter; also that the engineer when making his estimates of cost failed to make an estimate of benefits as to each tract involved.

It is first to be noticed that in each of the preliminary resolutions by which it was proposed to create Paving District 8, there was provision that the streets named be "graded, graveled, paved and otherwise improved." The authorities are to the effect that when it is declared that a street should be paved, the word "paved" includes not only the paving but also curbing and guttering as a necessary part of the project.

In City of Excelsior Springs v. Ettenson, 120 Mo.App. 215, 96 S.W. 701, 705, under a statute providing that cities would have power to cause " 'to be graded, constructed, reconstructed, paved, or otherwise improved and repaired all streets,' " the court said:

> "Curbing is a necessary part of paving to separate the sidewalk from the roadway for vehicles and it would require a strained construction of the enactment to say that the Legislature intended to authorize special assessments to be levied to pay for the cost of sidewalks and of paving the way for vehicles and not for the cost of the usual and necessary wall separating them. [Citing cases.]"

See also Bailey v. City of Des Moines, 158 Iowa 747, 138 N.W. 853; Board of Improvement, etc., of Fort Smith v. Brun, 105 Ark. 65, 150 S.W. 154; Muff v. Cameron, 134 Mo.App. 607, 114 S.W. 1125, 117 S.W.

116; Jacquemin v. Finnegan, 39 Misc. 628, 80 N.Y.S. 207; 14 McQuillin, op. cit. supra, § 38.13, p. 79; 31 Words & Phrases, Pave, p. 439.

In Warren v. Henly, 31 Iowa 31, the court held that the word "paving" applied to and described the construction of gutters; and that the curbstones are necessary in order to secure the gutter and are consequently a part of the pavement of the street. It was also held that when the necessary steps are taken to provide for paving streets, the curbing and guttering thereof are included in the term "paving". These principles have been thoroughly established and seem to be generally recognized.

In Wilson v. Chilcott, 12 Colo. 600, 21 P. 901, a wooden sidewalk had been constructed with assessment upon adjoining property to pay therefor. Later curbs and gutters were constructed of substantial cobblestones. The cost of all this was assessed against abutting property. Plaintiffs had refused to pay their assessments. The trial court granted a permanent injunction in their favor, and the City of Pueblo and the County Treasurer, whose duty it was, apparently, to collect, took an appeal.

The Colorado court had previously held that, under the laws at that time, special assessments could not be made upon abutting property for the grading and paving of streets. Palmer v. Way, 6 Colo. 106. Authority did exist to assess abutting property for the construction of sidewalks.

In the Wilson case the court said that gutters are part of the street rather than of the sidewalks. It was also of the opinion that [12 Colo. 600, 21 P. 902]:

> "The general rule is that the power to pave streets includes the power to supply gutters and curb-stones; but it does not follow that the power to construct sidewalks, and compel payment therefor by local assessments, carries with it the power to supply gutters and curb-stones by the same arbitrary means."

We hold that curbs and gutters are a part of paving of a street.

The next point made by appellants is that the engineer did not estimate benefits to accrue to the several property owners by the street improvements undertaken. We have previously set out that which the engineer is required to file with the city as to benefits and costs of paving.

It appears that the engineer did file in his report to the city an estimate of maximum benefits as to all properties embraced in the paving district, giving the names of the owners of the several lots or parcels.

Appellants had the maximum benefits reported by the engineer as to each of their lots. The estimated benefit, as shown by the record, is the exact amount as shown

to be the estimated cost of paving, including curb and gutter which are stated separately.

The exhibit showing the estimates of both benefits and costs appears to have been let into the record without any objection from appellants and without any comment by anybody in the lower court as to the column showing maximum benefits.

The New Mexico statute under which the engineer is required to make his estimate of maximum benefits provides that the estimate may be based on a front footage basis. The resolution directing the engineer to proceed to estimate both paving and cost of improvements followed the requirements of the statute.

There was no certainty about either cost or benefits. Any estimate made is the expression of the opinion of the maker. In this case the opinion is apparently that of the engineer. This is authorized by the statute providing that the engineer shall submit:

> "* * * an assessment plat showing the area to be assessed and the amount of maximum benefits estimated to be assessed against each tract or parcel of land in said assessment area, said estimate to be based on a front foot zone, area, or other equitable basis, which basis shall be set forth in said resolution."

The matter of the method of estimating benefits seems to have been given full consideration by earlier cases from this court. Not only does the state statute provide for estimates by the front foot, but these cases have approved the method. Roswell v. Bateman, supra; Ellis v. N. M. Construction Co., supra; Hodges v. City of Roswell, 31 N.M. 384, 247 P. 310.

The attack as to benefits is not well taken.

Appellants complain that the resolution directing the engineer to proceed to make estimates called for two types of paving but that the engineer submitted estimates for one type of paving only.

It is undisputed that the appellants were present by their attorney at the protest meeting held by the city council. Before this meeting was held the engineer had delivered the plans and specifications and estimates to the clerk of the city. This was done at an earlier meeting of the council, at which time the council found the report of the engineer satisfactory and proceeded to call the public hearing. At the public hearing appellants knew, or should have known, by proper inquiry and examination at the clerk's office, what the report of the engineer was, including all of its details. The record does not show how the appellants have been prejudiced in any way by the report of the engineer as to type or types of paving.

Appellants filed a written protest with the city council and later filed a supplemental protest. They did not, in either of these protests, mention the matter of the failure of the engineer to make estimates of two different kinds of paving.

The complaint does not mention the failure of the engineer to make estimates of two types of paving. Appellants requested findings of fact but made no mention therein of the matter now complained of.

The trial court made its finding of fact approving the city's final determination overruling protests filed by appellants, and city's final determination to improve all streets described in the earlier resolution, except for the streets which were eliminated from the project. The trial court, by conclusion of law, held that the appellants had failed to carry the burden of proof assumed by them. This burden was to show that the action of the city council in legislating as to the improvements in question was fraudulent or so arbitrary as to be fraudulent conduct; and the court held that without proof establishing fraud or the equivalent the court was without power to disturb the determination of the city.

The complaint as to the matter of two types of paving being called for by the council and one type only being estimated by the engineer is first called attention to, as far as we can find from the briefs and the record, in the argument in the brief-in-chief. The matter not having been properly called to the attention of the trial court is not entitled to consideration here. Moreover, there is no proof of fraud or of arbitrary conduct in the matter; and the city council having determined to adopt the estimates filed by the engineer, that determination will not be disturbed on account of the complaint here made.

Appellants' Point Three complains that the publication of the notice of the protest hearing was not made as required by law.

The statute requires publication be made "once each week for three (3) consecutive publications, the last publication to be at least one (1) week prior to the date of the protest hearing." § 14–37–17, N.M.S.A. 1953. The publication was made in each of three consecutive weeks, though not on the same day of the week, and the last insertion of the notice was more than a week before the date set for the hearing.

This notice was sufficient. Dewitz v. Joyce-Pruitt Co., 20 N.M. 572, 151 P. 237; De Graftenreid v. Casaus, 26 N.M. 216, 190 P. 728.

It should be said, moreover, that appellants have no standing in court to raise this proposition. They were present before the council and filed written protests and had a hearing, and if there had been irregularities in the matter of publication of notice, they could not have complained thereof.

Appellants' Point Four complains that at the time of the public hearing, but before that hearing actually began, the city adopted a resolution that Galisteo Road, on which, as stated previously, appellants own property, would be paved regardless of the protests made.

The point as stated by appellants is misleading. As written into the minutes, there was a motion made by one of the councilmen saying that inasmuch as the city owned at least 50% of the property along Galisteo Road and Galisteo Parkway, these streets would be paved. The motion also contained the proposition that any street, where 51% of abutting owners protested, would be eliminated from the paving program. The motion carried. It was known to the council that there were not, and could not be, protests from 51% of the property owners abutting Galisteo Road and Galisteo Parkway; but appellants filed their protest as to Galisteo Road and were heard by the council.

The city council overruled appellants' protests by formal resolution ordering paving of Galisteo Road along with other streets. This order is what the statute requires as to the determination to pave. Appellants cannot complain that they have been denied the statutory right to be heard as to the propriety and advisability of making improvements, the cost or the manner thereof, or the amount to be assessed against their property. They battled out all their objections which, after all, were mere argument with the council, as its action is legislative. The protest hearing is much like a hearing before any legislative committee of the state legislature. The final determination was for the council to make.

The judgment of the lower court should be and is hereby affirmed.

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

300 P.2d 943

MORA COUNTY BOARD OF EDUCATION, and William Salman, Glave Blattman, Joe Martinez, W. Shoemaker, and Lenore M. Valdez, the Members thereof, Plaintiffs-in-error,

v.

Mary VALDEZ, Tillie Martinez, Juanita D. Montoya, and Lilly Jaramillo, Defendants-in-error.

No. 5999.

Supreme Court of New Mexico.

Aug. 20, 1956.

Harry L. Bigbee, Donnan Stephenson, Santa Fe, for plaintiffs in error.

Donald A. Martinez, Las Vegas, E. P. Ripley, Santa Fe, for defendants in error.

PER CURIAM.

The opinions heretofore filed herein, both the majority and the dissenting opinions, are hereby withdrawn and the following opinions are substituted for them as expressing the divided views of the Court:

McGHEE, Justice.

This proceeding on writ of error questions the validity of a peremptory writ of mandamus issued in ex parte proceeding by the District Court of Mora County on August 27, 1955, directing the present plaintiffs-in-error, the Mora County Board of Education and the individual members thereof, to reinstate and assign the present defendants-in-error, teachers within the Mora County school system, to positions formerly held by them during the school year 1954–1955.

The root of the controversy is found in the action of the county board of education directing the transfer and reassignment of the teachers to schools and teaching assignments within the county differing from the schools and particular posts in which they were formerly employed, it being the contention of the teachers the action of the county board in changing their placement within the school system was unwarranted and unjustified.

According to the petition for the peremptory writ of mandamus, said action was taken by the county school board on or about May 11, 1955. The petition, in the form of four causes of action for the four teachers involved, asserts the objections common to each of them that they were transferred from larger communities in which they had been established for varying lengths of time to smaller and more remote communities and schools within the county, that the teaching burdens under their new placement would be more onerous and the positions less attractive than those they had previously held.

The petition alleges that the teachers requested a hearing before the county board of education, which hearing was granted and held on or about May 23, 1955, with the result the county board reaffirmed its decision to transfer and re-assign the teachers; that they then appealed to the State Board of Education from the decision of the county board and hearings were held before the state board on June 6 and July 12, 1955. The action of the state board, as set forth in a letter to the Mora County School Superintendent from the State Superintendent of Public Instruction, and copied from the minutes of the state board meeting of July 12th, was as follows:

> "It was moved and seconded that the State Board of Education finds little justification for the action of the Mora County Board of Education in transferring and reassigning the following named teachers from their former positions:
>
> Mrs. Juanita D. Montoya
>
> Mrs. Lily Jaramillo
>
> Mrs. Matias Martinez
>
> Mrs. Albert N. Valdez
>
> "The State Board of Education recommends to the Mora County Board

of Education that they reconsider their decision and reinstate the teachers in their former positions. Motion carried."

By letter from the county school superintendent to the state superintendent, the latter was advised the county board did not consider the motion for recommendation had carried because only five of the eight members of the state board were present at the meeting and of the number present only two members voted for the motion, one voted against it and two members abstained from voting. This letter also stated the decision of the county board as to the transfer of the named teachers remained unchanged.

The foregoing matters are set forth in the petition for the peremptory writ and, in addition, it is alleged that each of the teachers has acquired tenure under the Teacher Tenure Act, § 73–12–13, N.M.S.A., 1953, and that the actions of the county board violate the spirit and purpose of said act.

After the petition was filed two peremptory writs were issued, or attempted to be issued by the court, before the final writ was issued, it being amendatory of the previous writs. While point is made by plaintiffs-in-error of the sufficiency of the first two writs issued, in the view we take of the case only the sufficiency of the final writ is of concern. Neither is it necessary to notice questions raised concerning the procedure employed in procuring the issuance of the earlier writs.

Section 22–12–7, N.M.S.A., 1953, specifies the conditions under which a peremptory writ of mandamus may issue in the first instance:

"When the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance; in all other cases the alternative writ shall be first issued."

Also to be noted are §§ 22–12–6 and 22–12–11, N.M.S.A., 1953, which provide, respectively:

"The writ is either alternative or peremptory. The alternative writ shall state concisely the facts showing the obligation of the defendant to perform the act, and his omission to perform it, and command him, that immediately after the receipt of the writ, or at some other specified time, he do the act required to be performed, or show cause before the court out of which the writ issued, at a specified time and place, why he has not done so; and that he then and there return the writ with his certificate of having done as he is commanded. The peremptory writ shall be in a similar form, except that the words requiring the

defendant to show cause why he has not done as commanded, shall be omitted."

"No other pleading or written allegation is allowed than the writ and answer. They shall be construed and amended in the same manner as pleadings in a civil action, and the issues thereby joined shall be tried and further proceedings had in the same manner as in a civil action."

This Court has several times held with respect to alternative writs of mandamus, that the allegations of fact in an application for such writ form no part of the writ and ordinarily cannot be so considered in determining the legal sufficiency of the writ. State ex rel. Burg v. City of Albuquerque, 1926, 31 N.M. 576, 249 P. 242; State ex rel. Heron v. Kool, 1943, 47 N.M. 218, 140 P.2d 737; Laumbach v. Board of County Commissioners, 1955, 60 N.M. 226, 290 P.2d 1067, 1071. In the last cited case it is stated:

"Once the proceeding is accepted as one in mandamus, then certain well-recognized rules emerge to control the consideration of the case. A most important one is that the case must be tried on the writ and answer. The complaint itself drops out of the picture and the writ must contain allegations of all facts necessary to authorize the relief sought. State ex rel. Burg v. City of Albuquerque, 31 N.M. 576, 249 P. 242. Furthermore, allegations in the writ should be made as in ordinary actions. Hence, the usual rules applicable in testing the sufficiency of a complaint in an ordinary civil action apply. The facts should be pleaded with the same certainty, neither more nor less. State ex rel. Burg v. City of Albuquerque, supra."

The requirement that the writ contain allegations of all facts necessary to authorize the relief sought applies with even greater reason to peremptory writs of mandamus issued in ex parte proceedings. Indeed, this conclusion is compelled by §§ 22–12–6 and 22–12–7, set forth above.

While plaintiffs-in-error urge upon us many deficiencies in the writ, we view one matter therein as decisive of the case. That matter respects recitations in the writ as to the action taken by the State Board of Education following the hearings held before it. The writ recites:

"* * * that it was the decision and finding of the State Board of Education that the action of the Mora County Board of Education in so transferring and re-assigning petitioners was without justification, and that petitioners should be reinstated in their former positions, and,

"Whereas, It further appears that the said Mora County Board of Education and * * * the members

thereof, have refused to abide by the decision of the State Board of Education and have refused to reinstate petitioners in their former positions, which they are in duty bound to do, and have so notified petitioners and the State Board of Education, * * *"

Nowhere in the writ is the actual decision or action of the state board set forth or otherwise described, nor does the writ attempt to incorporate the allegations of the petition within it, although the defendants-in-error urge the writ should be considered as incorporating these petitionary allegations and, in addition, that the action of the state board is a matter for judicial notice.

We are of opinion that the cause of the defendants-in-error is not aided either by considering the writ as supplemented by the allegations of the petition, if that were proper, or by exercising the power of taking judicial notice for the simple reason that the action taken by the state board was not in the nature of an order, but its character was recommendatory only.

By law a peremptory writ of mandamus may issue in the first instance only where "the right to require the performance of the act is clear, and it is apparent that no valid excuse can be given for not performing it." § 22-12-7, supra. As reflected by its minutes, the state board found "little justification for the action of the Mora County Board of Education" and *recommended* that the members of the county board "reconsider their decision and reinstate the teachers in their former positions."

If definition be necessary, the word recommend means: To commend to the favorable notice of another; to put in a favorable light before anyone. A recommendation is not an act of final decisive power—it merely suggests the desirability of a course of action to be followed by another. People v. San Bernardino High School Dist., 1923, 62 Cal.App. 67, 216 P. 959; Ingard v. Barker, 1915, 27 Idaho 124, 147 P. 293; People ex rel. City of New York v. Woodruff, 1901, 166 N.Y. 453, 60 N.E. 28.

But little, if any, reflection is needed to see that a mere recommendation to reconsider an action and reinstate the teachers in their former posts must leave to the county board a residuum of decisional power, or a field in which it may yet exercise its choice one way or another. The performance of an act which is merely recommended by a superior authority is therefore not of such character that it may be compelled by the issuance of peremptory writ of mandamus.

Nor does the quality of the action by the state board become any more positive even if its finding of "little justification" for the county board's action could be viewed as equivalent to a finding of "no

justification" for the action (a view of highly doubtful validity), for such finding is not followed by an order to the county board. As in a judicial decree a finding of fact not followed by a mandatory statement is of no effect, Dunham v. Stitzberg, 1948, 53 N.M. 81, 201 P.2d 1000; Hollingsworth v. Hicks, 1953, 57 N.M. 336, 258 P. 2d 724, so in this proceeding for issuance of a peremptory writ of mandamus where the act sought to be enforced must be based upon the clear direction of a state to a local authority, a bare finding of fact followed only by a recommendation of suggested action does not afford sufficient predicate for the compulsion of the act.

In view of the determination made, it becomes unnecessary to pass upon other contentions made by plaintiffs-in-error raising questions as to the propriety of the issuance of the writ in ex parte proceedings; the applicability or non-applicability of provisions of our Teacher Tenure Act, supra; and the sufficiency of the affirmative vote of only two members of the State Board of Education to carry the motion described.

The peremptory writ of mandamus should be vacated and the cause is remanded to the District Court of Mora County with direction so to do and to dismiss the proceedings. It is so ordered.

COMPTON, C. J., and LUJAN, J., concur.

KIKER, J., not participating.

SADLER, Justice (dissenting).

The majority on rehearing have been persuaded the direction from State Board of Education to Mora County Board of Education amounted to no more than a recommendation and lacks the essentials of an order subject to enforcement by mandamus. This, in the face of the fact that the Mora County Board rejected it, not on the ground it lacked character as an "order," but, rather, because the motion for its adoption had not carried before the State Board by the necessary majority, McCormick v. Board of Education of Hobbs, 58 N.M. 648, 274 P.2d 299, to the contrary notwithstanding.

The questioned writing originated out of an appeal before State Board by the four teachers who are defendants in error before us. It states action of the County Board in transferring these teachers was without legal justification and, continuing in the very language employed, "recommends to Mora County Board of Education that they reconsider their decision *and reinstate the teachers in their former positions.*" (Emphasis mine.)

The majority have ignored, completely, the italicized portion of the order. Simply because the State Board employed polite and courteous language in approaching the mandate of the writing, it is seized upon in the prevailing opinion to temper the steel in the language commanding the

local board what to do, namely, "reinstate the teachers in their former positions."

The State Board was authorized on this appeal to choose one of two alternatives, either affirm action of the County Board or reverse it. It had no statutory authority to do anything else. It chose the latter alternative by telling the local board *exactly what to do*. Under the circumstances, to treat the order of the State Board as a "recommendation" is to constitute its solemn action in this matter a meaningless "gesture"! The County Board, the State Board and the District Judge, all and each, interpreted the writing as an order. We should give the language the same interpretation. Compare Cadwell v. Higginbotham, 20 N.M. 482, 151 P. 315; Butler Paper Co. v. Sydney, 47 N.M. 463, 144 P. 2d 170; Schreiber v. Baca, 58 N.M. 766, 276 P.2d 902.

The power to issue a peremptory writ of mandamus on an ex parte application where the right to require the performance of the act is clear and it is apparent no valid excuse can be given for not performing is recognized in our law both by the statute itself, 1953 Comp., § 22-12-7, and by decisions thereunder. See, Territory of New Mexico ex rel. Coler v. Board of County Com'rs, 14 N.M. 134, 89 P. 252; Board of County Commissioners of Guadalupe County v. District Court, 29 N.M. 244, 251, 223 P. 516.

An emergent situation was presented to the trial judge when he acted in this matter. It was on the very eve of the fall opening of the public schools. It was of the highest importance that the personnel and placement of the teaching staff be set at rest. Thus confronted with a petition for the peremptory writ, the "right to the performance of the act being clear and there being apparent no valid excuse for not performing," the judge acted promptly and, in my opinion, quite correctly.

It is my belief that our decision, heretofore filed and today withdrawn, has gone far toward settling and clarifying the muddled situation in which the school system of Mora County finds itself. Today's majority action, reversing our previous position, simply stirs up dying embers and prolongs the heat of controversy. The learned trial judge who was on the ground and familiar with the local situation entered an order that was just and lawful. It rights a grave wrong and merits our affirmance. See Smith v. School Dist. No. 18, 115 Mont. 102, 139 P.2d 518.

As always in cases of this kind, it is the public school children of Mora County who become the innocent victims of this prolonged court fight. For the second year in succession on the eve of fall opening of the public schools, the controversy continues to rage undiminished. The

decision of the trial judge was calculated to end the controversy. In my opinion, he acted wisely, justly and lawfully. His judgment should be affirmed.

The majority ruling otherwise, I dissent.

300 P.2d 948

TRANSCONTINENTAL BUS SYSTEM, Inc., Plaintiff-Appellant,

v.

STATE CORPORATION COMMISSION, James F. Lamb, John Block and Ingram B. Pickett, Members of said Commission, and Geronimo Lines, Inc., Defendants-Appellees.

No. 5920.

Supreme Court of New Mexico.

Aug. 13, 1956.

Motion for Leave to File Second Petition for Rehearing Denied Sept. 17, 1956.

Manuel A. Sanchez, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., Jack A. Smith, Asst. Atty. Gen., Jethro S. Vaught, Jr., Albuquerque, for appellees.

PER CURIAM.

Upon consideration of the motion for rehearing the former opinion is withdrawn and the following is substituted.

McGHEE, Justice.

This is an appeal brought by the Transcontinental Bus System, Inc. (hereinafter called Transcontinental) seeking the reversal of a judgment refusing to order the cancellation of a certificate of public convenience and necessity issued to Geronimo Lines, Inc. (hereinafter called Geronimo) for the operation of a passenger and express service in this state over Highway 85 between Albuquerque and Las Cruces, and between Albuquerque and Belen over Highway 87, except between Albuquerque and Isleta, and Truth or Consequences and Las Cruces.

Geronimo first secured a permit over the above mentioned highways in 1947 and the battle between it and Transcontinental has continued since said time. This is the third case to be brought before this Court in connection with the applications of Geronimo to operate such a line, the first being State ex rel. Transcontinental Bus Service, Inc., v. Carmody (Prohibition), 1949, 53 N.M. 367, 208 P.2d 1073; and the second, Transcontinental Bus System, Inc., v. State Corp. Commission, 1952, 56 N.M. 158, 241 P.2d 829.

In the latter case we directed that a permit granted to Geronimo be cancelled because of the failure of the commission to take into consideration the additional service then being furnished by another line. Immediately following the filing of that opinion, Geronimo petitioned the commission for a temporary certificate to operate on the same line; a hearing was held in due course and a permanent certificate of convenience and necessity was issued to Geronimo, which certificate Transcontinental now contends should have been cancelled.

We will disregard the claim of Transcontinental that Geronimo's petition for a temporary certificate could not be filed with the commission or entertained before mandate had issued from this Court and judgment entered thereon by the district court in the last cited appeal.

Our relevant statutes governing the issuance of such permits and the remedies afforded the parties are § 64–27–8, N.M.S.A., 1953, and following sections.

When Geronimo first entered the field, Transcontinental was operating practically six schedules each way per day between Albuquerque and Las Cruces, and six

schedules each way per day between Albuquerque and Belen. In the year 1946 Transcontinental had net earnings over the lines of approximately $10,000.

Geronimo matched each run with an almost identical departure and arrival time at each station along the way. As a result, Transcontinental was compelled to reduce its runs between Albuquerque and Las Cruces to four each way per day; Geronimo promptly did likewise and continued its practice of having substantially identical departure and arrival times from its terminals as those maintained by Transcontinental. There was thus provided perfect duplication of service on the schedules operated, but there was an actual material decrease of service to the public. A reduction was also made in the service between Albuquerque and Belen to two schedules each way per day.

Records of passengers hauled over monthly periods during this time of competition were introduced by Transcontinental; they show a vast number of empty seats; that it was seldom any passengers had to stand, and then for very short distances.

During the period from 1947 to the date of the hearing in 1952, Transcontinental proved it had lost approximately $500,000 in the operation of its line between Albuquerque and El Paso, as compared with its profit of $10,000 in 1947. It also proved Geronimo was not making operating expenses, although Geronimo owned no busses or stations and its tangible property consisted of office equipment of the approximate value of $500, a bank account of some $25,000 and a note of $17,000 signed by a person not identified but apparently presumed to be one of its officers. Geronimo was able to continue in business because of the tolerance of Pacific Greyhound Lines which was denied the right by the Interstate Commerce Commission to continue ownership of a large block of Geronimo stock, the commission saying such was not in the public interest and the Geronimo service was not needed for the handling of interstate traffic.

Geronimo used busses leased from Pacific Greyhound Lines on a mileage basis and at the time of the hearing it was falling badly behind in the mileage payments due Greyhound.

The substantial evidence in the record is that except for periods of time while the bus drivers of Transcontinental were on strike, good and sufficient service was being given by Transcontinental. It is not claimed the suspensions of service because of the strike justified the issuance of the permanent permit. It was during a strike that Geronimo got its second toe-hold which it has never turned loose. As stated above, since Geronimo entered the field, service to the public has actually been decreased.

In litigation between these same parties we said in 56 N.M. 158, 178, 241 P.2d 829, 842:

"In all jurisdictions it is recognized that the very purpose of enacting statutes regulating carriers is not only to promote convenience and satisfactory service for the public but to prevent ruinous competition which results in unsatisfactory public service. The statutes were not passed to foster competion but to regulate and control transportation facilities in the public interest and with consideration being given to the rights of existing carriers. Sec. 68–1301, N.M.S.A.1941 [§ 64–27–1, N.M.S.A., 1953] sets out that it shall be the purpose of the motor carrier act to 'carefully preserve, foster and regulate transportation and permit the coordination of transportation facilities.'

"Section 68–1306 of our statutes (§§ 64–27–6, N.M.S.A., 1953) invests the Commission with power and authority and makes it its duty 'to regulate the facilities, accounts, service and safety of operation * * * *so as to prevent unnecessary duplication of service between common motor carriers*'." (Emphasis supplied.)

As was stated in Canton-East Liverpool Coach Co. v. Public Utilities Comm., 1930, 123 Ohio St. 127, 174 N.E. 244, "necessity" for motor transportation is not synonymous with "convenience," but is a definite need of the general public for service where no reasonably adcquate service exists. It is also stated in that case that reasonably adequate service only contemplates practical service when measured by expense, volume of traffic and public needs.

Except for the testimony of one or two officials of the Greyhound system, almost all the evidence favoring the granting of a permit to Geronimo came from citizens along the line who rode the bus more or less frequently. Some preferred Geronimo because they thought its drivers were more courteous, some found its terminal more convenient and some favored its busses. Transcontinental produced practically the same number of witnesses who liked its line and services and balanced the testimony of like witnesses for Geronimo.

In these matters it is not the accommodation of a few individuals which controls. The convenience and necessity which the law requires to support the commission's order are the convenience and necessity of the public, as distinguished from that of a few individuals. Choate v. Illinois Commerce Commission, 1923, 309 Ill. 248, 141 N.E. 12; State Public Utilities Commission ex rel. Chicago Board of Trade v. Toledo, St. L. & W. R. Co., 1919, 286 Ill. 582, 122 N.E. 158. Our statute forbids the unnecessary duplication of service and that is unquestionably what we have here with Geronimo operating its line.

These lines run through sparsely settled communities and it is abundantly clear

there is not sufficient traffic to support the competing companies, even considering the interline passenger traffic which flows over the route. It is also clear that Geronimo, backed by Greyhound, has deliberately set out to capture a large part of the business that would naturally fall to Transcontinental by Geronimo's practice of operating on the same schedule, matching run for run.

In its motion for rehearing Geronimo says the majority did not give sufficient consideration to the unusually long record and the cases cited in the briefs. The record is unusually long, and likewise the briefs, but few cases since the writer has been a member of this Court have received the study this one has had here. We did not disregard the record or the cases cited.

Special complaint is made we did not consider our opinion in Harris v. State Corporation Commission, 46 N.M. 352, 129 P.2d 323, and have in effect overruled that case without mentioning it. We did consider it but the facts are so different in that case and the one at bar that it does not assist Geronimo in this case. There an inadequacy of service on the part of Harris was shown while the record here shows just the opposite. We have not overruled the Harris case.

The record in this case does not contain evidence justifying the action of the commission in granting the permit to Geronimo. On the other hand, it clearly shows the Geronimo operation is an unnecessary duplication of services and the trial court should have ruled as a matter of law that the commission's order granting unto Geronimo a certificate of public convenience and necessity to operate a service competing with that afforded by Transcontinental under the latter's certificate outstanding for several years was unlawful and unreasonable, and remanded the cause to the commission with instructions to cancel the permit so granted to Geronimo.

Decision on the above questions makes it unnecessary to decide other points raised by appellant.

The judgment will be reversed and the cause remanded to the district court with instructions to vacate its judgment and to enter another in accordance with the views herein expressed.

The motion for a rehearing is denied.

It is so ordered.

SADLER, J., and HENSLEY, D. J., concur.

KIKER, J., was of counsel below and did not participate.

LUJAN, Justice (dissenting).

The case is before us to review the judgment of the trial court on the combined record of proceedings before the Commission and before the Court. The trial court up-

held, and correctly so, the order of the State Corporation Commission directing that a certificate of public convenience and necessity be issued to Geronimo Lines, Inc., between Albuquerque and Las Cruces. From the entire record, which is voluminous, there is substantial evidence to sustain the order of the State Corporation Commission, and such order should be affirmed.

COMPTON, C. J., concurs.

301 P.2d 317

STATE ex rel. STATE HIGHWAY COMMISSION of New Mexico, Plaintiff-Appellant,

v.

E. S. WALKER, Commissioner of Public Lands of the State of New Mexico, Defendant-Appellee.

No. 6081.

Supreme Court of New Mexico.

Sept. 4, 1956.

John T. Watson, Santa Fe, for appellant.

Richard H. Robinson, Atty. Gen., Santiago E. Campos, Asst. Atty. Gen., Wm. O. Jordan, Sp. Asst. Atty. Gen., for appellee.

McGHEE, Justice.

The questions we will decide on this appeal are:

1. Must the respondent, the Commissioner of Public Lands of New Mexico, charge the State of New Mexico payment for rights-of-way or easements for state highways across lands which were granted and confirmed to the State of New Mexico in trust for various state institutions and agencies by the Enabling Act when New Mexico was admitted to statehood, Act of June 20, 1910, 36 Stat. 557; and, if so, then upon what terms and conditions?

2. Must the Commissioner charge for sand and gravel removed from such lands for use solely in constructing public highways across the trust lands? or

3. May the Commissioner grant to the state rights-of-way and easements, as above stated, and permit the described use of sand and gravel taken from lands under his supervision, free of charge?

Before proceeding to the merits of these questions, we take notice of a procedural matter.

This action was instituted below by the state on the relation of the State Highway Commission upon complaint as for a declaratory judgment. After hearing legal argument (there being no factual dispute) the lower court ordered the dismissal of the action for want of jurisdiction upon the basis the Commissioner acted pursuant to the requirements of the Enabling Act and Art. XIII of the New Mexico Constitution in refusing to grant the easements and permission to use the sand and gravel without payment of compensation therefor, and that the Commissioner's actions were not ministerial, sub-

ject to control by mandamus or by declaratory judgment.

Had the relator been entitled to a free easement and the use of the materials without charge, then it would have been entitled to a peremptory writ of mandamus. This fact has caused us to determine the case on its merits, although the action was brought for a declaratory judgment. It is, therefore, unnecessary to pass upon the question whether under our Declaratory Judgments Act, § 22–6–1 et seq., NMSA, 1953, an action will lie against a state department or official at the suit of another state department or official. In this connection see: Taos County Board of Education v. Sedillo, 1940, 44 N.M. 300, 101 P.2d 1027; and Arnold v. State, 1944, 48 N.M. 596, 154 P.2d 257.

Section 10 of the Enabling Act provides the lands granted and confirmed to the state thereunder shall be administered and the proceeds from the sales thereof, whether of the land itself or its natural products, shall be employed solely for the purpose of the trust imposed—that is, for the benefit of the various state institutions for which the lands were granted. This was pointed out in State ex rel. Shepard v. Mechem, 1952, 56 N.M. 762, 250 P.2d 897, where we held that except for the expense of administering the trust no part of the proceeds therefrom could be diverted to other purposes. In that case an appropriation by the legislature of a part of the fund for general state administrative purposes was held invalid.

Said section of the Enabling Act also provides any sale, lease, conveyance or contract of or concerning any of the lands so granted or confirmed, or the use thereof or the natural products thereof, not made in substantial compliance with the terms of the Enabling Act shall be null and void, notwithstanding any provision of the state constitution or laws to the contrary.

At the first legislative session after statehood, Ch. 82, Laws of 1912 was enacted, governing the handling, sale and disposition of state lands. Among its provisions was § 53, now § 7–8–61, NMSA, 1953, reading:

> "The commissioner may grant rights-of-way and easements over, upon or across state lands for public highways, railroads, tramways, telegraph, telephone and power lines, irrigation works, mining, logging and for other purposes, upon payment by the grantee or grantees of the price fixed by the commissioner, which shall not be less than the minimum price for the lands, used, as fixed by law."

The minimum sale price set by § 10 of the Enabling Act is $5 per acre for lands east of the New Mexico Principal Meridian, and $3 per acre for lands west of it.

A public highway is defined by § 55–1–1, NMSA, 1953, as follows:

> "All roads and highways, except private roads, established in pursuance of any law of New Mexico, and roads dedicated to public use, that have not been vacated or abandoned, and such other roads as are recognized and maintained by the corporate authorities of any county in New Mexico, are hereby declared to be public highways."

The foregoing section was in effect when § 7–8–61, supra, was enacted.

The question of the right of the Commissioner to grant rights-of-way for state highways across state lands without receiving consideration therefor has been several times presented to the Office of the Attorney General. In 1922, in Opinion No. 3454, the Attorney General stated such action would not be in violation of the Enabling Act in view of the fact the state was building the highway. In 1931, in Opinion No. 64, the Attorney General stated he doubted it was intended that the state should pay for rights-of-way for highways over state lands and it was a matter resting in the discretion of the Commissioner. This opinion was reaffirmed by the same Attorney General in 1933, in Opinion No. 677.

These opinions would undoubtedly be correct as to lands the state might have acquired absent restrictions, but here we are dealing with lands granted in trust by the United States, under restrictions so exact they permit no license of construction or liberties of inference, as will be shown by quotations from United States v. Ervien, infra. The general law on the subject that an agency of the state is not to be charged for the use of state property unless specific provision be made therefor is not applicable.

Our Enabling Act was brought in dispute in the case of United States v. Ervien, 1917, 246 F. 277, 280, 159 C.C.A. 7, where the Eighth Circuit Court of Appeals struck down a statute enacted by our legislature in 1915 over the veto of the Governor. The statute provided the land commissioner could spend three percent of the proceeds arising from state lands in advertising the resources of New Mexico. The United States brought suit to prevent the diversion of the money and the state contended the advertising would benefit the trust lands by securing settlers and the development of the lands.

(It should be noted, comparatively, that in the instant case claim is made by the relator the building of the highways across the trust lands will greatly benefit them.)

The court, in denying validity to the statute, said such expenditures would be contrary to the terms of the Enabling Act. Near the close of the opinion, with considerable prescience, it is stated:

"* * * It would be but a step further to argue the advantage that would accrue to the trusts from the physical construction of some of the attractive resources of the state that are to be advertised, such as systems of public highways, irrigation, public schools, and the like."

(Although in the present case the relator does not propose that the Commissioner build highways, it does ask that he be compelled to give free rights-of-way for highways and also to donate materials from trust lands for highway construction purposes.)

In 1919 the Ervien case went to the Supreme Court of the United States for review, 251 U.S. 41, 40 S.Ct. 75, 76, 64 L. Ed. 128, and we quote a portion of that opinion:

"* * * There is in the Enabling Act a specific enumeration of the purposes for which the lands were granted and the enumeration is necessarily exclusive of any other purpose. And to make assurance doubly sure it was provided that the natural products and money proceeds of such lands should be subject to the same trust as the lands producing the same. To preclude any license of construction or liberties of inference it was declared that the disposition of any of the lands or of the money or anything of value directly or indirectly derived therefrom for any object other than the enumerated ones should 'be deemed a breach of trust.'

"The dedication, we repeat, was special and exact, precluding any supplementary or aiding sense, in prophetic realization, it may be, that the state might be tempted to do that which it has done, lured from patient methods to speculative advertising in the hope of a speedy prosperity.

"It must be admitted there was enticement to it and a prospect of realization, and such was the view of the District Court. The court was of opinion that a private proprietor of the lands would without hesitation use their revenues to advertise their advantage and that that which was a wise administration of the property in him could not reach the odious dereliction of a breach of trust in the state.

"The phrase, however, means no more in the present case than that the United States, being the grantor of the lands, could impose conditions upon their use, and have the right to exact the performance of the conditions. We need not extend the argument or multiply considerations. The careful opinion of the Circuit Court of Appeals has made it unnecessary.

We approve, therefore, its conclusion and affirm its decree."

Other courts passing upon questions arising under Enabling Acts like ours have declared proposed use of or condemnation of trust lands by public power and irrigation companies without payment of compensation to be foreclosed by the terms of the trust.

In State ex rel. Galen v. District Court, 1910, 42 Mont. 105, 112 P. 706, the court had for determination the question whether lands granted to the state by Enabling Act for the benefit of certain institutions could be condemned for a dam and lake site by a power and irrigation company. A state statute gave the company the right of eminent domain to secure lands belonging to the state not already appropriated to some public use. It was held the method of disposition set forth in the Enabling Act was exclusive and the lands could not be condemned.

Two Nebraska cases have passed upon the question. The first case, State ex rel. Johnson v. Central Nebraska Public Power & Irr. Dist., 1943, 143 Neb. 153, 8 N.W.2d 841, 842, involved a right-of-way for a canal across public school lands for which the power and irrigation company, a public corporation, claimed it could not be compelled to pay compensation. The heart of the decision is stated in paragraphs 8 and 10 of the court syllabi:

"8. The legislature is without power to make a grant in fee of, or an easement over, public school lands without compensation for the damage for such taking or use.

* * * * * *

"10. The acts or parts of acts herein in question purporting to grant to public corporations engaged in construction, operation and maintenance of works of internal improvement the right to obtain rights of way over and across public school lands without compensation are declared to be unconstitutional, null and void."

In the second case, State v. Platte Valley Public Power and Irr. Dist., 1943, 143 Neb. 661, 10 N.W.2d 631, the same rule was declared. There the state sued to recover for land taken by the defendant in a condemnation suit without compensating the State of Nebraska for the interest it had in the lands at the time of condemnation as trustee of public school lands and funds. A tract of such land had been sold by the state on contract, but only a portion of the purchase price had been paid. The private purchaser was paid for his equity, but the irrigation district refused to pay the state the balance due it. Again the court held invalid a legislative act granting a public corporation free use of state land and directed judgment in favor of the state for the unpaid part of the purchase price.

The relator places much reliance on the case of Ross v. Trustees of University of Wyoming, 1924, 30 Wyo. 433, 222 P. 3, where the trustees sought to have declared invalid a certificate allowing the use of state land for a right-of-way for a public road. The university trustees claimed the grant could only be made by complying with the terms of the Enabling Act requiring advertisement, etc., and, further, that they, and not the state land board, had the sole right to dispose of the university trust lands.

The land board had granted the right-of-way under a statute giving the board such authority on terms satisfactory to it. No claim appears to have been made that the terms were not satisfactory to the board. The opinion on rehearing, reported at 31 Wyo. 464, 228 P. 642, shows the purpose of the suit was to determine whether the university trustees or the land board had the power of disposition of university grant lands. The court affirmed its former decision and stated it was unfortunate the trustees had seen fit to file the case attacking the grant of the right-of-way in order to get a determination of the question of their right to dispose of the lands.

Relator also relies on the case of State ex rel. Conway v. State Land Department, 1945, 62 Ariz. 248, 156 P.2d 901, which held the highway department could not be compelled to pay lease money for rights-of-way for public roads. This decision relies on Grossetta v. Choate, 1938, 51 Ariz. 248, 75 P.2d 1031, which held the land commissioner could grant a right-of-way for a county road over state school lands, and also upon Ross v. Trustees of University of Wyoming, supra.

Notwithstanding our high regard for the Arizona Supreme Court and its decisions, we feel their cases are based on the strained reasoning and inferences condemned in the opinions in United States v. Ervien, supra.

Further contention is made by the relator that because of the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C.A. § 932, granting free rights for public highways over the public domain, it was not the intent of Congress in the Enabling Act that the state should pay the trust compensation for rights-of-way for state highways. It is suggested, as we understand the argument, that this right survived the grant to New Mexico, at least so long as title to the land is in the state, although no highway existed when the land passed to the state. This argument is directly contrary to the holding in Greiner v. Board of County Com'rs, 1918, 64 Colo. 584, 173 P. 719, involving a school section. It is also contrary to our own decisions in Atchison, T. & S. F. Ry. Co. v. Richter, 1915, 20 N.M. 278, 148 P. 478, L.R.A. 1916F, 969; and Frank A. Hubbell Co. v. Gutierrez, 1933, 37 N.M. 309, 22 P. 2d 225, cases involving lands in private ownership at the time rights-of-way were

claimed under the Act of 1866, although the federal right had not been exercised prior to the time the lands ceased to be a part of the public domain.

Relator strongly asserts the long-continued acceptance of the Opinions of the Attorney General that the Commissioner could grant the highway department free rights-of-way over state lands and free use of road-building material found thereon should not now be disturbed. It also points out to us the fact the Attorney General of the United States, whose duty it is to enforce the trust provisions of the land grant, has never questioned such practice.

This practical construction given the Enabling Act by our executive department is very persuasive, and the weight of long administrative construction is well recognized by this Court. Nye v. Board of Com'rs of Eddy County, 1932, 36 N.M. 169, 9 P.2d 1023; Ortega v. Otero, 1944, 48 N.M. 588, 154 P.2d 252; Dillard v. New Mexico State Tax Commission, 1948, 53 N.M. 12, 201 P.2d 345.

When, however, we read the restrictive provisions of the Enabling Act which we accepted in our Constitution, the applicable decisions of the courts, state and federal, cited elsewhere in this opinion, our statute § 7-8-61, supra, and the doctrine of Owens v. Swope, 1955, 60 N.M. 71, 86, 287 P.2d 605, we are forced to the conclusion that long administrative interpretation is not sufficient to overcome them and that relator must henceforth compensate the trust for rights-of-way and construction material.

A final question remains respecting the manner of disposition of the interests and materials described. Section 10 of the Enabling Act provides that the sale of granted lands and the natural products thereof, as well as leases for more than a certain period, shall be advertised. We agree with the relator that it could not have been in the contemplation of Congress this provision should apply to right-of-way easements for state highways or for the taking of sand and gravel to be used in highway construction upon such lands.

The action of the District Court in dismissing the action will be affirmed for the reasons herein stated.

It is so ordered.

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

301 P.2d 322

TOM FIELDS, Ltd., Plaintiff in Error (Intervenor below),

v.

R. M. TIGNER, Defendant in Error (Plaintiff below),

and

Owl Drug Company, Inc., and Maurice A. Smith and Eleanor B. Smith, Defendants in Error (Defendants below).

No. 6083.

Supreme Court of New Mexico.

Sept. 6, 1956.

Carpenter, Eaton & Phelps, Roswell, for Tom Fields, Ltd., plaintiff in error.

Atwood & Malone, Roswell, for R. M. Tigner, defendant in error.

SADLER, Justice.

We are called upon in this proceeding on writ of error to determine whether an abuse of discretion appears in the action of the trial court in denying the petition of the plaintiff in error to intervene in a suit to foreclose a chattel mortgage on a stock of merchandise in the custody of a receiver appointed by the court incident to foreclosure.

The suit out of which the order before us for review arises was filed June 1, 1951, in the district court of Chaves County by the plaintiff against the defendants Owl Drug Company, a New Mexico Corporation, and Maurice A. Smith and Eleanor B. Smith to recover the unpaid principal of $50,800 said to be due on a note originally made for

$70,000 by the defendants Owl Drug Company and Maurice A. Smith, to the plaintiff. The note in its original amount represented the amount agreed to be paid by Smith as the purchase price of the capital stock of Owl Drug Company, then owned by plaintiff. As security for the purchase price of the capital stock represented by the promissory note in the amount above indicated the defendants, Owl Drug Company and Maurice A. Smith, gave plaintiff, R. M. Tigner, former owner of the capital stock of Owl Drug Company, a chattel mortgage bearing same date as the note, December 3, 1951. It covered all the stock of goods, furniture, equipment and other personal property owned by defendants, Owl Drug Company and Maurice A. Smith and used by them in the operation of the drug business in Roswell, New Mexico.

The complaint as filed consisted of three counts, the first asking recovery on the note above mentioned, and the second and third being for recovery on separate unsecured notes held by plaintiff and executed by Owl Drug Company. The day following filing of suit, June 2, 1951, the plaintiff secured an order to show cause why a receiver should not be appointed of all the property of Owl Drug Company, including the stock of merchandise and fixtures covered by the chattel mortgage so executed as aforesaid. Following hearing on the order to show cause, the court appointed a receiver who duly qualified by giving the bond required by his order of appointment. He took immediate custody and possession of all the chattels of Owl Drug Company that were subject to the mortgage and embraced the stock of merchandise and fixtures covered by the chattel mortgage, with power as well to preserve the assets of Owl Drug Company, pendente lite. In order the better to accomplish the last mentioned end, the receiver was also given power to conduct the business of Owl Drug Company during the period of foreclosure.

On July 5, 1955, a certificate of default was entered against Owl Drug Company. On the same date, to wit, July 5, 1955, the defendant Maurice A. Smith filed his answer and counterclaim alleging fraud on part of plaintiff, Tigner, seeking rescission and damages of $2,750. The defendant, Mrs. Maurice A. Smith, through a motion filed on the same day, sought dismissal of the suit as against her on the ground no cause of action had been asserted against her. Default judgment was taken against defendant Owl Drug Company, on August 24, 1955.

There were several attempts to intervene filed by parties after motion for default was filed, all claiming to be unsecured creditors of Owl Drug Company, three of whom it is here claimed by plaintiff in error are interested in a consolidated appeal prosecuted before this Court, seeking a review of an order denying their efforts to intervene in the foreclosure suit. It is said all of them challenge the validity of plaintiff's

mortgage and claim as well that certain assets of No. 2 Owl Drug Company established at Walker Air Base, near Roswell, to which portions of the stock from Owl Drug Company in Roswell were removed, are not covered by the plaintiff's mortgage. Thereafter, on September 26, 1955, the plaintiff filed an answer to the counterclaims of defendant, Smith, to be followed on January 14, 1956, by the filing by plaintiff of an amended answer to such counterclaims.

There were other attempted interventions by various unsecured creditors about this time in the proceedings in the foreclosure suit. The cause being at issue, trial was had on January 16 and 17, 1956, consuming two days, at the conclusion of which the trial court announced what his decision on the merits would be. Incident to such announcement, the trial judge requested the filing of the findings of fact and conclusions of law for consideration by him in preparing his findings.

So matters stood on January 17, 1956, when the plaintiff in error, Tom Fields, Inc., recovered a judgment for $99.44 before a justice of the peace in Chaves County, New Mexico, which became final on January 28, 1956. On the date last mentioned, an execution was issued on said judgment and returned nulla bona, the reason being that all property of Owl Drug Company was in the hands of the receiver appointed by the court in the foreclosure suit.

On the same date, the plaintiff in error here filed a motion in the foreclosure suit seeking to have the receiver discharged as to sufficient assets to satisfy its judgment before the justice of the peace in the sum of $99.44, recovered against Owl Drug Company as aforesaid. The motion was stricken by the court on February 9, 1956. The requested findings of fact and conclusions of law of defendant Smith were filed with the court on January 30, 1956, and those of plaintiff on the following day, January 31, 1956, along with additional requests by plaintiff on February 7, 1956, all pursuant to the trial court's notice to the parties at the time the court announced what his decision would be at conclusion of the trial.

With the foreclosure suit at this stage of completion and on February 13, 1956, the plaintiff in error filed its petition to intervene on the ground it was a judgment creditor and that all the property of Owl Drug Company was in the hands of the receiver in the foreclosure suit; that most of the property in the hands of the receiver was not covered by the mortgage under foreclosure and various other grounds of challenge to validity of the mortgage such as that it was ultra vires, among other claims.

Counsel for plaintiff in error call our attention to District Court Rule 24, appearing as 1953 Comp. § 21–1–1, divided into subparagraphs a, b and c. The Rule reads:

"(a) *Intervention Of Right.* Upon timely application anyone shall be permitted to intervene in an action: (1) When a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof. (As amended by Court Order effective December 31, 1949.)

"(b) *Permissive Intervention.* Upon timely application anyone may be permitted to intervene in an action: (1) When a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) *Procedure.* A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

It is claimed for the plaintiff in error that, specifically, it is the language of sub-paragraph (a) (3) which controls here. Thus it is its counsel would claim benefit of the rule, deleting language to them deemed immaterial, reading as follows:

> "Upon timely application anyone shall be permitted to intervene * * * (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

The rule above quoted on intervention came to us as one of the federal rules of civil procedure somewhat recently adopted by this Court. Prior to its adoption our statute, L.1880, c. 6, 1929 Comp., §§ 105–1501 to 105–1503, on intervention had been held to apply solely to actions at law. Flournoy v. Bullock, Baker & Co., 11 N.M. 87, 66 P. 547, 55 L.R.A. 745. Even though it did not cover suits in equity, it was employed by analogy as a guide on occasions. Compare, Clark v. Rosenwald, 31 N.M. 443, 247 P. 306; State ex rel. Lebeck v. Chavez, 45 N.M. 161, 113 P.2d 179.

The present rule covering interventions coming to us from the federal practice and procedure, we naturally turn to federal texts and decisions for clarification of the

same. As can be seen from a reading of Rule 24, provision is made for permissive intervention and intervention as a matter of right. But whether the one or the other, the language of the rule provides as an initial condition to invoking it, that the claim to its benefit must be "upon timely application." Touching this phase of the matter, the author of the text in 7 Cyclopedia of Federal Procedure, Third Edition, Section 24:31, states:

> "In each instance, timely application must be made. Failure to proceed in a timely manner will result in loss of the right to intervene. Courts have been said to be unanimous in requiring prompt action on the part of an intervenor who seeks to assert rights in an action to which he is not a party. However, whether as of right or by permission of the court, Rule 24 is silent as to what constitutes timely application, and the question must be answered in each case by the exercise of sound discretion by the Trial Court. There is, therefore now, as formerly, latitude for the court to allow intervention within what time scope the justice of the case may appear to warrant."

See, also, Cameron v. President and Fellows of Harvard College, 1 Cir., 157 F.2d 993; First State Bank of Chariton, Iowa v. Citizens State Bank of Thedford, D.C.Neb., 10 F.R.D. 424; Simms v. Andrews, 10 Cir., 118 F.2d 803. In the Cameron case, supra, the court said [157 F.2d 996]:

> "* * * an application for permission to intervene must be timely whether it is asserted as a matter of legal right under paragraph (a) or requested as a matter of judicial discretion under paragraph (b)."

As disclosed by some of the cases, just when an application to intervene is timely must depend on the circumstances of each case. Prior to the adoption of Rule 24, we had held that an attempt to intervene after judgment was untimely. Encino State Bank v. Tenorio, 28 N.M. 65, 206 P. 698. While judgment actually had not been entered here, the trial was concluded, the court had announced its decision and called for requested findings from the parties. Entry of judgment in due course was but a formality. Counsel for plaintiff in error has made no explanation below, nor here, as to why it delayed from June, 1955, to January, 1956, in asking intervention.

In the meantime trial had been completed and decision on the merits announced. The trial judge ruled the application was untimely and denied it on that ground. We are not prepared to say there was an abuse of discretion in his action, even if, as contended by counsel for plaintiff in error paragraph (a) of Rule 24 be controlling here, a matter we do not decide. State ex rel.

Meyers Co. v. Raynolds, 22 N.M. 473, 164 P. 830; Martinez v. Cook, 57 N.M. 263, 258 P.2d 375. Compare Pankey v. Hot Springs National Bank, 42 N.M. 674, 84 P.2d 649.

The judgment will be affirmed.

It is so ordered.

COMPTON, C. J., and LUJAN and KIKER, JJ., concur.

McGHEE, J., having recused himself, did not participate.

301 P.2d 326

Beola McMINN, Plaintiff-Appellee,

v.

Jay B. THOMPSON, Defendant-Appellant.

No. 6100.

Supreme Court of New Mexico.

Sept. 7, 1956.

Smith & Smith, George M. Murphy, Clovis, for appellant.

Compton & Compton, Portales, for appellee.

McGHEE, Justice.

The plaintiff (appellee) was struck by defendant's (appellant's) car when she walked across a fifty-foot paved street between intersections after dark. The street, in Portales, New Mexico, is also a state highway. The defendant appeals from a judgment in favor of the plaintiff for $7,500 on account of personal injuries suffered by her.

The complaint alleged the injury was caused by the careless and negligent manner in which the defendant was operating his automobile and, in addition, that he had a last clear chance to avoid the accident and resulting injury. The defendant denied such allegations and pleaded assumption of risk and contributory negligence on the part of the plaintiff.

The first point relied upon for reversal is the claimed error of the trial court in denying defendant's motion for a directed verdict and his later motions for a new trial and judgment *non obstante veredicto* on the ground there was no substantial evidence of his negligence.

We briefly summarize the evidence on the point as follows:

The plaintiff was going home from her place of business after dark. When she reached the middle of the block opposite her home she looked to the left and saw the headlights of three cars travelling slowly toward her, so she proceeded to the center line of the street and then looked to her right and saw the defendant's car approaching her. She thought she had time

to cross to the far side of the street. She then started across it and testified she did not remember anything more until she recovered consciousness in the hospital the following morning.

Police officers who investigated the accident a short time after its occurrence testified the defendant's car was stopped approximately even with the sidewalk leading from the street to the plaintiff's house and that she was lying in the street approximately 25 feet from the car; that the distance from the car back to the intersection of the first street north, from which the defendant had entered the street on which the accident occurred, was 165 feet, as it was stepped, although one of the officers at one place in his testimony gave it as 155 feet and later changed back to 165 feet. The officers also testified there were skid marks made by the tires on the defendant's car which extended back north for half of the distance to the intersection where the car had entered the street.

The defendant was called as an adverse witness by the plaintiff and admitted striking plaintiff with his car. He stated that while he was not watching the speedometer he knew he was not exceeding the speed limit of 25 miles per hour set by a city ordinance; that the headlights of his car were burning on dim, as required by the ordinance; that he did not see the plaintiff until he was approximately 30 feet from her and that he did all in his power to avoid hitting her. He also stated the right front fender of his automobile had a mashed place on it at the bend which was some 15 inches across where it struck the plaintiff.

It is easy to understand why the jurors rejected defendant's statements of how the accident occurred and when he first saw the plaintiff. His testimony that he first saw her when he was only 30 feet away is wholly inconsistent with the skid marks made by his tires for a distance of approximately 85 feet, or perhaps a few feet less from the point of impact, as he stated the car went a few feet after the plaintiff was struck. Defendant did not claim he applied the brakes before seeing plaintiff in the street.

It is a matter of common knowledge there is a reaction period between the time one becomes aware of danger and the actual operation of applying the brakes, and this would place the defendant still further up the street to the north before application of the brakes.

We believe under the record it was proper to submit the case to the jury and let it determine whether the negligence of the defendant was the proximate cause of the accident. However, if we be in error on this point, there still remained the issue of last clear chance.

The skid marks undoubtedly received serious consideration by the jury—

and properly so in this case where there were no eyewitnesses other than the parties —and were themselves sufficient evidence to sustain a finding of excessive speed in this 25 mile per hour zone. Bock v. Sellers, 1939, 66 S.D. 450, 285 N.W. 437; Bozman v. State, 1939, 177 Md. 151, 9 A.2d 60, and authorities therein cited; Swartz v. Dahlquist, 1948, 320 Mich. 135, 30 N.W. 2d 809.

The next point urged by defendant is the plaintiff was guilty of contributory negligence as a matter of law in crossing the street in the middle of the block in violation of an ordinance of the City of Portales prohibiting one from standing or walking in a street if it interferes with traffic, and that she also violated § 64–18–34, NMSA, 1953, which provides every pedestrian crossing a roadway at any point other than within a marked cross walk or within an unmarked cross walk within an intersection shall yield the right of way to all vehicles upon the roadway.

It is not to be questioned that the plaintiff was guilty of negligence *per se* in crossing this street (which is also a state highway) in the middle of the block in the nighttime so that she was struck by a car with its headlights burning and of which she had an unobstructed view. Zamora v. J. Korber & Co., 1955, 59 N.M. 33, 278 P.2d 569; Moss v. Acuff, 1953, 57 N.M. 572, 260 P.2d 1108. The question is, Should the trial court have held as a matter of law that her acts were a proximate contributing cause of her injury and directed a verdict against her, or was it the province of the jury to determine such question and to award the plaintiff damages if it determined the issue in the negative? We believe it was a matter for the determination of the jury under our decisions in Williams v. Haas, 1948, 52 N.M. 9, 189 P.2d 632, and Curtis v. Schwartzman Packing Co., 61 N.M. 305, 299 P.2d 776.

The next point relied upon is that the trial court erred in submitting the issue of last clear chance to the jury under the evidence in the case.

As already stated, the evidence of the plaintiff showed the defendant skidded his tires for half of the distance back to the intersection, which, under measurements she says were correct, would be a distance of 82½ feet. Of necessity, there was some reaction time after defendant had seen the plaintiff before he could apply the brakes and start the skidding.

The defendant says the fact of his skidding the tires shows he was trying to avoid the accident and that the case of Stokes v. Johnstone, 1955, 47 Wash.2d 323, 287 P.2d 472, where the tires were skidded for a distance of 83 feet is authority for his contention an instruction on last clear chance should not have been submitted to

the jury. However, aside from the length of the skid marks in that case and this one, the facts of the two differ. There a car was stalled in the highway and the injured parties were standing at the side of the car to the left of where the defendant was approaching and he testified he did not see them. There was no contention there, so far as the opinion discloses, that the defendant had a clear view of the road beyond the car, or that there was no traffic approaching from the opposite direction so that defendant might have swerved to the left. Here, so far as the record shows, there was no traffic approaching from the south which would have prevented defendant turning to his left in the fifty-foot paved portion of the street. He did not offer any explanation of his failure in this regard, but instead apparently relied on his statement he did not see the plaintiff until he was within 30 feet of her, notwithstanding the silent testimony of the skid marks extending back up the road for more than 80 feet.

We agree with the statement of the Washington court in the Stokes case, supra, that the last clear chance doctrine means a clear chance and does not mean a last possible chance, but we believe the fact and circumstances warranted the jury in finding the defendant had a last clear chance here and that the trial court did not err in submitting the issue to it.

The final point made by defendant is the trial court erred in refusing his tender of proof that plaintiff was drawing more from social security benefits than she would have earned from her business and that she could not have drawn her social security payments if she had remained on the job and assisted in the conduct of the business in which she was a partner.

Social security payments come from funds contributed by an employer, the employee or a self-employed person, aided, as we understand, by a benevolent government. No authorities in point are cited in support of the claim and we are satisfied it is without merit.

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

LUJAN, SADLER and KIKER, JJ., concur.

COMPTON, C. J., not participating.

301 P.2d 329

STATE of New Mexico, Plaintiff-Appellee,

v.

Gilbert CAMPOS and Bob Moon, Defendants-Appellants.

No. 6085.

Supreme Court of New Mexico.

Sept. 5, 1956.

Hartley & Buzzard, Clovis, for appellants.

Richard H. Robinson, Atty. Gen., Paul L. Billhymer, Fred M. Standley, Asst. Attys. Gen., for appellee.

SADLER, Justice.

The defendants have jointly appealed from a judgment of the district court of Curry County sentencing them to the penitentiary for the crime of breaking and entering in the nighttime with intent to commit the crime of larceny and with grand larceny.

They have presented two claims of error which counsel for defendants argue under two points, the first of which reads:

> "That the Court erred in admitting the State's Exhibits Nos. 2, 4, 5, 6, 7, 8, 9 and 10 over the appellants' objection, because said exhibits were not properly identified nor connected up with the appellants."

Exhibit No. 2 was a pair of trousers; Exhibit No. 4, a man's gray coat; Exhibit No. 5, a man's white coat; Exhibit No. 6, a pair of white trousers. Exhibits Nos. 7 and 10 were samples of white paint, and Exhibits Nos. 8 and 9 were samples of grease.

The principal argument of counsel for defendants under this point, particularly as to Exhibits Nos. 2, 4, 5 and 6, rests on a claim that the exhibits mentioned were not sufficiently connected with the defendants, or shown to have been worn by them at the time of the crime and that this shortage of proof by the State as to the exhibits mentioned took away its right to introduce Exhibits Nos. 7, 8, 9 and 10. Thus it is that error was committed by the court, say counsel for defendants, by the reception in evidence of all such exhibits.

The attorney general takes an entirely different view of the evidence. We are reminded by him that the evidence of the State placed both defendants in Clovis on the evening the crime was committed. Exhibit No. 2, being a pair of trousers, was taken from the defendant Moon by Sergeant Miles of New Mexico State Police. Moon was arrested during the day following the crime and the trousers identified as Exhibit No. 2 were taken from him as a part of his wearing apparel at the time of his arrest. Certainly, there is no failure to identify this exhibit as clothing belonging to him.

Exhibit No. 4, a man's gray coat, was secured by a police officer from the defendant Moon's home. The possession of chattels raises a presumption of ownership of such chattels. 9 Wigmore on Evidence (3rd Ed.) 425, § 2515. As to Exhibits Nos. 5 and 6, being a white coat and a pair of white trousers, there was evidence they belonged to defendant Campos and that he was wearing them on the night or evening of the crime charged. Other testimony connected Campos with these two articles of wearing apparel.

Coming now to Exhibits 7 through 10, inclusive, as to which there is no serious contention by defendants' counsel, there was a lack of proper identification. The defendants do contend however that the exhibits just mentioned lack relevancy and materiality. Exhibit No. 7 was made up of paint samples scraped by the sheriff's office from the safe alleged to have been stolen. Exhibits 8 and 9 were samples of grease taken from a floor jack, whereas Exhibit No. 10 was a sample of paint scraped from the same floor jack.

Counsel for defendants base their claim of error with reference to the introduction of these exhibits, in large measure, upon the contention that before they can have probative value on the question of identification of defendants and thereby connect them with the breaking and entering charge, the evidence should establish that the articles of clothing designated as State's Exhibits Nos. 2, 4, 5 and 6 were worn by the defendants when the crime was committed. They agree, however, if that fact were once established, "then Exhibits Nos. 7 through 10 would have been relevant and material." On this concession by counsel alone, we very well might cease discussion of this claim of error, since the evidence amply supports an inference the exhibits in question represent clothing worn by defendants at the time and scene of the crime.

In Underhill's Criminal Evidence, p. 157, § 117, it is stated "the proper method is to prove first that the clothing offered belonged to the accused and that it was worn by him at the time of the tragedy." See, also, 2 Wigmore on Evidence (3rd Ed.), pp. 385–387, §§ 411–412; 2 Wharton's Criminal Evidence (11th Ed.) 192; Commonwealth v. Parrotta, 316 Mass. 307, 55 N.E.2d 456, 459. In the text cited, Mr. Wharton states:

> "If a question of fact as to the connection of the article sought to be admitted with the defendant or the crime is raised, the evidence should be admitted for the determination of the jury. The lack of positive identification in such a case affects the weight of the article or substance as evidence rather than its admissibility."

The doctrine announced in the foregoing text is applied by the Supreme Court of Massachusetts in Commonwealth v. Parrotta, supra, as follows:

> "The lack of positive identification affects not the competency but the weight of the evidence, and the issue of identity was for the consideration of the jury."

A consideration of the claim of error argued by counsel for defendants under their point one must be denied. We find no abuse of discretion in the trial court's

admitting these exhibits for such weight and consideration as the jury might give them.

Finally, it is claimed as a basis for reversal that the trial court erred in denying the motion for a mistrial interposed by defendants during progress of the trial. This claim of error finds expression in the second point presented in their brief-in-chief. It reads:

> "That the appellants were denied a fair trial because of the Court's overruling their motion for a mistrial based on a prejudicial account in a newspaper of general circulation and the jury having access to said newspaper during an overnight recess."

The newspaper article appeared in the evening issue of Clovis News-Journal circulated on the afternoon of the overnight recess.

It is as follows:

> "Surprise Witness Is Called In Trial Here. E. L. Cavallero, manager of the former Laborer's Club at Grand and Hull Streets, was a surprise witness for the State Tuesday morning during early testimony in the Ninth District Court trial of Gilbert Campos, 35, and Bob Moon, 25, both of Santa Rosa.
>
> "Campos and Moon are charged with two counts, grand larceny and breaking and entering, in connection with the burglary of Williams and Son Motor Company, 800 Main, during the early hours of April 30.
>
> "Cavallero testified from the witness stand that Campos had been in the Laborer's Club from about 11 PM, April 29, to between 3 and 4 AM, April 30, but that Moon wasn't with him.
>
> "His testimony surprised District Attorney Richard F. Rowley who said Cavallero had told Sheriff Dan Webster, State Patrolman Charles Hawkins and a former state policeman, Pat Stovall, the night of April 30 that Campos and Moon had visited the club together the night before.
>
> "District Judge E. T. Hensley, Jr. who is presiding over the case, overruled the objections of Dan Buzzard, defense attorney, in permitting Cavallero to be questioned concerning his previous statement.
>
> "On being cross-examined by District Attorney Rowley, Cavallero remembered talking to the officers but 'didn't recollect' saying Campos and Moon had arrived at the Club together about 11 PM, Friday, April 29, and left together about an hour before he had closed at 3 AM.
>
> "'I don't recall' was Cavallero's answer when being cross-examined by

Rowley on whether Moon had been in the Laborer's Club that particular night.

"First person called to the witness stand today was Ada Gant, bookkeeper for Williams and Son. She was followed by Bob Williams, shop foreman, and Roy Williams, owner, who testified as to what was missing from the company and the condition of the shop.

"Stolen in the burglary was a new Oldsmobile and a large safe weighing around 2,500 pounds which contained around $6,000 although only about $300 was in cash.

"The Oldsmobile, broken down by the weight of the heavy safe, was recovered abandoned about 15 miles north of Fort Sumner on April 30.

"A Fort Sumner policeman and former auto mechanic, M. C. Gunter, was also called to the stand. He testified that he noticed the broken down Oldsmobile and a 1949 or '50 model green Buick with a busted radiator on the highway north of Fort Sumner around 7:30 AM, April 30, as he was enroute to Las Vegas.

"Moon flagged him down, he said, and he gave him a ride into Santa Rosa.

"Gunter testified that a man was sitting in the Buick but he couldn't identify him because when he looked at the Buick the man turned his head.

"Crawford Goodman, Jr., testified that he and Bobby Skeen noticed the two cars on the shoulder of the road as they were enroute from Alamogordo Dam to Santa Fe.

"Johnny Paschal of the Clovis Air Force Base testified that he was working at the service station at 7th and Rencher the night of April 29 and the two men drove in the station in a green Buick to have the battery checked.

"He pointed at Campos and Moon and identified them as the two men. He stated that Campos made a telephone call from the station while Moon paced nervously about.

"Also called to the witness stand before the case was recessed for the noon hour today was Art Hall, filling station operator at Taiban.

"Hall testified that Moon, driving a green Buick, appeared at his gas station between 5:30 and 6:00 AM Saturday, April 30. Moon got two gallons of gas in a can for another car which he said had run out of gas, Hall said.

"The green Buick has been identified by officers as the property of Campos. It was towed to a repair shop in

Santa Rosa for repairs to the radiator and fan.

"When the new Oldsmobile was stolen from Williams and Son the burglars siphoned gasoline from the other cars in the shop for its gas tank, officers disclosed at time of the burglary.

"Campos has a long criminal record dating back to 1945. He has been charged with burglary, grand larceny, assault, robbery, car theft, and both jewel and post office burglary.

"He was acquitted about a year and a half ago of having robbed a rancher near Santa Rosa of around $32,000. He has no occupation.

"Moon was released from the Oklahoma penitentiary about three years ago and had been working in a Santa Rosa cleaning establishment up until his arrest."

There was no effort on the part of defendants' counsel to show that any member of the jury had read the article appearing in the Clovis News-Journal. Indeed, none had, if the jury observed the admonitions of the court made previously and on the eve of the overnight recess. Furthermore, after denying the motion for mistrial and upon the reconvening of court the following morning, the court instructed the jury touching this matter, as follows:

"The Court: Do both sides close?

"Mr. Buzzard: Closed, Your Honor.

"Mr. Rowley: State closes.

"The Court: Ladies and gentlemen, you have heard all the testimony that is to be submitted in this case. There yet remains the preparation of the instructions on the law as applied to the testimony as submitted. That will take a little time, the recess will be no longer than is necessary. I will ask you to be back in your jury box after we recess in approximately forty-five minutes. During this recess bear in mind that it is increasingly important that you not discuss the case nor permit anyone to discuss it in your presence, and that you continue to refrain from forming an opinion as to the merits of the case until it is finally submitted to you. At the close of the session yesterday, and on prior overnight recesses through this term, the court has admonished this Jury, as all jurys to be very cautious and avoid if possible the listening to any news accounts of whatever transpired during the trial of a case and not to read over any printed matter in newspapers about the trial of the case. The Court is compelled at this time, in the interests of justice, to instruct this jury particularly that if they happened to read yesterday's issue of the Clovis

News Journal to completely ignore it, ignore the matters therein stated with reference to this case, since they could be highly prejudicial to the defendant, wholly unwarranted and not based upon any testimony that has been received in this case. Someone saw fit to publish in the newspaper yesterday, just referring to an article, counsel, prior behavior of the defendants on trial. You are instructed that there has been no testimony introduced whatever in this case as to that, that the information is wholly misleading, that there is no testimony of either of these defendants having ever been convicted of any offense of any nature, and anything appearing in that article you are specifically instructed to disregard. It is unfortunate that courts cannot receive, and the public receive the information factually, as it is entitled to. Too frequently the public is given an entirely erroneous impression about matters that transpire in Courts. This is an excellent illustration. Anything further, Counsel?

"Mr. Buzzard: Nothing further?

"Mr. Rowley: No, sir.

"The Court: Court will be in recess about 45 minutes. Mr. Reporter, will you mark this article and put it in the record?"

In order to predicate error on the action of the trial court in denying the motion for mistrial, we should have to assume a violation by the jurors, or some of them, of the trial court's admonition given on the eve of the recessing of the court for the night, and that prejudice resulted therefrom. A matter of this kind rests largely within the broad discretion of the trial court. In the text of 23 C.J.S., Criminal Law, § 961, p. 281, the author states:

> "The declaring of a mistrial, on his own motion or on motion of a party, rests in the trial court's discretion; but it has been held that this power is to be exercised only in very extraordinary and striking circumstances, and where accused's rights are not prejudiced; and he may properly refuse so to do where he is satisfied that no injustice has resulted, or will result, from the acts or occurrences complained of."

See, also, State v. Bentley Bootery, Inc., 128 N.J.L. 555, 27 A.2d 620; Commonwealth v. Barker, 311 Mass. 82, 40 N.E.2d 265; United States v. Weber, 2 Cir., 197 F.2d 237; United States v. Pinna, 7 Cir., 229 F.2d 216; State v. Fouts, 79 Ohio App. 255, 72 N.E.2d 286.

We have carefully considered the errors charged and find no merit in any of them. The defendants received a fair trial and the judgment should be affirmed.

It is so ordered.

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

301 P.2d 334

MIDWEST ROYALTIES, Inc., a Corporation, Plaintiff-Appellant,

v.

J. E. SIMMONS, Defendant-Appellee.

Charles E. Brown; A. G. Rushing; J. W. Wallrich; J. E. Simmons; M. Stinebaugh; Virgil Linam; Warren Oil Company, a Corporation; H. D. Schenck; Earl Payne; Harriet V. Patten; Joseph N. Hicks and J. L. Burke, Jr., Defendants,

No. 6078.

Supreme Court of New Mexico.

Sept. 6, 1956.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

Easley, Quinn & Stout, Hobbs, for appellant.

Hervey, Dow & Hinkle, W. E. Bondurant, Jr., Roswell, for appellee.

McGHEE, Justice.

The plaintiff (appellant) brought this action against the defendant, J. E. Simmons, and other defendants who are not concerned for the purpose of this appeal, seeking to quiet plaintiff's title to minerals in certain lands in Lea County. The case was never tried on its merits, and the present appeal is from the decision of the lower court denying plaintiff's motion to vacate an order of dismissal of the action as to defendant and appellee Simmons.

Prior to the appointment of the Honorable George T. Harris as District Judge of the Fifth Judicial District, the law firm of which he was a member signed answers for several defendants in the case.

Upon the case being called for trial on June 2, 1949, the presiding judge, the Honorable C. Roy Anderson, announced his disqualification in open court. The record here shows the following statements by the then attorney for the plaintiff, and Judge Anderson:

> "Judge Harris will also be disqualified in this matter, and I wonder if we could arrange to have a judge certified to try this?

"The Court: Yes, sir, I will be happy to cooperate with you to get somebody here to try it for you. Do you have a number of witnesses who are out of Lea County?"

On July 25, 1949, depositions were filed in the case; on February 14, 1950, a motion of the plaintiff to dismiss the action as to two defendants who had been given quitclaim deeds by it and an order of dismissal thereon signed by Judge Harris were filed. The attorney testified that he initialed the order of dismissal and sent it and the motion to dismiss to the attorneys for the defendants named therein, but that it did not occur to him the motion and order might be submitted to Judge Harris.

On November 9, 1951, the defendant Simmons filed a motion to dismiss the action under Rule 41(e), § 21–1–1 (41) (e), NMSA, 1953, because of the failure of the plaintiff to take any action toward bringing the case to trial for more than two years. A certificate of the mailing of notice of such motion to the then attorney for plaintiff was executed by Mr. James M. Hervey, one of the attorneys for defendant Simmons. An order of dismissal of the cause as to Simmons was thereafter signed by Judge Harris and filed in the case on February 5, 1952. Mr. Neal testified he had no recollection of ever seeing the copy of that motion to dismiss and that it was not in his files. On March 27, 1953, the plaintiff learned the order of dismissal had been filed, but waited until October 16, 1953, to file a motion under Rule 60(b), § 21–1–1(60) (b) NMSA, 1953, asking that such order be vacated. As already noted, this appeal is taken from the decision of the lower court denying said motion to vacate the order of dismissal.

The first contention of the plaintiff is that Judge Harris was disqualified to sit in the case because of the provisions of Art. VI, § 18, of the New Mexico Constitution, which reads:

"No judge of any court nor justice of the peace shall, except by consent of all parties, sit in the trial of any cause in which either of the parties shall be related to him by affinity or consanguinity within the degree of first cousin, or in which he was counsel, or in the trial of which he presided in any inferior court, or in which he has an interest."

It is conceded a statutory affidavit of disqualification of Judge Harris was not filed and, also, that no one in any manner called to his attention the fact he had been one of the attorneys in the case; neither the plaintiff, nor anyone else, objected to his acting as judge in the case.

We held in Gutierrez v. Middle Rio Grande Conservancy District, 1929, 34 N.M. 346, 282 P. 1, 4, 70 A.L.R. 1261, the constitutional provision did not contain an

absolute disqualification, but conferred a right upon litigants which they might either exercise or waive by consent. We there said:

> "* * * If a litigant chooses to avail himself of his constitutional right, then our procedure requires that some motion, objection, or other appropriate remedy be invoked calling the grounds of disqualification to the court's attention and demanding a ruling thereon."

See also Tharp v. Massengill, 1933, 38 N.M. 58, 28 P.2d 502.

The plaintiff says Mr. Neal meant by his statement quoted above to announce a present fact—that is, that Judge Harris was disqualified under the Constitution, while the defendant Simmons says it indicated an intention to disqualify Judge Harris in the future. There is no claim that Mr. Neal's statement was brought to the attention of Judge Harris, or that it was transcribed and filed with the papers in the case until the time of the hearing before the court below on the motion to vacate the order of dismissal.

We should state here that the answers of the defendants which were filed by the firm of which Judge Harris was a member were signed by a partner on its behalf, Mr. A. D. Williams. Knowing Judge Harris as we do, we are confident when he signed the orders in this case he was not conscious of the fact his firm had been attorneys for some of the defendants in the case.

Orders of dismissal of this case and others for failure to prosecute were entered by Judge Anderson on his own motion some three months prior to the filing of the motion to vacate the order of dismissal of Judge Harris. The plaintiff also moved to set aside Judge Anderson's order of dismissal, and a hearing was held on these motions by the lower court, which held the order signed by Judge Anderson was void, although it held the order of Judge Harris was valid. These rulings, the plaintiff contends, are inconsistent, apparently overlooking the fact that Judge Anderson had recused himself in open court and the parties had not later agreed that he should act.

We hold Judge Harris had not been disqualified in the case and that he was acting within his jurisdiction when he signed the order of dismissal.

The judge of the lower court held the motion to vacate the order of dismissal under Rule 60(b) was not timely filed, but if the setting aside of the order of dismissal of Judge Harris was a matter within his discretion, then in the exercise of such discretion he refused to vacate it.

When asked why the case was allowed to drag along so long, plaintiff's former attorney stated it was just one of those things that got lost in the shuffle. It was

in part because of such delays that Rule 41(e) was adopted. The plaintiff did not set out in its motion to vacate any excuse for its delay in bringing the case to trial, or make any showing that it came within the implied exceptions we set out in Ringle Development Corporation v. Chavez, 1947, 51 N.M. 156, 180 P.2d 790, so that it might have a chance to successfully resist the motion to dismiss if it were given the opportunity to defend against the motion.

The then attorney for defendant Simmons, Mr. Hervey, did all that was required of him under our rules when he mailed a copy of the motion to dismiss to opposing counsel and made due certificate of that fact and filed it in the case. The failure of the attorney to receive the motion, if such was the fact, did not relieve his client from the legal effects following the filing of such pleading. Phelps v. Schmuck, 1940, 151 Kan. 521, 100 P.2d 67. Even if it is required that notice be given of a motion to dismiss under Rule 41(e), failure to give such notice is not a jurisdictional error. Zielinski v. United States, 2 Cir., 1941, 120 F.2d 792.

Had the motion to vacate been promptly filed after the plaintiff learned of the entry of the order, the statement of Mr. Neal to the effect he had never received a copy of the motion would, no doubt, have considerably influenced the lower court in the exercise of its discretion.

The plaintiff relies on Adams & McGahey v. Neill, 1954, 58 N.M. 782, 276 P.2d 913, where a plaintiff took a default judgment against the defendant while an answer was on file without giving the defendant notice of his application therefor. The rule required three days' notice before a default judgment could be taken where a defendant had appeared, and it was not even claimed a notice had been mailed to the defendant's attorney, or notice given the defendant in any manner. That case is not in point here.

There is nothing in the record that would justify us in holding the lower court abused its discretion in refusing to vacate the order, even if that were the controlling factor in the case.

For the reasons above stated the judgment will be affirmed. It is so ordered.

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

301 P.2d 337

STATE of New Mexico, Appellant,

v.

Juan GARCIA, Appellee.

No. 6018.

Supreme Court of New Mexico.

Sept. 6, 1956.

Richard H. Robinson, Atty. Gen., Paul L. Billhymer, Walter R. Kegel, Asst. Attys. Gen., for appellant.

Harry L. Bigbee, Donnan Stephenson, Matias A. Zamora, Santa Fe, for appellee.

LUJAN, Justice.

The appellee, Juan Garcia, was indicted by the grand jury of Santa Fe County for the crime of perjury. Appellee interposed a motion to quash the indictment on the ground that the grand jury was composed of more than twelve members. The motion was sustained, and from that judgment the state appeals.

The record discloses that the grand jury which returned the indictment against appellee was composed of thirteen persons.

The State-appellant filed a pro forma brief in chief pursuant to Rule 15, subd. 5, of the Rules of Supreme Court, wherein, among other things, it calls upon the appellee to specify and maintain the insufficiency of the indictment which was quashed by the district court. Thereafter the appellee filed his brief in chief wherein he contends, among other things, that the grand jury which returned the indictment against him was not a grand jury as contemplated by our Constitution and that its action was a nullity. We agree with this contention.

In Ogle v. State, 43 Tex.Cr.R. 219, 63 S.W. 1009, 1011, 96 Am.St.Rep. 860, we find this language, and quote with approval:

> "'* * * What constitutes a grand jury? Our constitution answers the question plainly and emphatically.

It says, "Grand and petit juries in the district courts shall be composed of twelve men, but nine members of a grand jury shall be a quorum to transact business and present bills." There is no authority of law for a grand jury composed of any other number of men than twelve. Thirteen do not and cannot constitute a grand jury. If thirteen could be considered a grand jury, so could one, five, fifty or any other number that the fancy of the judge organizing the same might dictate. * * * In Stell v. State, 14 Tex.App. 59, it is said: "The record must show that the jury was a legal one, and if it does not the error is a radical one, which will be considered on appeal, whether properly availed of in the court below or not, because 'due course of the law of the land' demands a legal conviction by a legal jury." If, then, a trial by jury composed of fewer or more than 12, the constitutional number, be an infringement of the right of trial by jury, and not a trial by due course of the law of the land, for the same reason the action of a body of men fewer or more than 12 in number cannot be regarded as the action of a grand jury. Such a body of men is unknown to the law, and its acts, being wholly without authority of law, are absolutely null, and a pretended indictment preferred by such a body can have no legal standing or effect whatever. It cannot confer any jurisdiction of the case upon the court.' * * * In Rainey's case [Rainey v. State, 19 Tex.App. 479] we find this language: 'This error does not appear to us to be a mere irregularity, but one of fundamental and vital importance, such as renders all proceedings, each and every step in the prosecution, void. * * * This objection is not to irregularity in forming, or to the personnel of, the grand jury. The objection that it was composed of thirteen men strikes deeper. It denies that such a body of men, under our constitution, is a grand jury at all. * * * To compose a constitutional grand jury, the panel must be composed of twelve persons, neither more nor less. A greater or less number is not a grand jury. The number of persons of which the panel is composed is, in this state, a question of constitutional law; and no man can, by his consent, will, carelessness, or ignorance, constitute a grand jury to convict and punish for a felony. The party must be tried upon an indictment. What an indictment is, is a matter of law. It is the act of a grand jury. What constitutes a grand jury is a matter of law. Unless indicted by a grand jury, there is no jurisdiction in the court to try the defendant; and it will not be questioned that no man, either

by his expressed consent, laches, or ignorance, can confer jurisdiction to try for a felony.'"

See, also, Ex parte Reynolds, 35 Tex.Cr. Rep. 437, 34 S.W. 120; Hill v. State, 146 Tex.Cr.R. 333, 171 S.W.2d 880, 174 S.W.2d 733, petition dismissed 320 U.S. 806, 64 S.Ct. 72, 88 L.Ed. 487; State v. Vaughn, 132 Mo.App. 135, 112 S.W. 728; Jones v. McClaughry, 169 Iowa 281, 151 N.W. 210; Ex parte Harris, 118 Tex.Cr.R. 154, 39 S.W.2d 883; People v. Lieber, 357 Ill. 423, 192 N.E. 331; Ralls v. State, 151 Tex.Cr.R. 146, 205 S.W.2d 594, 595.

It is our opinion, and so hold, that a grand jury composed of more than twelve members is not a grand jury under our Constitution and an indictment returned by that body is void and ineffective. Article 2, § 14 of our Constitution, provides that:

"A grand jury shall be composed of such number, not less than twelve, as may be prescribed by law. * * * Until otherwise prescribed by law a grand jury shall be composed of twelve in number of which eight must concur in finding an indictment. * * *"

There are other interesting matters raised but they will not be considered in view of our disposition of this appeal.

The judgment is affirmed.

It is so ordered.

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

301 P.2d 339

STATE of New Mexico, Plaintiff-Appellant,

v.

Melvin W. TIMMONS, Defendant-Appellee.

No. 6019.

Supreme Court of New Mexico.

Sept. 6, 1956.

Richard H. Robinson, Atty. Gen., Paul L. Billhymer, Walter R. Kegel, Asst. Attys. Gen., for appellant.

Carl S. Schreiber, Santa Fe, for appellee.

PER CURIAM.

The same questions are presented in this case as in the case of State v. Garcia, 61 N.M. 404, 301 P.2d 337, and with which it has been consolidated for oral argument and submission. Accordingly, on the authority of the pronouncements made in the latter case, the judgment in this case is correct and should be affirmed.

It is so ordered.

301 P.2d 339

STATE of New Mexico, Plaintiff-Appellant,

v.

Mike ORTIZ, Defendant-Appellee.

No. 6021.

Supreme Court of New Mexico.

Sept. 6, 1956.

Richard H. Robinson, Atty. Gen., Paul L. Billhymer, Walter R. Kegel, Asst. Attys. Gen., for appellant.

Harold A. Roberts, Santa Fe, for appellee.

PER CURIAM.

The same questions are presented in this case as in the case of State v. Garcia, 61 N.M. 404, 301 P.2d 337, and with which it has been consolidated for oral argument and submission. Accordingly, on the authority of the pronouncements made in the latter case, the judgment in this case is correct and should be affirmed.

It is so ordered.

301 P.2d 518

A. L. ZINN and Elizabeth P. Zinn, Plaintiffs-Appellees,

v.

E. Price HAMPSON, Defendant-Appellant.

No. 6130.

Supreme Court of New Mexico.

Sept. 6, 1956.

Rehearing Denied Oct. 3, 1956.

Joseph Phil Click, Malcolm W. deVesty, Albuquerque, for appellant.

Dean S. Zinn, Frank B. Zinn, Santa Fe, for appellees.

LUJAN, Justice.

Appellees, A. L. Zinn and Elizabeth P. Zinn, instituted this action against the appellant, E. Price Hampson, seeking specific performance of a written contract for the sale and purchase of a certain parcel of land located in Bernalillo County, New Mexico.

The case was submitted to the court on stipulation of facts, in which it was admitted that the parties entered into an agreement for the purchase and sale of certain unimproved real estate located in Bernalillo County, New Mexico on January 27, 1956; that plaintiffs furnished the defendants with abstracts of title showing plaintiffs' title to the tract of land covered by the contract, to have been derived from a patent issued to them by the Commissioner of Public Lands of the State of New Mexico dated July 27, 1955; that plaintiffs stand ready and willing to convey the land to defendant in accordance with the agreement upon payment to them of the purchase price; that defendant refuses to complete the contract with plaintiffs by paying the purchase price and accepting the warranty deed to the land, contending that the plaintiffs' title is not merchantable, and basing that contention on a claim that the patent to plaintiffs was beyond the authority of the Commissioner of Public Lands to issue; that the tract of land covered by the contract of sale and upon which the State patent was issued was a portion of the land sold by the Commissioner of Public Lands of New Mexico at a public auction and upon which a contract of sale was subsequently executed between the plaintiff A. L. Zinn, the highest bidder at the public auction, and the Commissioner of Public Lands; that with the exception of the parcel of land covered by the parties' agreement, all of the land originally included in the sale at the public auction and in the original contract of sale between the plaintiff A. L. Zinn and the Commissioner of Public Lands, are now held by various assignees or successors to assignees of the plaintiffs, with those persons having entered into contracts of sale with the Commissioner of Public Lands all of which

contracts are still executory in that the balance due on the purchase price of the land covered by those contracts has not been paid to the Commissioner of Public Lands.

The sole question presented on this appeal is: "Does the Commissioner of Public Lands have the authority to issue a patent to the purchaser at a public auction of state land upon receipt of payment for a portion of the tract covered by the contract while the remainder of the land covered by the sale is held under executory contract and upon which the purchase price is still owed?"

Appellant attacks the patent from the State on the sole ground that under the law the Commissioner of Public Lands had no authority to execute a patent to a portion of a tract of land sold under an installment contract prior to final payment thereon.

In selling lands belonging to the State and issuing patents therefor, the Commissioner of Public Lands is merely an agent of the State and has those powers, and only those powers given by law. State ex rel. Del Curto v. District Court of Fourth Judicial District, 51 N.M. 297, 183 P.2d 607.

This is a case of first impression in this jurisdiction and the primary source of authority for this decision must come from the exact wording of our Enabling Act, Constitution and Legislative acts.

Section 10 of the Enabling Act specifically provides that "no sale or other disposal [of lands] * * * shall be made * * * upon credit *unless* accompanied by ample *security,* and the legal title shall not pass until the *consideration* shall have been paid. * * *" It reads:

> "* * * No mortgage or other encumbrance of the said lands, or any thereof, shall be valid in favor of any person or for any purpose or under any circumstances whatsoever. Said lands shall not be sold or leased, in whole or in part, except to the highest and best bidder at a public auction to be held at the county seat of a county wherein the lands to be affected, or the major portion thereof, shall lie, notice of which public auction shall first have been duly given by advertisement, which shall set forth the nature, time, and place of the transaction to be had, with a full description of the lands to be offered, and be published once each week for not less than ten successive weeks in a newspaper of general circulation published regularly at the state capital, and in that newspaper of like circulation which shall then be regularly published nearest to the location of such lands so offered; nor shall any sale or contract for the sale of any timber or other natural product

of such lands be made, save at the place, in the manner, and after the notice by publication thus provided for sales and leases of the land themselves: Provided, That nothing herein contained shall prevent said proposed state from leasing any of said lands referred to in this section for a term of five years or less without said advertisement herein required.

"All lands, leaseholds, timber, and other products of land before being offered shall be appraised at their true value, and no sale or other disposal thereof shall be made for a consideration less than the value so ascertained, nor in any case less than the minimum price hereinafter fixed, nor upon credit unless accompanied by ample security, and the legal title shall not be deemed to have passed until the consideration shall have been paid. * * *

* * * * * *

"Every sale, lease, conveyance, or contract of or concerning any of the lands hereby granted or confirmed, or the use thereof or the natural products thereof, not made in substantial conformity with the provisions of this act shall be null and void, any provision of the Constitution or laws of the said state to the contrary notwithstanding. * * *"

The consideration in the instant case is the amount bid for the entire tract of land at the auction sale, accepted by the commissioner, and reduced to a written contract. The action of the commissioner in issuing the patent to the plaintiffs for a portion of the large tract of land sold to them before the balance due on the contract was fully paid diminished the State's security and prevented a full compliance of the contract on their part. Under such circumstances the only remedy left the State is to retain the small sum of money paid for the small portion of the land as liquidated damages, since it is powerless to enforce specific performance of the contract. It cannot proceed against the purchaser for no personal obligation is created under this type of transaction. The security for the payment of the purchase price is the land itself and the title thereto which remains in the State until final payment is made is the only inducement to purchaser to carry out the contract. See, Veseley v. Ranch Realty Co., 38 N.M. 480, 35 P.2d 297; State v. Field, 31 N.M. 120, 241 P. 1027.

Article 13, §§ 1 and 2 of the State Constitution provides as follows:

"Section 1. (Disposition of state lands.)

"All lands belonging to the territory of New Mexico, and all lands granted, transferred or confirmed to the state by congress, and all lands hereafter acquired, are declared to be public lands of the state to be held or disposed of

as may be provided by law for the purposes for which they have been or may be granted, donated or otherwise acquired; * * *.

"Sec. 2. (Duties of land commissioner.)

"The commissioner of public lands shall select, locate, classify, and have the direction, control, care and disposition of all public lands, under the provisions of the acts of congress relating thereto and such regulations as may be provided by law."

The law under which this sale was made and patent issued is found in the following Section of 1953 Compilation.

§ 7–8–9. "Sale for Cash—Contracts —Interest on deferred payments—Maximum term.—State lands shall be sold for cash or upon payment of one-twentieth of the purchase-price in cash and the balance at any time within thirty (30) years from the date of the contract. Deferred payments shall bear interest at the rate of four (4) per centum per annum from the date of contract until paid, interest payable annually, and interest due and unpaid shall bear interest at the rate of one (1) per centum per month from the date such interest is due until paid; Provided, that the provisions of this act shall not be applicable to lands selected for the benefit of the Santa Fe and Grant County railroad bond fund, but such lands shall be sold as provided by section 5236, New Mexico Statutes, Annotated, Code of 1915 (7–8–18), and outstanding contracts for such lands shall not be subject to the provisions of this section."

The Act further provides:

§ 7–8–10. "Restrictions on deferred payments.—At any time after sale and prior to the expiration of thirty (30) years from the date of the contract, the purchaser or his successor in interest may pay all or any part of the purchase-price due on any contract for purchase of state lands, but no payment shall be accepted, other than the first payment, for less than one-thirtieth of ninety-five (95) per centum of the purchase-price, nor be effective for credit on any date other than the anniversary of the date of the contract next following the date of tender."

§ 7–8–12. "Outstanding contracts may be canceled and new contracts granted—Conditions.—Contracts for the purchase of state lands now outstanding shall, upon application of the holders thereof and payment of a fee of four dollars ($4.00) for each contract of one (1) section or less, and ten cents (10¢) for each additional section or fraction thereof, be canceled and new contracts issued under the provisions of this act (7–8–9, 7–8–10,

7–8–12), in lieu of such outstanding contracts. Provided, that the provisions of this act shall not be applicable to lands selected for the benefit of the Santa Fe and Grant County railroad bond fund, but such lands shall be sold as provided by section 5236 of the Code of 1915(7–8–18), and outstanding contracts of such lands shall not be subject to the provisions of this section."

§ 7–8–21. "Assignment of contracts not in default—Certified copy to be filed with commissioner.—Any purchaser of state lands under deferred payment contract, not in default as to any payment, may assign all right, title and interest under any such contract; Provided, certified copy of the assignment shall be filed with the commissioner before same shall become effective."

It will be seen from an examination of the aforementioned provisions of the Enabling Act, State Constitution and Statutes that there is no specific authority given the Commissioner of Public Lands to issue a patent to a portion of a tract of land sold under contract when only that part covered by the patent has been paid for and the balance due under said contract has not been paid at the time the patent is issued.

We are of opinion, and so hold, that there was no authority of law for the execution of the patent involved in this case.

The judgment of the trial court is hereby reversed, with directions to the trial court to enter judgment for appellant.

It is so ordered.

COMPTON, C. J., and SADLER and KIKER, JJ., concur.

McGHEE, J., not participating.

301 P.2d 521

Leonard L. WALDROOP, Claimant-Appellee,

v.

DRIVER-MILLER PLUMBING & HEATING CORP., Employer, and Fireman's Fund Insurance Co., Insurer, Defendants-Appellants.

No. 5951.

Supreme Court of New Mexico.

Sept. 4, 1956.

Rehearing Denied Oct. 3, 1956.

McAtee & Toulouse, William C. Marchiondo, Albuquerque, for appellants.

Rodey, Dickason, Sloan, Mims & Akin, William A. Sloan and Frank M. Mims, Albuquerque, for appellee.

KIKER, Justice.

This is a claim brought under the Workmen's Compensation Act. The claimant alleged that he was injured while lifting a plumbing unit; that the injury was to his

back and that he suffered total permanent disability; that he had incurred, up to the time of filing his claim, medical expenses in excess of $700; and that his earnings before the injury were $100 per week.

Answering, defendants denied all material allegations stated in plaintiff's claim.

The verdict of the jury was for total temporary disability for a number of weeks and for 40% permanent partial disability for the statutory maximum period. Judgment was entered in conformity to the verdict and the defendants, employer and insurer, have appealed.

For Point One in the argument, appellants state two propositions. The first is that there is no substantial evidence to support the verdict of the jury and the second is that the claimant failed to prove his case by a preponderance of the evidence.

As to the first of these propositions, it is clear that the testimony of the claimant is substantial in its character and sufficient support to take his case to the jury. In jury trials any question of fact supported by substantial evidence must be determined by the jury. Schulz v. Pennsylvania R. Co., 350 U.S. 523, 76 S.Ct. 608; Rivera v. Atchison T. & S. F. R. Co., N.M., 299 P.2d 1090, and cases cited therein.

The second proposition under Point One, being that the case is not supported by a preponderance of the evidence, we cannot consider for the reason that it is well established in this court, and we think it established almost universally, that in jury trials, if there is substantial evidence to support the verdict of the jury, the courts will not consider whether a preponderance of the evidence will support the verdict. The credibility and weight of the testimony of witnesses is for the jury and not the court to determine.

Appellants, for their second point as basis for reversal, submit that statements of an injured person as to his present condition and symptoms, detailing the history of his case and the circumstances which attended the injury, made to a physician examining him for the purpose of qualifying as a witness on behalf of the plaintiff, are not admissible, and that the court in this case committed reversible error in admitting such testimony by the physician.

There is reputable authority supporting the proposition stated by appellants and there is as much, if not more, equally reputable authority which holds to the contrary.

As pointed out in appellants' brief, support for their contention is found in opinions of certain federal circuits and, among others, the courts of Kansas, Missouri, Iowa, and Texas. An excellent statement of this view is found in Gaines v. Stewart, Tex.Civ.App., 57 S.W.2d 207, 208:

"But where an injured party, for the express purpose of qualifying a physician to testify in his behalf about matters on which such party seeks a recovery, makes statements as to subjective matters of pain, suffering, etc., not disclosed to the physician by other and independent means, there exists both motive and opportunity for the patient to magnify or feign injuries. Under such circumstances his statements become clearly self-serving and hearsay, and should not be admitted."

See also Delaware, L. & W. R. Co. v. Roalefs, 3 Cir., 70 F. 21; Murphy v. Edgar Zinc Co., 128 Kan. 524, 278 P. 764, 65 A.L.R. 1213, 1217; Standard Accident Ins. Co. v. Terrell, 5 Cir., 180 F.2d 1; Holmes v. Terminal R. Ass'n of St. Louis, 363 Mo. 1178, 257 S.W.2d 922; Pierce v. Heusinkveld, 234 Iowa 1348, 14 N.W.2d 275; Texas Employers' Ins. Ass'n v. Wallace, Tex. Civ.App., 70 S.W.2d 832; Lee v. Kansas City Southern Ry. Co., D.C., 206 F. 765; and other cases cited in annotation at 65 A.L.R. 1217.

Among jurisdictions supporting the contrary view are Alabama, California, Maine, Massachusetts, Oklahoma and Washington. In Groat v. Walkup Drayage & Warehouse Co., 14 Cal.App.2d 350, 58 P.2d 200, 203, the California court said:

"Appellants argue in favor of the rule in other jurisdictions, which, distinguishing between history told an attending physician for purpose of treatment and that given an expert solely for purpose of testifying, hold the former admissible and the latter inadmissible. See 8 R.C.L. 639. No such distinction has been made in this state. 'Declarations and statements, made to an examining expert by an injured party, of previous condition and past suffering, when declared by the expert to be necessary to enable him to form an opinion as to the nature and extent of disease or injury, and when such statements constitute in part the basis upon which the opinion of the expert is based, are admissible, not for the purpose of establishing the truth of the statements, but to serve as a basis for the medical opinion the expert is about to give. [Citing cases.]' Willoughby v. Zylstra, 5 Cal.App.2d 297, 300, 42 P.2d 685, 686. The rule in this state is in accord with the majority rule. 67 A.L.R. 10, 18; 80 A.L.R. 1527, 1528."

The Washington court stated in Kraettli v. North Coast Transp. Co., 166 Wash. 186, 6 P.2d 609, 611, 80 A.L.R. 1520:

"'It is obvious that no intelligent examination could have been made, nor any intelligent opinion expressed, without taking into consideration both the subjective and objective symptoms.'"

See also Lowery v. Jones, 219 Ala. 201, 121 So. 704, 64 A.L.R. 553; Johnson v. Bangor Ry. & Electric Co., 125 Me. 88, 131 A. 1; Cronin v. Fitchburg & L. St. Ry. Co., 181 Mass. 202, 63 N.E. 335; Danner v. Chandler, 205 Okl. 185, 236 P.2d 503; Poropat v. Olympic Peninsula Motor Coach Co., 163 Wash. 78, 299 P. 979; III Wigmore § 688, § 1720.

In every diagnosis of a physician, the opinion expressed by him is necessarily founded upon both objective and subjective symptoms. In order to express an intelligent opinion he must know as much as he can ascertain of the physical history of the patient, whether the purpose of his examination is to treat the patient or to express an opinion in court as to his condition and its causes. If in stating an opinion it is clearly expressed as based on statements made by the individual and that which he ascertained by examination of that person's body, we fail to see how any harm can be done by the fact that the examination was not made for purposes of treatment. The jury should be instructed as to the effect of this testimony. In this case, failure so to instruct is not urged as error, and in addition the witness Dr. Clark testified "the history given to the doctor ordinarily is just what the patient tells you" and, "I am in no position to make any commitments as to the exact truth of his history even though I am sworn to on the witness stand, but I think that's understood."

We think that the better reasoned cases support the position taken by appellee. We therefore rule appellants' Point Two against them.

Appellants' Point Three involves the admission of testimony of claimant's wife and of certain exhibits. The wife was allowed to testify over the objection of appellants that both she and a minor child of the parties were compelled to go to work in order to support the family; and that to supply family needs it became necessary to sell certain articles of household furniture and equipment at public auction; also that claimant and his family were finally compelled to apply for charitable assistance from several organizations.

It seems too clear for argument that the testimony was incompetent in the trial of this case and that it was highly inflammatory and could have had no other actual effect than to appeal to the sympathies and prejudices of the members of the jury. That this kind of testimony in this case was highly prejudicial to the rights of the defendants seems to us to be beyond any kind of doubt.

It is a cardinal principle of our jurisprudence that the rich and poor must stand alike in the courts of justice in America; and the general rule as stated

in the authorities is that evidence of pecuniary circumstances, whether of the wealth or of the poverty of a party to an action, is not ordinarily admissible as evidence. There are certain exceptions but none of them obtain in workmen's compensation cases. See cases collected at 122 A.L.R. 1408.

In Miranda v. Halama-Enderstein Co., 37 N.M. 87, 18 P.2d 1019, this court had this proposition under consideration and spoke as follows:

> "Over repeated objections, appellee was allowed to show that her husband had been sick for fifteen years, and unable to work, and that his support fell upon her. Appellant contends that the evidence was irrelevant as a measure of damages—on which question it could alone have any bearing—and that, as it contained an appeal to sympathy, it was prejudicial.
>
> "It seems to be generally held that evidence of the injured plaintiff's domestic relations is irrelevant to the question of damages, and that, when of a nature calculated to prejudice, its admission will constitute reversible error."

See also Coca Cola Bottling Co. of Fort Worth v. Tannahill, Tex.Civ.App., 235 S.W.2d 224; Griser v. Schoenborn, 109 Minn. 297, 123 N.W. 823; 20 Am.Jur. 250, Evidence; 122 A.L.R. 1408.

We hold that the admission of evidence of claimant's poverty was reversible error.

Point Four challenges the action of the court in refusing defendants' attorneys the right to use the blackboard during the course of the trial for the purpose of placing thereon the differences, as brought out by medical witnesses, between symptoms of an ulcer and a herniated intervertebral disc.

Whether a party shall be allowed to use the blackboard during the trial of a case rests in the sound discretion of the trial court. State v. Jones, 51 N.M. 141, 179 P.2d 1001, and cases therein cited. We find no abuse of discretion.

Point Five complains that the court erred to the prejudice of appellants when it excluded their Exhibit 11, which was a medical report made by Dr. W. D. Andrews to the State Labor Commissioner and to the insurer showing that the disability of claimant, for which Dr. Andrews had treated him, was not due to injury. It is claimed that the exclusion of this testimony, which was offered to be identified by an agent of the insurer, was prejudicial.

It requires no citation of authority to show that the excluded testimony is clearly hearsay.

In addition, the record shows that Dr. W. D. Andrews appeared as a witness for appellants and testified in the case. There could have been no prejudice to appellants by reason of the exclusion of Exhibit 11.

Point Six is to the effect that it was prejudicial error to overrule appellants' objections to a question on cross-examination of Dr. Joseph Peterson, appellants' witness, as to whether he employed appellants' attorneys as his attorneys. The point cannot be sustained. It rests fully within the discretion of the trial court as to whether the cross-examination should be allowed. State v. Roybal, 33 N.M. 540, 273 P. 919; II Wigmore § 949.

Point Seven alleges prejudicial error of the trial court in not allowing in evidence a record of the Veterans' Administration purportedly showing that claimant's disability rating for government pension had been raised by the Veterans' Administration at a date subsequent to the alleged work injury. The report is incompetent as evidence in this case. Also, a number of doctors from the Veterans' Administration Hospital at Albuquerque testified for appellants in this case. No error was committed by the exclusion of this report.

Point Eight asserts that the trial court abused its discretion in overruling appellants' motion for a "continuance" from 8 p. m. Thanksgiving Eve, after the evidence had been taken but before the case had gone to the jury, to Friday morning at 9 a. m., which motion actually amounted to a request for a recess.

It has been uniformly held in New Mexico that the conduct of a trial, including the granting or denial of continuances and postponements is within the sound discretion of the trial court. State v. Fernandez, 56 N.M. 689, 248 P.2d 679; State v. Gallegos, 46 N.M. 387, 129 P.2d 634, and cases therein cited. We cannot find an abuse of discretion in the court's action in overruling the motion at the time made.

Point Nine charges that the court mistakenly entered judgment for an amount in excess of that allowed by statute, and appellee admits the error. Since the judgment must be reversed, this mistake doubtless will be avoided in case another trial should result in favor of plaintiff.

Appellants also complain that allowance was made to Dr. Peterson, claimant's physician, who treated him for ulcer and gallbladder difficulty. This treatment by the doctor was not requested by, and was in no way related to the claim

against, the employer and the allowance should not have been made. Dudley v. Ferguson Trucking Co., 61 N.M. 166, 297 P.2d 313. We have no doubt that this error also will be avoided at a second trial.

Appellants' final charge of error is that an award was made of the maximum payment of $30 per week. This complaint was based upon the proposition that while claimant worked only two weeks for the defendant employer, he did not receive full payment for the work done by him until several months later; and appellants urge that the amount earned by claimant for the two weeks should be spread over the entire number of weeks between the time he began work and the time of final payment. There is nothing in the statutes which justifies this contention and we know of no rule by which the compensation, if any, to which claimant may be entitled is to be measured other than by the time during which he worked and the compensation received by him for that work.

Because of the error pointed out in this opinion, the judgment of the lower court should be and is hereby reversed, and the case is remanded for new trial.

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

301 P.2d 527

D. M. HALLMARK, Plaintiff-Appellant,

v.

Margarito A. BACA, Defendant-Appellee.

No. 6084.

Supreme Court of New Mexico.

Sept. 14, 1956.

Donald A. Martinez, Las Vegas, for appellant.

Roberto L. Armijo, Las Vegas, for appellee.

KIKER, Justice.

In this case plaintiff filed suit alleging that he was the owner of certain lands as described in the complaint. He further alleged that he and his predecessors in title had been in open, notorious and adverse possession of said lands as enclosed in all parts by fence, except on the east, and in that part by a precipitous cliff, a canyon wall. The cliff and the fence served to keep cattle both in and out of the land within the enclosure.

Plaintiff further stated that defendant had entered upon said lands and was building a fence across a portion of the same so as to cut off an area to possession of which plaintiff was entitled.

For answer, defendant denied all allegations of plaintiff's complaint except that he, defendant, had recently purchased a tract of land. The defendant did not plead affirmatively in any manner whatever.

The facts of this case are that plaintiff, as tenant of one Helm, occupied the lands enclosed by fence and canyon wall for a period of two years, at the end of which time plaintiff purchased the lands from Helm. Thereafter plaintiff continued to occupy the entire tract so enclosed until defendant entered upon a portion of the land, straightening up an old fence which at one time had existed across the property so occupied by plaintiff. There is no dispute that for more than 10 years plaintiff and his predecessors in title had occupied all lands enclosed as above stated.

At the close of plaintiff's case, defendant moved to dismiss on the ground there was a fatal variance between the testimony given by the witnesses and the allegations stated in the complaint. After some argument, the court took this motion under advisement and at a later date entered an order sustaining the motion. Judgment followed and plaintiff has appealed.

The defendant, after making his motion to dismiss, and before the court had ruled

on the motion, called the plaintiff as an adverse witness, but there was no change in his testimony. The defendant Baca then testified as to the value of building a fence such as that which defendant undertook to put across the lands enclosed as above stated. What became of the fence which defendant started to put across the lands occupied by plaintiff or actually did put across them is not shown by the record. Whether plaintiff took the posts and wire and put them to his own use, the record does not show. As far as we know from the record, the fence might have been torn down and left in the condition it was before the defendant had restored this old fence to the position which it had at one time occupied.

On the strength of the testimony of the defendant Baca, which was not objected to by plaintiff and which had no pleading for its support, the court entered judgment against plaintiff for $186 for the value of the fence.

Another fact which the record does not show is whether defendant had any right whatever to enter upon the tract of land enclosed as above stated. As far as we know from the record, defendant may be a mere trespasser upon property the possession of which plaintiff had taken lawfully.

In this situation we dispose of the matter of damages awarded by the judgment by saying there is nothing in the record which justified the entry of any judgment for damages in favor of defendant and against plaintiff and on that account there must be a reversal.

The matter of any right of ownership became of no importance by reason of a statement made by plaintiff's attorney just before defendant took the testimony of plaintiff and of Mr. Baca. Plaintiff's attorney explained to the court that his theory was the suit called upon the court to determine by declaratory judgment the possessory rights to the tract of land enclosed above as between plaintiff and defendant. Then plaintiff's attorney stated:

> "I believe that as it turns out, neither one of them actually have the title to it and we are not seeking to acquire title to this property. All we are seeking to do is determine is (sic) whether the Defendant was right in ousting the Plaintiff of his possession; or Plaintiff, by virtue of his prior possession of that property was entitled to continue in possession of it until the rightful owner would oust him."

In the brief filed in this court by plaintiff, as appellant, plaintiff stated with reference to the tract which defendant's fence would have cut off: "Appellant is willing to concede that it probably lies outside of the survey description." Plaintiff argues at considerable length that he is entitled to hold possession of the entire tract enclosed

by the fence and canyon wall until ousted by one showing a better right of possession.

There is some doubt whether this question was before the court at the close of the case since it appeared that plaintiff had on his own account restored himself to possession by tearing down the fence rebuilt by defendant. It does not appear that defendant was doing or threatening to do anything to regain possession of any portion of the tract. The consideration of these facts doubtless brought about the ruling of the trial judge.

It follows that we should probably say nothing about this proposition, but a brief declaration may serve to bring about that which it seems to us clearly should result. By doing a little surveying, if that is necessary, and by the exhibition to plaintiff by defendant of any claim of title or other right of possession to any part of the tract in question, the parties ought to be able to settle for themselves the right of possession. We say, however, that plaintiff is right in his declaration that he is entitled to hold possession until ousted by someone showing a better right thereto, Romero v. Herrera, 27 N.M. 559, 203 P. 243; 1 Am.Jur. "Adverse Possession", §§ 6, 15.

For the reasons above stated the judgment of the lower court should be reversed and the cause remanded to the district court with directions to permit the parties to make such amendments to their pleadings as they may desire and to grant a new trial. It is so ordered.

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

301 P.2d 529

Chester PLUMMER, H. L. McCrary, C. A. Tevis and H. J. McCrary, Appellants,

v.

Sam JOHNSON, Appellee,

S. E. Reynolds, State Engineer of the State of New Mexico, Respondent.

No. 6113.

Supreme Court of New Mexico.

Aug. 15, 1956.

Rehearing Denied Oct. 3, 1956.

Reese, McCormick & Lusk, Carlsbad, for appellants.

Lewis C. Cox, Jr., Roswell, for appellee.

Charles D. Harris and Jack Love, Roswell, for respondent.

COMPTON, Chief Justice.

Appellants are seeking a review of an order of the District Court of Roosevelt County dismissing their appeal from a decision of the state engineer. The state engineer cross-appeals from an order dismissing him out of the case.

Appellee, Sam Johnson, applied to the state engineer for a permit to appropriate waters from the Roosevelt County Underground Water Basin and appellants protested the same. Following a hearing before him, the application was approved and the permit was granted. Appellants issued a "Notice of appeal" from the decision of the engineer to the District Court of Roosevelt County, which was served on the engineer and appellee and later filed in the office of the District Clerk of Roosevelt County. The notice reads:

"Notice of Appeal

"To: Sam Johnson
"Arch, New Mexico

"State Engineer
"State of New Mexico
"Sante Fe, New Mexico

"Comes now Chester Plummer, H. L. McCrary, C. A. Tevis, and H. J. McCrary, protestants in the above styled and numbered matter, by their attorneys, and serves notice of their intention to appeal to the District Court of Roosevelt County, New Mexico, from the decision of the State Engineer of the State of New Mexico, made and entered of record in this matter on July 29, 1955, and as amended on August 5, 1955.

"Dated at Portales, New Mexico, this 23 day of August, 1955.

"Mears & Mears
"Portales, New Mexico

"By: S/ Fred Boone

"Reese, McCormick, Lusk & Paine
"Carlsbad, New Mexico

"Attorneys for Protestants"

Subsequently, appellee and the state engineer jointly moved for a dismissal of the cause with prejudice on the ground that no appeal was taken to the district court within 30 days following the decision of the engineer. The motion was sustained and an order was entered dismissing the cause with prejudice, from which the protestants appeal.

The pertinent statutes read:

"75-11-10. Appeal to district court. —The decision of the state engineer shall be final in all cases unless appeal be taken to the district court within thirty (30) days after his decision as provided by section 151-173 of the 1929 New Mexico Statutes Annotated (75-6-1)."

"75-6-1. Appeal to district court—Notice—Proof of service—Procedure. —Any applicant or other party dissatisfied with any decision, act or refusal to act of the state engineer may take an appeal to the district court of the county wherein such work, or point of desired appropriation, is situated; Provided, notice of such appeal shall be served by appellant upon the state engineer and all parties interested, within thirty (30) days after notice of such decision, act or refusal to act, and unless such appeal is taken within said time, the action of the state engineer shall be final and conclusive. Notice of such appeal may be served in the same manner as summons in actions brought before the district courts of the state, or by publication in some newspaper printed in the county or water district wherein the work or point of desired appropriation in question is situated, once a week for four (4) consecutive weeks, the last publication to be at least twenty (20) days prior to the date when such appeal may be heard. Proof of service of such notice of appeal shall be as in suits brought in district courts, same to be filed in the district court to which appeal shall be taken within 30 days after service shall be complete. At the time of filing such proof, and upon payment by the appellant of the sum of seven dollars and fifty cents ($7.50), the clerk of the district court shall docket said appeal. Costs shall be taxed as in cases brought in district courts, and bond for costs may be required upon proper application. The proceeding upon appeal shall be de novo, except evidence taken in hearing before state engineer may be considered as original evidence, subject to legal objection the same as if said evidence was originally offered in such district court, and the court shall allow all amendments which may be necessary in furtherance of justice, and may submit any question of fact

arising therein to a jury, or to one (1) or more referees at its discretion."

Appellee and the engineer take the position that taking an appeal from a decision of the state engineer requires the filing of a formal application therefor and the allowance of the same by the district court. As we construe the statute, no such application to the district court is required. The district court does not grant the appeal, nor does the state engineer. An appeal is taken simply by serving the state engineer and the interested parties with the notice of appeal within 30 days after notice of his decision, filing the notice with proof of service in the district court within 30 days after such service is completed, and the payment of the required docket fee. The engineer's decision was made August 5, 1955, and the notice of appeal was served on appellee, Sam Johnson, on August 23, 1955. The state engineer was served with notice of appeal on August 29, 1955, which notice was retained in his office as a permanent record. Thereafter, on September 28, 1955, the notice with proof of service, was filed in the office of the Clerk of the District Court of Roosevelt County, the court to which the appeal was taken. The statutory fee was then paid and the case was docketed. Appellants thus complied with all statutory requirements in taking the appeal. Compare Commissioner of Public Lands v. Van Bruggen, 51 N.M. 108, 179 P.2d 528.

It must be borne in mind that the appeal provided is a creature of the statute and the word "appeal" does not mean that judicial power has been conferred on the state engineer or that the appeal is from one judicial tribunal to another. Quite the contrary; as thus used, it merely denotes the review by a judicial tribunal of the acts of an administrative officer, the state engineer.

In the dismissal order, the trial court held that the state engineer was not a proper party to the action and he cross-appeals.

We think there was error in this regard. The engineer has general supervision of public waters, the measurement, appropriation, and use thereof, § 75-2-1, 1953 Comp., and any decision entered by the district court is binding upon him, § 75-6-3, 1953 Comp. Consequently, on appeal from his decision, the engineer becomes a proper, if not an indispensable, party. We find the general rule announced at 73 C.J.S., Public Administrative Bodies and Procedures, § 178, as follows:

"In the absence of a statutory provision as to parties, the question with respect to who may or must be joined as parties to a proceeding to review the decisions and orders of an administrative agency is governed by the rules as to parties in civil actions generally. Accordingly, only necessary or proper parties may be joined, and the agency which made the order in question is usually considered a necessary, or at

least a proper, party, particularly where there is a public interest to be protected as distinguished from that of the parties directly affected by the order of the agency. * * *"

Also see Ferguson-Steere Motor Co. v. State Corporation Commission of New Mexico, 59 N.M. 220, 282 P.2d 705; State ex rel. Bliss v. Dority, 55 N.M. 12, 225 P.2d 1007; Bullock v. Tracy, 4 Utah 2d 370, 294 P.2d 707.

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

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

301 P.2d 532

Ernest T. CHAVEZ and Frances Chavez, his wife, Plaintiffs-Appellees,

v.

J. M. RYAN and Ardys K. Ryan, his wife, Defendants-Appellants.

No. 6103.

Supreme Court of New Mexico.

Sept. 12, 1956.

Owen J. Mowrey, Albuquerque, for appellants.

Harold O. Waggoner, Albuquerque, for appellees.

McGHEE, Justice.

The plaintiffs (appellees) recovered judgment below against the defendants Ryan (appellants) for $1,000 damages arising out of the sale of restaurant fixtures to the plaintiffs on conditional contract and the further agreement to give plaintiffs a sublease on the building in which the fixtures were located, the sublease to be approved by the owner and to run for a term of one year.

The sublease was executed by all of the parties, but was retained by defendant Ryan, who represented he would secure the written approval of the owner of the premises to the sublease and deliver a copy to the plaintiffs. He did not do so, and the sublease the parties executed was never delivered to the plaintiffs.

The contract was executed February 15, 1953, and the plaintiffs operated the cafe until May 22, 1953, when, pursuant to demand by the owner following the institution of a condemnation suit by the County Commissioners of Bernalillo County to secure the site for highway purposes, the plaintiffs closed the business, leaving the fixtures in the building as they were required to do

by the terms of the conditional sale contract.

The plaintiffs paid $500 down on the purchase price and made three monthly payments of $50 each. They sued to recover such amounts and the sum of $3,000 damages for the loss of their bargain and business.

The findings of the trial court were that the defendants breached their contract by failing to secure the approval of the sublease by the owner and that under the terms of the sales contract the plaintiffs could not move the restaurant fixtures from the building and their profitable business was thus destroyed.

The defendants assign error because of the refusal of the trial court to make certain of their requested findings of fact and conclusions of law, and also because of the findings of fact favorable to the plaintiffs which it did make.

The defendants argue here that the plaintiffs should have recouped their losses from the county in the condemnation case, but the plaintiffs did not have a valid sublease on the property and so had no estate subject to condemnation. It is also argued by the defendants that monthly rents were paid by plaintiffs to the owner of the building and that such acts constituted ratification by the owner of the sublease. However, when we examine the checks representing such payments we find they were payable to defendant, J. M. Ryan, and there is no evidence the owner had anything to do with defendant's acceptance of the checks. This contention is, of course, wholly without merit.

The further contention is made that the plaintiffs did better in private employment after they lost the cafe than they did when they operated it and that the defendants really did the plaintiffs a favor.

It is true the damages were minimized, but we must remember the down payment of $500 paid by plaintiffs, plus the three monthly installments, and the fact they lost a profitable business, as found by the court, but only recovered judgment for a total of $1,000, which we believe was not excessive.

The findings fully support the judgment and we see no reason why they should not stand as made.

We are not impressed by the arguments of the defendants and the judgment will be affirmed. It is so ordered.

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

301 P.2d 723

Sherman S. SMITH, Plaintiff-Appellee,

v.

SPENCE & SON DRILLING COMPANY, Employer,

Travelers Insurance Company, Carrier, Defendants-Appellants.

No. 6097.

Supreme Court of New Mexico.

Sept. 19, 1956.

G. T. Hanners, Lovington, for appellants.

Lon P. Watkins, Carlsbad, Jack Underwood, Lovington, for appellee.

SADLER, Justice.

The defendants below being the employer and insurer in the trial of a claim for Workmen's Compensation prosecuted before the district court of Eddy County, complain before this court, as appellants, of a judgment rendered against them upon the verdicts of a jury returned into court at the conclusion of the trial.

The injury on account of which the claim is prosecuted took place on April 3, 1954. The plaintiff was 37 years of age at time of the accidental injury of which he complains. He was married and the father of two children. He had substituted for another man on two occasions and about a week before his accidental injury he was given steady employment by Spence & Son Drilling Co., hereinafter referred to as "employer" or "main defendant". He drove a truck and served as a driller's helper.

On the day in question, the plaintiff injured his back while in the act of assisting another workman in lifting a heavy steel pan used as a reservoir in which water is run in circulating mud out of a hole. Asked how much the pan weighed, the plaintiff testified:

"* * * Q. About how much does that pan weigh? A. Well, the two of us couldn't pick it up off the ground, if you just reach down and get it. And he had a cable on the small end of it, letting it down on me, and I was walking back with it. And I bent over to set it on the ground, and my back started hurting.

"Q. Well, now, did you set it on the ground? A. No. I didn't get to do that. I dropped it. It was about 12 inches from the ground, and the pain hit me, and I had to drop it.

"Q. Can you describe to the Jury just what kind of pain it was, and where it was? A. Well, it was from my belt line down, and it burnt like fire when it happened. And the next morning I couldn't get out of bed.

"Q. Now, over what section of your body did it burn? A. Well, all from my belt on down to below part of my back bone."

Following his injury the plaintiff remained on the job and worked the remainder of the afternoon, then drove his truck some 50 miles into Lovington. In the weeks and even months after his injury the

plaintiff received treatment or examinations from several physicians, the first of whom was an osteopath and the remainder regular M. D. physicians engaged in the general practice. He was under the care of Dr. Charles Hargreaves of Lovington perhaps a longer time than any other. He happened to be plaintiff's own physician and a general practitioner at Lovington.

He was also examined, although not treated, by two orthopedic physicians and surgeons over the period following injury and prior to suit, namely, Dr. W. Compere Basom of El Paso, Texas, who holds periodic clinics in Hobbs, New Mexico and, also, by Dr. John S. Moore of Roswell, New Mexico. Dr. Basom examined the plaintiff on two occasions and Dr. Moore as many as three times. All took x-ray pictures of plaintiff's back.

The jury would have been warranted in finding from the evidence that the plaintiff as a direct and proximate result of the accident mentioned suffered from herniated disc. A herniated disc is described by one of the physicians as a rupture of the padding between the vertebrae. It was this same witness who gave it as his opinion that he suffered from a herniated disc. He also found some numbness in his right thigh. All told, plaintiff had been treated some 36 times by this same physician. It was he who as one of the physicians testified:

> "It (a herniated disc) is the padding squeezed out, so that it puts pressure against some of the spinal nerves, causing pain."

Dr. Basom, a witness for defendants, stated it was quite possible the plaintiff had a herniated disc but that he could not be sure without the Myelogram test, which plaintiff declined to undergo, it being in evidence there was some danger, though not great, incident thereto. This same witness, also, observed a narrowed intervertebral joint between the 2nd and 3rd lumbar vertebrae. This, he described as the degenerative process of the spine and he thought it had been there all the time. The testimony of Dr. Moore, a defense witness, was along the same line.

The plaintiff, himself, testified he had been unable following his injury to do heavy labor. He had endeavored to hold light jobs, but was compelled to abandon even them. He had worked for a time on a used car lot wiping dust off cars. He also took another job of ferrying cars from one point to another but was unable to sit up and drive cars the distance necessary to hold the job and was discharged by reason thereof. He had dropped from 156 pounds to 120 pounds in weight between the date of accident and time of trial.

In addition to testifying he was no longer able to do heavy manual labor, the plaintiff stated that following accident he had

been unable to lace his shoes or to move about in bed, or to bend over. If he turned over on his stomach while in bed, he found himself unable to turn again onto his back without the aid of his wife. He was confirmed in much of this testimony by his wife, and his landlady, who owned an apartment occupied by plaintiff and his wife and children.

Each of the three physicians who appeared in the case, expressed opinions as experts on plaintiff's condition. Dr. Basom thought he had suffered 30 per cent bodily disability. Dr. Moore gave it as his opinion he had suffered 40 per cent bodily disability. Whereas, Dr. Hargreaves, who had actually treated the plaintiff over a period of several months, expressed the view in a report he had signed as of July 3, 1955, that 33⅓ per cent would be a fair estimate of plaintiff's then bodily disability. Explaining this statement on cross-examination, he stated:

> "* * * A. I meant, as far as being able to do light work, and all, he still is capable, I think, of being up and around and doing a lot of odds and ends, and earning a small salary, of course; but as far as going out and hiring out for a job, he is likely to be 100 per cent disabled, because he can't do the work."

Notwithstanding Dr. Basom's rating of 30 per cent bodily disability and he had seen him only twice, he had this to say in the course of his examination:

> "Q. Assume, sir, a man 37 years old, who went through the eighth grade in school and no further, and who has worked throughout his life, after he got out of school, driving log trucks, working in a saw mill, working at a filling station changing tires, and lastly, working as a driller's helper—which necessitates hard manual labor; who has suffered an injury such as a herniated disk or a lumbosacral sprain: is he able to do 70 per cent of the work he was able to do before he suffered such an injury? A. On the patient who had a very definite herniated disk, and without treatment and without improvement, then I would say that he would be 100 per cent disabled for heavy work. Nearly all the cases, I've seen, however, can do quite a bit of work; and the disability is rated primarily on pain, and that makes the actual rating very difficult.
>
> "Q. Then you just actually can't arrive at a correct rating; is that true? A. On the basis of what I have on Mr. Smith—the medical evidence—it wouldn't go any higher than 30 per cent, at all.
>
> "Q. Now, do you believe, Doctor, from your treatment and examination of Mr. Smith, that he is able to do

hard manual labor? A. I don't think he can do heavy manual labor, with that kind of spine, at all."

It should be mentioned that the plaintiff had a very limited education, having attended school only through the eighth grade. Prior to the date of his injury, the only work in which he had engaged and in which he was capable of rendering qualified service was heavy manual labor. After finishing the eighth grade in school, he worked for a railroad company in Missouri for about three years, carrying cross-ties and loading them on railroad cars. He then moved to Arkansas and, for a time, drove a log truck and worked in a saw mill. This type of job was followed by about ten (10) years spent in a service station as a grease monkey and tire boy.

So much for the facts. At conclusion of the trial, the cause was submitted to the jury on the general issue and on special interrogatories. The general verdict was for the plaintiff. The jury then considered the special interrogatories, to which it supplied answers as indicated below; to-wit:

"1. Do you find by a preponderance of the evidence that claimant sustained disability resulting from accidental injury while employed by Spence and Son Drilling Co.?

Answer Yes or No: Yes

"2. If you have answered the above question in the affirmative, what percentage of disability, if any, was claimant suffering from this accident on May 15, 1955?

Answer: 100%

"3. If you have answered Question No. 1 above in the affirmative, then do you find claimant is presently disabled as the result of injury sustained by accident while employed by Spence and Son Drilling Co.?

Answer Yes or No: Yes

"4. If you have answered Question No. 3 "Yes," then state the percentage of disability claimant is now suffering.

Answer: 100%"

Judgment was entered in conformity with the general and special verdicts for compensation due plaintiff and unpaid as for total permanent disability to December 3, 1955 and at rate of $30 per week commencing December 4, 1955, and continuing during the period of plaintiff's total and permanent disability but "not to exceed the period of 550 weeks from April 3, 1954, (date of injury), subject to all of the terms and provisions under the Workmen's Compensation Act of the State of New Mexico." An award to plaintiff of attorneys' fees in the sum of $1,500 was also allowed by the court. The defendants prosecute

this appeal from the judgment so rendered against them.

The first and most vigorously argued point presented for our consideration rests on the claim that there is no substantial evidence in the record to support an award in excess of that being paid at time of trial, namely, $12 per week, based upon a partial permanent disability of forty per cent. In as much as the second point is so closely related to defendants' Point No. 1, the two will be considered and ruled upon together. The second point is as follows:

> "100 per cent disability award cannot be sustained where claimant is able to do light work and his doctor testifies to 33⅓ per cent disability."

The facts have been summarized sufficiently to enable us to say they afford substantial evidence in support of the verdicts returned by the jury. Chief reliance is placed by counsel for defendants on our somewhat recent case of Waller v. Shell Oil Company, 60 N.M. 484, 292 P.2d 782, 785. In that case, as here, the claim made was for compensation for total permanent disability on account of a back injury. The jury made an award of 20 per cent partial permanent disability and we reduced it to 10 per cent, the amount agreed by all the medical witnesses, including plaintiff's own physician placed on the stand by him, as extent of his disability. All the medical testimony was based solely on subjective symptons.

Other differences in the two cases arise on the fact that in the Waller case there was no disc injury, no numbness in one of the legs, and the testimony showed claimant was able to perform heavy manual labor, though with some discomfort at times. Here, even the medical witnesses for defense, made no claim the plaintiff was able to perform heavy manual labor, his injured spine being in the condition it appeared to be at the time of examination and treatment. Furthermore, the plaintiff's symptoms in the case at bar were not entirely subjective as in the Waller case.

We think the following language from our opinion in the case of Waller v. Shell Oil Company, supra, will suffice to show such differences in the facts of the two cases as to deny the Waller case character as authority against the judgment rendered in the case at bar. We said:

> "We are not unmindful of our earlier cases holding that medical testimony, as other expert testimony, is intended to aid, but not to conclude a court or jury. See Elsea v. Broome Furniture Co., 47 N.M. 356, 143 P.2d 572; Lemon v. Morrison-Knudsen Co., 58 N.M. 830, 277 P.2d 542; Gilbert v. E. B. Law & Son, Inc., 60 N.M. 101, 287 P.2d 992, and Seay v. Lea County Sand & Gravel Co., 60 N.M. [399], 292 P.2d 93, only recently decided. We have no intention of overruling these cases on this subject. Nor do we think

our holding in this case in any way modifies or impairs the decisions mentioned.

"What we here hold is that where a plaintiff's entire case rests upon proof of subjective symptoms and the testimony, not alone of medical experts produced by defendant, but of a physician presented and vouched for by the plaintiff, himself, flatly contradicts the finding of the jury as to the extent of disability, partial in character, it so weakens the testimony relied upon as to deny it substantial character. The persistent effort of plaintiff's counsel to draw from the experts, even his own, the slightest evidence of damage to a disc in the spine ended in complete failure. The same result followed the effort to have confirmation from plaintiff's expert, Dr. McIntire, of the presence of a 'dead spot,' or numbness, in plaintiff's heel.

"Indeed, throughout the testimony failed to show anything beyond soreness from muscular strain, following an unwitnessed accidental injury. * * *"

It should be borne in mind that defendant, neither by pleading nor proof, made any serious contention that the plaintiff did not suffer 40 per cent partial permanent disability. True enough, they expressed the opinion in their pleadings that any disability of a seemingly permanent nature would continue to diminish with treatment and the passage of time. If it does, of course, the defendants have it within their power by requests for periodic examinations to have the fact ascertained and a corresponding reduction in the amount of compensation payments ordered.

The real basis of the argument for defendants, however, flows from a belief on the part of their counsel that, if an injured workman is able to do "any kind of work," however trivial and unremunerating, not necessarily of the type he had formerly followed and for which alone he is qualified by training, experience, and educational background, he may, nevertheless, not establish a claim for disability of a permanent character, partial or total, as a basis for compensation. We do not think the cases will support them in this contention.

The opposing views on the question were pinpointed at the trial by the court's action in striking from two instructions given, Nos. 5 and 12, immediately preceding the word "work" in each, the words "any kind of." The two instructions as they were given to the jury in the corrected or amended form, read as follows:

"5. It is provided by our Workmen's Compensation Law [1953 Comp. § 59–10–1 et seq.] that for disability partial in character but permanent in quality, the compensation shall be

measured by the extent of such disability. Partial disability, as those words are used in our Compensation Law and as applied to this case, means that the claimant, solely as the result of such accident, has been, is now and will permanently continue to be partially unable to perform ~~any kind of~~ (initialed CRA) work for which he is fitted by age, education, training, general physical and mental capacity, and previous work experience, as distinguished from total and permanent disability as herein~~above~~ explained to you.

* * * * * *

"12. If you do not find that the claimant is totally and permanently disabled, as those words have hereinabove been explained to you, you should then consider and determine whether the claimant, solely as a result of such accident, is partially but permanently disabled, to some percentage extent, from performing ~~any kind of~~ work for which he is fitted by age, education, training, general physical and mental capacity and mental capacity and previous work experience; and if you find from a preponderance of the evidence that the claimant is partially and permanently disabled to some extent, you should then determine the percentage extent of such partial permanent disability. In determining whether the claimant is now and will continue to be partially and permanently disabled to some percentage extent, you should take into consideration the same factors of age, education, training, general physical and mental capacity and previous work experience as hereinabove set forth."

It will be noted that the exact point to defendants' objection to instructions Nos. 5 and 12 is upon the deletion therefrom of the words "any kind of" (work). In urging this objection their counsel place great reliance upon the case of Helms v. New Mexico Ore Processing Co., 50 N.M. 243, 175 P.2d 395, 399, and the claimed approval of that opinion in the later case of Gerrard v. Harvey & Newman Drilling Co., 59 N.M. 262, 282 P.2d 1105. The particular language invoked in the Helms case is to be found in the opinion of which Mr. Justice Hudspeth is the author, reading as follows:

> "This and other provisions of the statute clearly indicate that the proper test is not whether the injured workman is able to do the same kind of work as he did before the injury, but whether he is able to do any kind of work."

A reference to the report of the Helms case will disclose that the opinion of Mr. Justice Hudspeth, appearing first in the report of the case, was signed by Mr. Justice Bickley, alone. The opinion of Mr. Justice Brice, specially concurring in the

result announced by Mr. Justice Hudspeth, and concurred in by the writer, as then Chief Justice and Mr. Justice Lujan, had this to say regarding the above quoted portion of the opinion in the Helms case, to-wit:

> "I do not pass upon the question; but I do not subscribe to the doctrine stated by Mr. Justice Hudspeth, 'This and other provisions of the statute clearly indicate that the proper test is not whether the injured workman is able to do the same kind of work as he did before the injury, but whether he is able to do *any kind of work.*'
>
> "That this statement is too broad is quite evident. I know of no case going so far. The workman would have to be paralyzed before it could be said that he was totally disabled. See Cleland v. Verona Radio, 130 N.J.L. 588, 33 A.2d 712."

It is the language just quoted from the specially concurring opinion of Mr. Justice Brice which, alone, has the support of a majority of the court and represents the law on the disputed issue, in so far as any law is to be deduced from the decision in that case. As a matter of fact, the majority of the Court expressly declined to construe the words "permanent and total disability," as used in Workmen's Compensation Act, beyond indicating an unwillingness to accept the construction of such words proposed by Justices Hudspeth and Bickley and quoted, supra. The majority view was expressed by Mr. Justice Brice, as follows:

> "In my opinion it is not necessary to construe the words 'permanent, total disability' as used in the Workmen's Compensation Act. This question has been posed in at least three cases (Lipe v. Bradbury, 49 N.M. 4, 154 P. 2d 1000; New Mexico State Highway Dept. v. Bible, 38 N.M. 372, 34 P.2d 295; Bubany v. New York Life Ins. Co., 39 N.M. 560, 51 P.2d 864) and not decided because unnecessary to a decision in any of them. While the question was raised in this case, it is unnecessary to a decision and I see no reason for deciding it at this time."

The defendants find themselves as barren of decisive authority on the question at issue in pointing to the case of Gerrard v. Harvey & Newman Drilling Co., supra, and quoting therefrom, as they do in the Helms case. Actually, since two of the justices in the Gerrard case dissented and two specially concurred, the opinion of Mr. Justice Kiker becomes a majority opinion upon the single point upon which he and the specially concurring justices agree, namely, the award of a new trial for error in giving Instruction No. 5, as mentioned in the specially concurring opinion. Thus it is that neither the Helms case nor the Gerrard case can be a source

of comfort to the position of defendants in the case at bar.

Frankly, we find ourselves no more called upon here than did the majority in the case of Helms v. New Mexico Ore Processing Co., supra, to attempt by construction a precise definition of the words "'permanent, total disability'" as used in our Workmen's Compensation Act. It is enough to say here, as the Court said in the Helms case that confining the meaning of the questioned words to the ability "to do any kind of work" gives them too broad an application. Compare Lipe v. Bradbury, 49 N.M. 4, 154 P.2d 1000. It is enough to say here, as we did in last cited case, that the evidence is sufficient to support a verdict of total, permanent disability.

Finally, the defendants say the court erred in giving its Instruction No. 14A, reading:

> "In this connection you are instructed that the medical witnesses are not received as experts on economic consequences of an injury, and in this field you will not let the physicians substitute their judgment for yours. ~~as to the economic effects of a given injury on plaintiff's ability to earn a living.~~ CRA."

Here, again, counsel rely solely on what should be described as the minority views of two Justices of this Court in the case of Helms v. New Mexico Ore Processing Co., supra, as support for the claim of error made.

It perhaps would have been better if the trial court had omitted this instruction altogether, thus declining to touch upon the field of economics. We find in the record, however, no evidence of any of the medical witnesses attempting to give expert testimony on the economic consequences of plaintiff's injury, being careful to confine their testimony as experts to the percentage of bodily disability he had suffered. Two of such witnesses expressly disclaimed any intention to speak on the subject of the economic consequences of the plaintiff's injury.

Thus, it seems a more pertinent objection would have been that the questioned instruction injected a false issue, there being no testimony wherein a physician had attempted, as an expert, to speak on the subject of economic consequences of the injury. Whatever view be taken of the matter, we can see no harm to defendants.

The plaintiff will be allowed the sum of $500 as attorneys fees for services of his attorneys in this Court. It is to be remembered that the defendants acknowledged liability for a forty per cent partial permanent disability in this case.

Finding no error, the judgment will be affirmed.

It is so ordered.

COMPTON, C. J., and LUJAN and KIKER, JJ., concur.

McGHEE, Justice (dissenting).

The award of 100% disability is too high. I dissent.

301 P.2d 1091

George LARKIN, Plaintiff-Appellant,

v.

The FOLSOM TOWN AND INVESTMENT COMPANY et al., Defendants-Appellees.

No. 6069.

Supreme Court of New Mexico.
Sept. 27, 1956.

Robert A. Morrow, Raton, Howard B. McClellan, Clayton, for appellant.

Krehbiel & Alsup, Clayton, for appellees.

SADLER, Justice.

The appellant, who was the plaintiff below, complains before this Court of a decree rendered by the district court of Union County, New Mexico, dismissing with prejudice his complaint to quiet title to certain town lots described therein, located in the village of Folsom. While

numerous parties were joined as defendants in the original complaint, as the issues finally developed, the controversy eventuated into one between the plaintiff and a single defendant, namely, Magdalena V. Uharriett, a daughter of the defendants, T. M. Vigil and Mary D. Vigil, the latter having failed to appear in the case.

The suit involves the ownership of three town lots in the village of Folsom, Union County, New Mexico. They are Lots 16, 17 and 18 in Block 27 in the village of Folsom in said county. They were owned originally by T. M. Vigil and Mary D. Vigil his wife who had been residents of Folsom, New Mexico. While so residing they became indebted to George Larkin, also a resident of Folsom, in the sum of $277.09, for groceries purchased at his store. In the meantime, they removed to Denver in the state of Colorado.

Following their change of residence, George Larkin brought suit against the Vigils on the open account mentioned, the complaint being docketed as civil cause No. 11,121 in the district court of Union County. The plaintiff caused an attachment to be issued out of said suit and levied on the lots mentioned as the property of the Vigils, to abide whatever judgment should be entered therein. Attempted service on the Vigils outside New Mexico of notice of the attachment suit, begun as aforesaid, was made and the Vigils having defaulted therein, judgment was rendered against them. In due course, a sale of the lots as the property of the Vigils was had to satisfy the judgment rendered therein. The plaintiff Larkin's bid for the lots for the amount of his judgment, interest and costs was accepted and the property knocked off to him as the purchaser. Special Master's deed was issued to him in due course and the sale confirmed by the court.

In the meantime and while these attachment proceedings were pending, the Vigils conveyed by warranty deed the lots in question to their daughter, the said Magdalena V. Uharriett, one of the defendants in the quieting title suit. It was following the acquisition by Larkin of whatever title he received under the Special Master's deed that he began this suit to quiet title to the lots, joining as defendants numerous parties, including the Vigils and their daughter, Magdalena V. Uharriett. The defendants Vigil defaulted again as they had in the attachment suit. Their daughter, however, Magdalena V. Uharriett, having taken title to the lots mentioned through a warranty deed as above set forth, answered in the case and defended actively.

At the trial, when the plaintiff sought to introduce in evidence the Special Master's deed conveying the lots to him as purchaser at the judicial sale, the defendant, Uharriett, objected to its admission upon the following grounds, set forth in a

stipulation upon which the case was tried, to wit:

"(a) It affirmatively appears from the proceedings which have been placed in evidence by plaintiff from Union County District Court action No. 11,121 that no valid attachment was ever levied upon the property then owned by Mary D. Vigil and T. M. Vigil, nor was personal service in New Mexico had upon said Vigils or either of them; that the court did not acquire jurisdiction in said action to render a valid judgment.

"(b) It affirmatively appears no order by the court was ever entered authorizing and directing the issuance and service upon said Vigils, or either of them, of a notice of suit stating the nature and amount of plaintiff's demand and further notifying said Vigils their property had been attached and that unless they appeared at the return day named in such notice of suit judgment would be rendered against them and their property sold to satisfy such judgment.

"(c) No notice of suit was ever issued or served in any manner upon said Vigil defendants or either of them.

"(d) The required notice of suit not having been issued and served in said attachment suit No. 11,121, the court did not acquire jurisdiction therein to render a valid judgment of any character.

"(e) The purported judgment against the Vigil defendants and the land in question having been void, the sale attempted thereunder likewise was void and the deed issued pursuant thereto was absolutely void and hence is not admissible in evidence in the present case as proof of title in plaintiff, nor is it admissible for any other purpose."

As already indicated, the cause was tried upon a stipulation of the parties, the closing paragraphs 5 and 6 whereof read as follows:

"5. It is further Stipulated and Agreed that unless the special master's deed to which defendant Magdalena V. Uharriett has objected is valid and admissible in evidence, plaintiff cannot recover herein and that defendant Magdalena V. Uharriett is entitled to an order dismissing plaintiff's action with prejudice. On the contrary, it is Stipulated and Agreed that if the special master's deed which has thus been offered in evidence and whose admissibility has been objected to for the above stated reasons is a valid conveyance of such title as the Vigil defendants had, then and in such event plaintiff is entitled to an

order quieting his title against Magdalena V. Uharriett, as well as other parties to this quiet title proceeding not represented herein. In other words, for the purpose of this stipulation it is agreed that Mary D. Vigil and T. M. Vigil were the owners and seized of the record fee title to the property in question at the time plaintiff George Larkin initiated said action No. 11,121, although it is not stipulated that they were the owners of said property at the time the special master's deed was executed; on the contrary it is stipulated that at a time during the course of said attachment proceedings, namely, on July 17, 1953, all of the right, title and interest of the Vigils was conveyed to Magdalena V. Uharriett, unless prevented by a valid attachment.

"6. It is further Stipulated and Agreed the following instruments, and no others, were served upon the Vigil defendants in the State of Colorado in said cause No. 11,121, to-wit: complaint, affidavit in attachment, writ of attachment.

"Howard B. McClellan, Clayton, New Mexico, Attorney for Plaintiff.

"Krehbiel & Alsup, By Adolf J. Krehbiel, Clayton, New Mexico, Attorneys for Defendant Magdalena V. Uharriett."

Pursuant to the stipulation, the parties attached thereto true, full and correct copies of every pleading, process, writ, return of service, order, note, or other proceeding of any character whatsoever had or action taken in said cause No. 11,-121, the attachment suit on the civil docket of the district court of Union County, New Mexico. It perhaps should be added at this point that the stipulation mentioned was the outgrowth of a pretrial conference as recited in paragraph one (1) thereof, reading:

> "This matter came on for hearing before the Court on March 7, 1955. After preliminary steps and pre-trial conference, the parties agreed to submit this action to the court upon stipulated facts. This stipulation is the result of such agreement."

Acting pursuant to the terms of the stipulation, the trial judge duly considered same and found the facts and deduced certain conclusions of law from the facts so found. He identified the suit as one to quiet title to the lots above mentioned and stated the plaintiff's claim of title was based upon the Special Master's deed dated September 18, 1953, executed by virtue of the proceedings in the attachment suit recited in the stipulation. And, as further recited in the stipulation, he called attention to the objection by defendant, Magdalena V. Uharriett, to the admission of the deed in evidence.

The judge then found that both at the time attachment proceeding was begun and throughout its progress the defendants, Mary D. Vigil and T. M. Vigil, her husband, were non-residents of New Mexico and residents of the State of Colorado. He went on to say there was no personal service on either of them within New Mexico in the attachment suit.

Furthermore, he pointed out that no order of the court was ever entered therein, authorizing or directing the issuance and service upon the Vigils, or either of them, of a notice of suit, stating the nature and amount of plaintiff's demand and further notifying them their property had been attached and that, unless they appeared at the return day named in the notice of suit, judgment would be rendered against them and their property sold to satisfy the same. Only the complaint, affidavit in attachment and writ of attachment were served upon the Vigils in Colorado, or elsewhere, as the trial judge's findings went on to recite.

Turning next to the basis of the title of defendant, Uharriett, the findings recited the conveyance of the lots in question to her by the Vigils by warranty deed dated July 17, 1953, pendente lite. This was prior to execution of the Special Master's deed above mentioned, a fact mentioned in the findings.

Having found the facts as aforesaid and in strict conformity with the stipulation of the parties, the trial judge drew therefrom conclusions of law, as follows:

"I. The Court has jurisdiction of each of the parties hereto and of the real estate which is the subject matter hereof. The Court likewise has the power to determine the issues herein involved.

"II. Plaintiff's right to introduce the Special Master's Deed into evidence is dependent upon the regularity of the preliminary proceedings in said cause No. 11,121 leading up to the execution of the Special Master's Deed. That Sec. 26-1-18 N.M.S.A. 1953 Comp. was not complied with either by publication or by substituted personal service outside of the State.

"III. The judgment rendered in said cause No. 11,121 is void.

"IV. The Special Master's Deed executed pursuant to said void judgment in cause No. 11,121 is void.

"V. The void Special Master's Deed which was offered in evidence by plaintiff cannot lawfully be received in evidence herein.

"VI. The defendant Magdalena V. Uharriett is entitled to have the plaintiff's action herein dismissed with prejudice, in accordance with the stipulation entered into by the parties hereto, and to recover her costs herein.

"Fred J. Federici, District Judge."

There is so much wrong with the whole attachment proceeding from its beginning until the end, under the pertinent sections of Chapter 26, 1953 Comp., that it would be purely an act of supererogation to do more than cite a few cases to demonstrate the fatal irregularity in essential steps disclosed by this record. The notice of suit was bad, attempted service was bad, the levy itself was defective, the officer's return was imperfect, the bond carried no penalty, among other things. But why say more? While not every defect is necessarily fatal, enough of them are to render the attachment proceeding bad even in a collateral attack. See, Smith v. Montoya, 3 N.M.,Gild., 13, 21, 3 N.M., John., 39, 1 P. 175, and Mares v. Schuth, 38 N.M. 101, 28 P.2d 527, 92 A.L.R. 567. Compare, Dye v. Crary, 12 N.M. 460, 78 P. 533.

In fairness, it should be stated that attorney Robert A. Morrow of Raton, New Mexico, was not an attorney of record in the case until after all the proceedings antedating final judgment entered in the present cause, including the attachment proceedings and Special Master's deed out of which title in plaintiff-appellant arose, had transpired. His first appearance in the case was as co-counsel on a motion to vacate and set aside the final judgment herein which the trial court properly denied.

The trial judge's conclusions of law were proper under the facts found and both findings and conclusions operated to support as well as demand the judgment entered. It should be affirmed.

It is so ordered.

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

301 P.2d 1094

Matter of the Last WILL and Testament of Nathan B. STERN, Sometimes Known as N. B. Stern, Deceased.

Adolfo MONTOYA, Claimant-Appellant,

v.

Anita FRIEDMAN, Morey Goodman and Carl H. Gilbert, Trustees of the Estate of Nathan B. Stern, Respondents-Appellees.

No. 6093.

Supreme Court of New Mexico.

Oct. 1, 1956.

Daniel Sosa, Jr., Las Cruces, for appellant.

Gilbert, White & Gilbert, Santa Fe, for appellees.

COMPTON, Chief Justice.

Appellant appeals from an order dismissing his claim against the estate of the decedent, Stern.

The claim, omitting the prayer, is as follows:

"Amended Claim

"Adolfo Montoya, formerly a resident of Santa Fe, New Mexico, and now a resident of Las Cruces, New Mexico does hereby present this his claim for services rendered, against the Estate of Nathan B. Stern, Deceased, and for granting of said claim would show the Court.

"1. That the undersigned Adolfo Montoya did, from the year 1924 through the year 1954, render personal services for the said Nathan B. Stern. That said services were rendered upon the express understanding between

Adolfo Montoya and the aforesaid Nathan B. Stern that Adolfo Montoya would receive a reasonable compensation therefor. That said services consisting in being a close personal companion of the aforesaid Nathan B. Stern and in chauffering the said Nathan B. Stern to New York, Florida, California, and Mexico. That said Adolfo Montoya in anticipation that he would be taken care of, did sell real estate for the said Nathan B. Stern, that he did perform every task that Mr. Nathan B. Stern asked of him, including sales as Mr. Stern's agent of real estate, the aforesaid Adolfo Montoya further states that he was never compensated for his services and that he devoted 30 years of his life to the performance of all kinds of tasks for the aforementioned Nathan B. Stern. That a reasonable sum for the services which were performed would be $2,500.00 a year for 30 years, making a sum total of $75,000.00. That he was to receive a reasonable compensation for his services and that $75,000.00 is reasonable for 30 years service.

"2. That the decedent Nathan B. Stern in the presence of several witnesses did state that he was going to pay Adolfo Montoya a reasonable sum for his services. That claimant represents and shows unto the executor, or administrator, or the trustees, and to the Court, that he did perform all tasks asked of him whenever he was called upon to perform any special service for Mr. Nathan B. Stern, deceased."

At a hearing on the merits, the claim was denied. The court found the evidence insufficient to sustain the alleged agreement; that the claim in part was barred by the statute of limitations; and that appellant previously had been fully compensated by the decedent for his services rendered during the period of limitation. From an order dismissing the claim, appellant brings the cause here for review of alleged error.

The single error assigned is the refusal of the court to permit appellant to add the phrase, "and provide for him in his will", at the end of the first sentence of paragraph 2 of the claim.

While amendments of pleadings should be permitted with liberality in the furtherance of justice, § 21-1-1(15), 1953 Comp., our Rule (15), the application was addressed to the sound discretion of the court and its action in denying the motion is subject to review only for clear abuse of discretion. Martinez v. Cook, 57 N.M. 263, 258 P.2d 375; Bounds v. Carner, 53 N.M.

234, 205 P.2d 216; Leggett v. Montgomery Ward & Co., 10 Cir., 178 F.2d 436. Appellant makes no showing whatever of such abuse.

Appellant had previously filed an original and an amended claim. The requested amendment was made at the commencement of the trial and there was no abuse of discretion in denying the motion at this stage of the proceeding. The case is thus distinguished from those cases where amendments are made in advance of the trial. Hudson v. Herschbach Drilling Co., 46 N.M. 330, 128 P.2d 1044; Puritan Mfg. Co. v. Toti & Gradi, 14 N.M. 425, 94 P. 1022.

Moreover, we fail to see the materiality of the proposed amendment. It would add nothing to the amended claim. Nowhere is it alleged that appellant performed services for the decedent pursuant to an agreement between them that decedent would provide for appellant in his will.

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

LUJAN, McGHEE, and KIKER, JJ., concur.

SADLER, J., not participating.

302 P.2d 177

Luz A. APODACA et al., Plaintiffs-Appellants,

v.

Eva L. HERNANDEZ, Defendant-Appellee.

No. 6061.

Supreme Court of New Mexico.
Sept. 17, 1956.
Rehearing Denied Oct. 3, 1956.

W. A. Sutherland, Las Cruces, for appellants.

J. Benson Newell, Las Cruces, for appellee.

LUJAN, Justice.

The appellants, Luz A. Apodaca and Marta Salaz, plaintiffs below, together with other mentioned party plaintiffs, who were dismissed by the court, brought this action to establish their interests in certain real estate located in Dona Ana County, New Mexico, and to quiet their title thereto. The answer of defendant-appellee, Eva L. Hernandez, denies the allegations of the complaint, except wherein it alleges that she claims an interest in the land; it then sets up title in herself through a quitclaim deed issued to her ex-husband Frank Apodaca, Jr., as being part of the community; also through a decree of the district court of Dona Ana County rendered on August 12, 1943, in a divorce proceeding adjudging her half of the community property; and by adverse possession; and prays that her title to said property be quieted. She also filed a counter-claim for rents collected from said property by the plaintiffs for a specified period. The case was tried to the court and at the conclusion of the trial it found the issues in favor of defendant-appellee and entered judgment accordingly, and plaintiffs appeal.

The facts necessary to be stated are these: Francisco Apodaca, Sr., and Concepcion Apodaca, his wife, were the original owners of the land involved in this litigation. Francisco Apodaca, Sr., died intestate in 1930 leaving him surviving five children, among them being appellants, and defendant Frank Apodaca, Jr., and there was no administration upon his estate. Appellee, Eva L. Hernandez and Frank Apodaca, Jr., were married on December 30, 1930, and shortly thereafter went to live in said premises and continued to do so until the year 1942 when the defendant left the state and went to live in California. During all of this time they paid no rent. The mother, Concepcion Apodaca, died intestate in 1940 leaving her surviving the aforementioned children, and there was no administration upon her estate. On August 12, 1943, the defendant procured a divorce from Frank Apodaca, Jr. While living in California, the defendant rented part of the premises to different individuals. Frank Apodaca, Jr., suffered the property

to be sold for delinquent taxes. Knowing that they could not purchase the tax title in their own names they advanced the sum of $170 to one Albino Apodaca so that he could buy the tax title in his, Albino's name. On September 14, 1938, B. F. Archer, Treasurer of Dona Ana County executed a tax deed for the 1934 delinquent taxes on said property to Albino Apodaca and on the next day, September 15, 1938, the said Albino Apodaca conveyed the property by quitclaim deed to Frank Apodaca, Jr.

Appellants contend that Frank Apodaca, Jr., and Eva L. Hernandez did not obtain title to the real estate herein involved in good faith and that the statute of limitation could not run against them under such circumstances and that the use of the premises by defendants Frank Apodaca, Jr., and Eva L. Hernandez was permissive and not hostile.

We believe that good faith is essential where a claim is made under color of title and the statute of limitation is relied on. Did Frank Apodaca, Jr., and Eva L. Hernandez, his former wife, act in good faith in procuring title to the premises as they did? Frank Apodaca, Jr., testified as to how he procured the quitclaim deed to this property, as follows:

"* * * Q. At any rate, Eva told you how to get this title? A. Yes, sir.

"Q. And she told you that Albino, that Jimmie Apodaca, the County Clerk—A. Suggested.

"Q. Told her what to do. Now what did you do after you received that information? A. Well, I got the money and gave it to Albino.

"Q. How was that? A. I got the money and gave it to Albino; and he paid the taxes; and he gave the deed in my name.

"Q. Then, he gave you a deed? A. Yes, sir.

"Q. Whose money was it that paid those taxes? A. My money.

* * * * * *

"Q. Just why did you do that in that way? A. To save my property.

"Q. Save your property? A. Yes, sir.

"Q. Now, at that time, was that known or not to you and Eva and Albino that that was how that thing was to be handled? A. Well, just—

"Q. You were to pay the taxes? A. Yes, sir.

* * * * * *

"Q. Did all three of you know of that transaction as you have explained it? A. Yes, sir.

* * * * * *

"Q. Mr. Apodaca, after you got this deed from Albino Apodaca, did you ever tell your sisters or any of the

heirs that you then considered that that property belonged to you? A. No, sir.

"Q. Did you ever tell them anything about the way that you had gotten this deed through Albino, through the tax title, and then Albino conveyed it to you; did you ever tell them how you did that in around about way, until this case started? A. Not until this case started.

* * * * * *

"Q. I don't know whether you have already testified that you gave Albino the money? A. Yes, sir.

"Q. That he paid the treasurer? A. Yes, sir.

"Q. Then he conveyed it to you? A. Yes, in my name."

Eva L. Hernandez, the defendant, testified on cross-examination as follows:

"Q. * * *. Now, Mrs. Hernandez, why did you go to Jimmie Apodaca to ask him about getting the deed to this property? A. Because Frank sent me there to talk with him, so he can explain to us how we can get the property.

"Q. How you could get the property? A. Yes.

"Q. And did Jimmie tell you that you could buy it direct by yourself? A. He told me that I couldn't buy it.

"Q. You couldn't? A. No.

"Q. Why did he say you couldn't buy it direct? A. Because I wasn't allowed to buy the property, because I was Frank's wife.

"Q. Did he say that Frank couldn't buy it too, and you must go around? A. He said Frank couldn't buy the place.

* * * * * *

"Q. Any how, what you did was to get Albino to buy it, and then convey it to Frank? A. Yes, sir.

"Q. And Albino didn't pay any money, you and Frank paid it? A. Yes.

* * * * * *

"Q. You knew that he had sisters and brothers? A. Yes.

"Q. You knew he got this property from his father and mother? A. Yes."

We are of opinion, and so hold, that the method employed by the defendant and her former husband in acquiring title to the property, under the above circumstances, was not such a claim under color of title made in good faith as to lay the foundation for an application of the statute of limitation.

In Dussart v. M. Abdo Mercantile Co., 57 Colo. 423, 140 P. 806, 808, the court in discussing the elements of good faith in color of title said:

> "But this claim under 'color of title,' must be made in good faith, and is not available where the title is accepted with knowledge of its invalidity."

The quitclaim deed relied upon as color of title is the creature solely of Frank Apodaca, Jr., and the defendant, Eva L. Hernandez, the same being secured with the knowledge of its invalidity. The policy of the law prohibits such a transaction, because they could not indirectly acquire that which the law would not allow them to acquire directly.

Adverse possession must be openly hostile. Divestiture of title by adverse possession rests upon the proof or presumption of notice to the true owner of the hostile character of possession. In the instant case the relationship of the parties has a bearing and may well be considered. The nature of the occupation may be sufficient to give notice of its adverse character to interested parties who are strangers and yet not sufficient as to persons standing in more intimate relationship. If these parties had been strangers no one would question that the evidence would be amply sufficient to sustain a finding that the possession was hostile. But they were co-heirs and cotenants. Smith v. Borradaile, 30 N.M. 62, 227 P. 602; Torrez v. Brady, 37 N.M. 105, 19 P.2d 183. Possession originating in tenancy is presumably permissive, not hostile. Permissive occupation of the family estate by one of the family is so usual that acts of occupation thereof to show hostile possession as to strangers, are not sufficient as between near relatives. Smith v. Borradaile, supra; Torrez v. Brady, supra. And where the original entry or occupation is permissive the statute of limitation will not begin to run until an adverse holding is declared and notice of such change is brought to the knowledge of the owner, and, for this purpose, mere possession is not enough. Smith v. Borradaile, supra; Torrez v. Brady, supra.

Under the laws of this state, although a given paper may constitute color of title, no prescription can be based thereon, unless the claimant entered thereon honestly and in good faith.

The judgment of a district court purporting to vest title to the land of a husband in his wife is generally color of title on which prescription can be based. But possession to be the foundation of a prescription under such judgment must not have originated in fraud.

We conclude, under the facts as testified to by Frank Apodaca, Jr., and Eva L.

Hernandez, his former wife, title to the land in question originated in gross fraud, which was not brought to the attention of the district court at the time it entered its decree declaring one half interest in the community to belong to said defendant.

It follows from what has been said that the judgment of the district court should be reversed and cause remanded with instructions to the district court to set aside its judgment, and proceed with the disposition of this case not inconsistent herewith.

It is so ordered.

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

On Motion for Rehearing

LUJAN, Justice.

It is asserted on motion for rehearing that this Court did not pass upon the defendant's claim this cause of action was barred under the four-year statute of limitation, Section 23-1-4 of 1953 Comp. The matter is ruled adversely to her. Nickson v. Garry, 51 N.M. 100, 179 P.2d 524. The motion for rehearing is denied.

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

302 P.2d 514

W. C. WHATLEY and Lafel E. Oman, Plaintiffs-Appellees,

v.

Thomas H. COLCOTT, George W. Benvie and Florence E. Benvie, Defendants-Appellants.

No. 6096.

Supreme Court of New Mexico.

Oct. 10, 1956.

Charles H. Fowler, Socorro, for appellants.

Whatley & Oman, Las Cruces, for appellees.

COMPTON, Chief Justice.

Appellants are seeking review of a judgment directing specific performance of a contract to convey real estate. The complaint alleges that appellees are lawyers and as such were employed by appellants to defend a quiet title action instituted against them in Dona Ana County and for their services were to be compensated on a cash basis; that the suit was successfully concluded in the district court and thereupon the cause was appealed to the Supreme Court for review; that appellants were then without funds to pay a cash fee and proposed and agreed with appellees to pay them for their services in the district court and on appeal the usual and customary percentage of the land involved, contingent upon recovery of a favorable judgment ultimately in the Supreme Court.

The material averments were denied. As affirmative defenses, appellants first denied having entered into any agreement, written or oral, to convey an interest in the premises as a fee. Second, they alleged that the agreement, is barred by the Statute of Frauds. Third, that appellees have an adequate remedy at law on the basis of quantum meruit.

It should be stated here that present counsel for appellants did not participate in the trial in the lower court.

The pertinent findings are:

"9. That upon the suing out of said appeal to the Supreme Court of the State of New Mexico by the said plaintiffs in cause No. 11,345 the defendants came to the offices of the plaintiffs herein at Las Cruces, New Mexico, and represented to the plaintiffs that they were without funds with which to pay plaintiffs a reasonable fee for their services and proposed to the plaintiffs, and agreed with the plaintiffs, to convey to them by way of a fee for services which had been rendered in the District Court, and which were to be rendered in the Supreme Court of the State of New Mexico in the defense of said suit, an interest in said lands contingent upon the successful defense of said suit equal to the usual and customary fee paid for services rendered on a contingent basis.

"10. That the usual and customary fee for legal services rendered on a contingent basis in a case of this nature is one-third or thirty-three and one-third per cent of the property involved upon the successful defense or recovery of the same.

"11. That after said agreement by the defendants to convey to the plaintiffs said interest in said real estate, if they should be successful in the defense of said suit in the Supreme Court of the State of New Mexico, such proceedings were had in the Supreme Court in and about said suit that on August 5, 1954, an opinion and decision of the Supreme Court was filed affirming the judgment of the District Court in favor of the defendants, and subsequently and on August 26, 1954, the mandate of the Supreme Court was sent down to the District Court affirming said judgment of the District Court theretofore entered in said suit."

It is first contended that the contract was oral, hence, within the Statute of Frauds. In this respect, the findings are conclusive. The appeal comes to us on a partial record and it is silent on the question whether the agreement was written or oral. The record discloses that appellants neither tendered nor requested findings as to whether the contract was written or oral, nor did they object to the findings made by the court. In such circumstances every

presumption must be indulged in support of the judgment. Keirsey v. Hirsch, 58 N.M. 18, 265 P.2d 346, 43 A.L.R.2d 929; Chavez v. Chavez, 54 N.M. 73, 213 P.2d 438; Case v. Henry, 55 N.M. 154, 228 P.2d 433.

Our next inquiry is directed to the sufficiency of the contract under consideration. Appellants strongly assert that it is too indefinite, uncertain and vague to support a decree of specific performance. We find this contention without merit. While a contract to convey real estate must be definite and certain before it will be enforced, absolute certainty in a contract is not required in order to support a decree of specific performance; reasonable certainty is all that is required. Compare Current v. Hubbard, 46 N.M. 256, 127 P.2d 239; Paulos v. Janetakos, 41 N.M. 534, 72 P.2d 1; Wooley v. Shell Petroleum Corp., 39 N.M. 256, 45 P.2d 927; Micheli v. Taylor, 114 Colo. 258, 159 P.2d 912. The contract as found by the court is expressed in plain and simple language which is easily understood, and there can be no uncertainty about the land involved as that had been the subject of litigation for several years.

It is further contended that appellees can be reasonably compensated for their services on a quantum meruit basis. Further, that such contract is not of such exceptional or extraordinary character that performance thereof cannot be measured in money. Even so, the fact that appellees might have sued and recovered on quantum meruit, does not preclude their suing for specific performance. They accepted employment on the contingency and are, therefore, entitled to the benefits of their bargain. Jones v. Jones, 333 Mo. 478, 63 S.W.2d 146, 90 A.L.R. 219; Hynd v. Sandler, Tex.Civ.App., 95 S.W.2d 165.

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

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

302 P.2d 726

Ross McDONALD, Plaintiff-Appellant,

v.

Dave McDONALD, Defendant-Appellee.

No. 6080.

Supreme Court of New Mexico.

Oct. 18, 1956.

[redacted]

John E. Hall, Albuquerque, for appellant.

Charles H. Fowler, Socorro, for appellee.

MACPHERSON, District Judge.

In the late Fall of 1924, three brothers by the name of McDonald purchased a cattle ranch in Socorro County, New Mexico, which the United States Government subsequently took over and leased to form part of the Alamogordo bombing range.

This suit involves a determination of how compensation paid and to be paid by the Government under Title 43 U.S.C.A. Chapter 8A, § 315 et seq., for the use of the ranch as a bombing range for war and national defense purposes, should be divided between two brothers, Dave McDonald and Ross McDonald, the third brother, Rube McDonald, having theretofore sold his interest in the ranch and facilities to his brother, Ross McDonald.

Hereafter, in most instances, the plaintiff below and appellant here, Ross McDonald, will be referred to as Ross; the defendant below and appellee here, Dave McDonald, will be referred to as Dave; and Rube McDonald, the third brother who sold to plaintiff, will be referred to as Rube.

On November 14, 1924, Ross, then aged 25; Dave, then aged 22; and Rube, then aged 21, entered into the cattle business by purchasing 232 head of cattle and the homestead entry rights to 640 acres of land containing a water well (the only permanent water in a large area). Shortly thereafter, leases were obtained in the name of McDonald Brothers on three sections of state land for grazing purposes. Federal public domain was then unrestricted for grazing, and the brothers made free use of the federal domain adjacent to the ranch. After homestead was perfected, title was taken in the name of Dave and Rube only, but both always recognized Ross' one-third interest therein. For several years the ranch operated successfully, most transactions being conducted in the name of McDonald Brothers, all income and expense being commingled, and each brother taking one-third of the profits. The entire ranch operation depended upon the permanent water available on the fee land, and upon a dirt water tank about four miles south, located on federal domain (the source of water for which is not disclosed in the record).

On June 28, 1934, Congress passed the Taylor Grazing Act, 43 U.S.C.A. §§ 315–315r, which ended the free unrestricted use of federal domain for grazing purposes,

but authorized the Secretary of the Interior to issue grazing permits thereon. The brothers then proceeded under this Act and received a federal permit in the name of McDonald Brothers to graze 444 head of cattle on portions or all of some 44 federal sections. In 1938, this Taylor permit was renewed for a ten-year period. The McDonald ranch, including the fee land, state leases, and federal permit, then comprised some 22,000 acres, including ranch headquarters improvements, fences and corrals.

Apparently at the insistence of Ross, a contract was drawn by a notary public on July 25, 1936, and signed by the three brothers, stipulating that each owned a one-third interest "in all real estate in Socorro County", valuing same at $7,500, and restricting the sale of the "real estate or leases" for two years to anyone except the parties to the agreement. The agreement further provides that any brother may remove his individual cattle from the premises at any time, in which event the remaining brothers will maintain the taxes and leases and pay the other brother $1 per head per annum for all stock so removed (with exception in case of general drought). At the end of two years, the restriction concerning the sale is ended, and any brother can sell to an outsider or move back on the property "and be entitled to one-third of the grazing privileges, and to run one-third of the stock which is handled on said property."

Thereafter, each brother owned and ran his own cattle. Nevertheless, they continued to pool all receipts, to share all expenses, and to conduct ranching operations essentially as before. By and large, as might be expected of brothers, few records were kept, honest dealing prevailed among them, and few disputes arose.

On February 26, 1941, the youngest brother, Rube, sold to his older brother, Ross, the aforesaid plaintiff, for a consideration of $4,000, his "undivided interest which consist— of ⅓ of the said Mac-Donald's Brother— ranch"; he further agreed to turn over to Ross "all state leases and ⅓ interest in one patented section." A few days later, a formal relinquishment of the state leases from Rube to Ross was filed in the State Land Office, and a warranty deed was executed by Rube and his wife in favor of Ross, and duly recorded, conveying Rube's one-third interest to the fee land and the dirt tank on public domain, all buildings, fences, improvements, and appurtenances. Rube thereupon removed his cattle from the ranch.

Ross and Dave continued to conduct cattle operations on the ranch. Each ran approximately the same number of cattle, and once again pooled all income and shared all expenses, on a fifty-fifty basis (with minor exceptions now immaterial), both largely ignoring the fact that Ross had acquired Rube's interest in the ranch,

except that Dave acknowledged his right to run cattle beyond one-third of the ranch's capacity was at the sufferance of Ross. Things were continuing on this "happy-go-lucky" basis, when the Federal Government came into the picture, and if money be the root of all evil, what transpired between these two brothers since then fully exemplifies the truth of this adage.

About October, 1941, the United States Government notified plaintiff and defendant, as well as their surrounding neighbors, that all territory used by them had been set aside for war purposes, and to move out all livestock at the Fall roundup. In December of the same year all grazing permits were cancelled. The brothers removed their cattle from the ranch on April 16 and 17 of 1942, disposed of the same shortly thereafter when other pasturage was unavailable and, in effect, gave up and abandoned their cattle business of seventeen years duration.

On July 9, 1942, Congress amended the Taylor Grazing Act by passing Statute, 43 U.S.C.A. § 315q, providing for the withdrawal of public domain for war purposes and authorizing the payment to persons holding grazing permits or licenses of such amounts for cancellation of grazing permits as should be determined by the head of the federal department or agency using the land to be "fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes."

Pursuant to this Act, and following long negotiations, largely conducted and successfully prosecuted by Dave, something over $70,000 has been paid, and $7,635 is being paid yearly, not to extend beyond June 30, 1970. Whether these monies should be divided between Ross and Dave on a 50–50 basis, or on a ⅔rd and ⅓rd basis, is the exact problem for determination.

Before we can squarely face this issue, however, further facts demand our attention.

While the lengthy negotiations for a settlement were being conducted with the War Department, both brothers signed a letter to the Army Engineers' office in support of their claim for damages, dated February 28, 1945, which contained the following paragraph:

> "We know what our ranch will produce and carry as we have used it for many, many years, and on the basis of past history and experience, the amount of $5300.00 which was offered for the three year term is grossly inadequate. Ross McDonald alone paid $2758.82 pasturage on his cattle from April 27, 1942, to July 1, 1944, which exceeds his share of the rental he would have under the offered $5300.-00 payment."

Apparently, under the informal bookkeeping arrangement between Ross and Dave, each was charged pasturage for use of the ranch properties. According to the letter, Ross' "share" would have been one-half of $5,300 or $2,650, which is less than the $2,758.82 he was charged. Had Ross claimed ⅔rds of the $5,300, same would have exceeded the $2,758.82 he "paid".

Again, for a short period, the Government returned the ranch to the brothers, who rented grazing privileges to other cattlemen, the rental receipts from which the brothers divided equally.

Finally, the Government and the brothers agreed upon a proper measure of damages, and in March of 1947, the first two checks, one for $7,200, the second for $3,585, made payable to both brothers and their wives, arrived. All parties endorsed the checks, and thereupon the first serious trouble over the many years broke out between these brothers—Ross picked up the $7,200 check, handed the $3,585 check to Dave, and stated he was entitled to ⅔rds of the money and his brother only one-third. As subsequent checks came in, the controversy continued, Dave keeping one-half of what monies he was able to get, and Ross keeping two-thirds of what monies he was able to get. Finally, the parties agreed to escrow all future payments in the Otero State Bank at Alamogordo, New Mexico, where a considerable sum has accumulated, and is continuing to accumulate, to be divided upon determination of this law suit.

While the record discloses that the parties executed an agreement in December of 1945, with the War Department, covering the matter of payment of compensation to them, this agreement was not introduced in evidence and the record is silent as to its details. All we know is that it covered damages for the McDonald Brothers' inability to conduct their cattle business between April, 1942, and July 1, 1945. Apparently, pursuant to another similar agreement, again not of record, damages were agreed upon for the period July 1, 1945, to July 1, 1948. From the latter day forward, and continuing for a period not beyond June 30, 1970, we find a document in evidence entitled "Lease and Suspension Agreement", executed June 22, 1950, between the Government, on the one part, and Ross and Dave on the other part, which demands our attention.

By the agreement of June 22, 1950, the grantor (Ross and Dave) "leases" to the Government, for the period from July 1, 1948, to June 30, 1970, at $7,055 a year, for 2 years, thereafter at $7,635, a year, the following: (a) the patented land; (b) the federal land; (c) the state land; and (d) all other interests within the Holloman Air Force Bombing Range Project. No statement of ownership, or division of the lease payments is mentioned in the agreement.

The monies paid under this agreement have been escrowed with the Otero State Bank.

The Court below entered 26 findings of fact and 4 conclusions of law. The findings follow substantially the foregoing recitation of facts, except that the contract of July 25, 1936, and the Lease and Suspension Agreement of June 22, 1950, are not mentioned or commented on. The Court's findings give Dave full credit for securing a favorable settlement with the Government, in the face of hindrance by Ross. The Court likewise found that a Government agent "finally admitted that the Government compensation was based upon the use to which the land was being put, such as carrying capacity" (Finding XVII) and that another witness, a member of the Cattlemen's Committee dealing with the Army, testified. "that all compensation fixed for the Ranchers was based strictly upon carrying capacity and use of said land and not at all upon ownership of the same, as in many instances Ranchers were paid compensation where they owned not one acre of any land." (Finding XXVI.)

The lower Court concluded that Ross owned two-thirds of the fee land involved in the case and that Dave owned a one-third interest therein; that the rentals paid by the United States for lands taken were based upon the use of the land before the taking; that as Ross and Dave had used the premises equally and conducted their cattle business on a fifty-fifty basis they were each entitled to one-half of the money in controversy. Judgment was entered that the money paid and to be paid in the future should be equally divided, from which judgment Ross appeals.

In brief, Ross, as appellant, contends the monies in question are annual rentals for the use of the ranch property, paid pursuant to written lease, and should be divided in proportion to the ownership of the ranch. Dave, on the other hand, in support of the judgment, contends the monies are not in reality rentals, but payments to compensate the parties for their losses by reason of being prevented from carrying on their livestock businesses, which should be divided in proportion to the measure of use being made of the ranch at the time the Federal Government assumed control of it.

We believe the trial court erred in failing to make a finding concerning the Lease and Suspension Agreement of June 22, 1950, a point properly preserved by appellant. In our opinion this agreement is of vital significance in the determination of this case, because Dave has acknowledged his right to run cattle upon the ranch beyond one-third of its carrying capacity was at the sufferance of Ross. Therefore, there is nothing upon which to predicate a legal right in Dave to receive more than a one-third share of the proceeds unless such right exists under the Government agreement and the laws under which the payments are authorized. With this added

finding in the record, we will proceed to determine whether the evidence is sufficient to support the findings that the Federal Government negotiated with Ross and Dave on the basis of the use made of the premises; whether the federal statutes authorize payment upon that basis; and whether, in turn, the findings support the judgment.

At the outset we note that Dave pursues a theory in support of the judgment here which differs from that followed below. There his position was that Ross owned a two-thirds interest in the state leases and Taylor Grazing Permit as well as the fee lands and improvements, but because he (Dave) actually used one-half of the entire ranch he was entitled to one-half of the proceeds in question. Here he urges that the trial court did not find that plaintiff owned anything more than a two-thirds interest in the fee lands and improvements; that Rube McDonald's relinquishment of his interest in the state leases to Ross was ineffective; and that Rube McDonald had no conveyable interest in the Taylor Grazing Permit by virtue of provision of the Taylor Grazing Act, § 315b, 43 U.S.C.A., that "the issuance of a permit pursuant to the provisions of this chapter shall not create any right, title, interest, or estate in or to the lands."

Interesting as this contention is, it is foreclosed by the judgment entered below from which appellee Dave has taken no cross appeal. It provides:

> "It Is Ordered Adjudged And Decreed:
>
> "(a) That the plaintiff, Ross McDonald, is the owner of an undivided two-thirds interest in and to the McDonald Ranch, described as
>
> "The South half of the NW Quarter, the SW Quarter, and the SE Quarter, of Section 4, and the NE Quarter, and the North half of the NW Quarter, of Section 9, Township 9 South of Range 4 East, N.M.P.M., containing 640 acres, more or less, and the State of New Mexico lease lands and Taylor grazing allotment used in connection with said patented lands and State lease lands, and that the defendant, Dave McDonald, is the owner of an undivided one-third interest in said ranch and properties."

The federal act under which the monies in question have been paid, Act of July 9, 1942, as amended, appearing at 43 U.S.C.A. § 315q, reads as follows:

> "Whenever use for war or national defense purposes of the public domain or other property owned by or under the control of the United States prevents its use for grazing, persons holding grazing permits or licenses and persons whose grazing permits or licenses have been or will be canceled

because of such use shall be paid out of the funds appropriated or allocated for such project such amounts as the head of the department or agency so using the lands shall determine to be fair and reasonable for the losses suffered by such persons as a result of the use of such lands for war or national defense purposes. Such payments shall be deemed payment in full for such losses. Nothing herein contained shall be construed to create any liability not now existing against the United States."

(The amendment, effective May 28, 1948, merely inserted "or national defense" between "war" and "purposes" wherever appearing.)

The Act was further amended October 29, 1949, by adding a new section now cited as 43 U.S.C.A. § 315r, reading: "In administering the provisions of section 315q of this title, payments of rentals may be made in advance."

It is to be noted that under this Act there are no court proceedings provided for; condemnation in the usual sense of the word is absent; after the federal domain is withdrawn and permits cancelled, the monies to be paid by the Government come through administrative action by the head of the department or agency involved. Here the monies paid and to be paid were mutually agreed upon, but no division as between Ross and Dave ever stipulated.

A reasonable interpretation of these two sections would indicate that the Government, in withdrawing the federal domain, can cancel existing permits, paying for the "losses suffered", Section 315q, or in lieu thereof can pay "rentals", and in effect lease back the Government's own permit, Section 315r. It might appear incongruous for the Government to lease back its own federal domain, but that is exactly what happened in the present case.

The document by which the parties settled their differences with the Government for the period from July 1, 1948 forward, is the Lease and Suspension Agreement of June 22, 1950. As stated, the earlier agreements were not introduced of record, but we can assume they followed the general tenor of the June 22 agreement. (The record does show one other form of agreement, signed between the Government and Ross, but not by Dave, introduced to show Ross' willingness to accept any offer made —which form is substantially the same as the June 22, 1950 agreement.)

In addition to the features of the June 22, 1950 agreement mentioned above, we would point out that the grantor warrants title to the Taylor grazing permit and the 640-acre fee land and that "rental" is determined at certain amounts per annum but payable at the *end* of each quarter.

This document does not fall strictly within either of the pertinent Federal Statutes, 43 U.S.C.A. §§ 315q or 315r. The

federal grazing permit is apparently not cancelled for in the agreement the grantor specifically warrants title to the permit. Again, Section 315q seems to contemplate payment for cancellation of the *federal permit only*, while here the agreement covers not only the federal permit, but the state leases, the fee land, and all other improvements. Likewise, Section 315r authorizes payment of rent in advance, while here the rental is paid at the *end* of each quarter.

The most that we can assume is that in executing this agreement the Government, acting through the Corps of Engineers, proceeded under Sections 315q and 315r in leasing back the federal Taylor grazing permit, and under other statutes not before the Court in leasing the fee land, the state leases and the other improvements.

The findings of the lower Court as to the basis upon which settlement was reached with the Federal Government have been described above, but are here set out in full:

"XVII.

"About the month of December, 1944, a Trespass charge was filed against both Dave and Ross and an Order was served for both to appear and Show Cause in January, 1945, why they should not be punished for contempt. Upon an Answer being filed by Dave denying any guilt, the Government withdrew the charge as to Dave, but Ross admitted the charge and Judge Neblett Dismissed the same, and immediately after that Hearing, Dave, Ross and their respective attorneys, went to the office of the United States Attorney Robinson, where discussion followed and Government Agent Schadel finally admitted that the Government compensation was based upon the use to which the land was being put, such as carrying capacity, and offered to increase the $5300.00 prior offer by $200.00, but Dave again refused to sign."

"XXVI.

"Dick Gilliland, a witness, testified that—without being disputed—he was on the Committee that represented the Cattlemen to deal with the Army, and was elected in March, 1949, at the Cattlemen's Convention, and was also on the Advisory Board, and that all compensation fixed for the Ranchers was based strictly upon carrying capacity and use of said land and not at all upon ownership of the same, as in many instances Ranchers were paid compensation where they owned not one acre of any land."

The first of these findings is based upon the following testimony of Ross, so far as we can determine:

"Q. Do you recall that you moved your cattle back on the property down

there, in violation of the government's order upon you in '44? A. Yes.

"Q. And the government filed a criminal trespass charge against you, didn't they? A. Yes, sir.

"Q. And Dave too? A. Yes, sir.

* * * * * *

"Q. While this was going on, and while you were on that trespass up there, did you, or did you not, have Mr. Hall with you, and Mr. Newell was with Dave; he was his attorney, wasn't he, you all four went into Shadel's office, didn't you? A. Yes, sir.

* * * * * *

"Q. Isn't it a fact that Mr. Newell did insist to Mr. Shadel that the true criterion and the rule of the thumb to be used by the government is to pay you ranchers for the use that you were making of the land? A. Yes, that's right.

"Q. Isn't it a fact, right there, that Shadel refused to show and reveal to Mr. Newell that amount and number of cattle that this ranch was supposed to have as carrying capacity? A. I don't know about that part.

"Q. Isn't it a fact that eventually, however, after a question by Mr. Newell, he was going to show it anyway, he brought forth a slip of paper stating that this cattle ranch was shown as 370 cows in pasturage? A. He had to go to the grazing office in Albuquerque to get it.

* * * * * *

"Q. Don't you remember, also at that conference that Mr. Newell complained that they hadn't used the full 440 figure, that you finally had it raised to by your appeal under the Taylor Grazing Act, you don't remember that either? A. Yes, I remember that.

"Q. Yes, of course you remember that, it was based at that time entirely on carrying capacity, wasn't it? A. It has been all the time."

While finding No. XVII is correct as it stands, the testimony upon which it is based does not support the inference that nothing except the annual carrying capacity set by the Taylor grazing permit was used in arriving at extent of usage—indeed, that it was used as a "rule of thumb."

As to finding No. XXVI, Gilliland, defendant Dave's witness, testified he was a member of a committee elected in the Cattle Growers' Association to work with the army to try to reach an agreement with the Federal Government on a price the Government would offer, attempting to get the offer up to present day values. He then testified:

"Q. * * * did you have any discussions with these representatives as to the basis upon which the compensation should be made to them, did you talk about carrying capacity? A. We did. Yes, sir, and we said it was to be settled on carrying capacity.

* * * * * *

"Q. Now, when the government finally entered into these leases, for you ranchers on the bombing range, they settled on the basis of permits that had been established by the Division of Grazing years before, didn't they? A. Yes, sir, that was many years before, a few years before, not too many.

"Q. They didn't pay any attention to the number of cattle that happened to be on the range at that particular time did they? A. No, sir.

"Q. The settlement was on the basis of permits that had been established by the Division of Grazing, is that right? A. Yes, sir. * * *"

This testimony supports the finding thereon, but again cannot be the basis of inference that the negotiations were concerned with actual use. There is no indication the Government knew or cared who owned the cattle which happened to be on the range at the time. Instead, the permit holders were compensated for the loss of the right of grazing privileges solely upon the basis of the number of cattle specified in their permits as the annual carrying capacity.

We see nothing in the negotiations for settlement, the Lease and Suspension Agreement, or the statutory authority under which the funds were and are being paid to indicate the Government officials were authorized to or did arrive at a compensation base separating ownership from use.

We believe the court below was impressed by Dave's efforts in procuring a favorable settlement with the Federal Government in the face of not only indifference, but even hindrance, by Ross. But Dave has admitted there was never any agreement for payment for his services or reimbursement for his expenses.

The findings, in the light of the testimony upon which they are based, the settlement made, and the authority therefor, do not support the conclusion and judgment that Dave is entitled to share equally in the monies in controversy.

Finally, appellant Ross has claimed error in the refusal of the lower court to order an accounting, part of the relief sought in original suit. Of necessity, the same will be required to settle this controversy, and we so hold.

The judgment, except for that portion adjudging the plaintiff to be the owner of an undivided two-thirds' interest in the fee lands, improvements, state leases and Tay-

lor grazing permit, and the defendant to be the owner of an undivided one-third interest therein, is reversed and the cause remanded for the entry of a new judgment and further proceedings consistent with this opinion.

It is so ordered.

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

302 P.2d 734

R. M. TIGNER, Plaintiff-Appellee,

v.

OWL DRUG COMPANY, Inc., Maurice A. Smith and Eleanor B. Smith, Defendants-Appellees,

Davis Bros., Inc. and Fox Vliet Drug Company, Proposed Intervenors-Appellants.

No. 6128.

Supreme Court of New Mexico.

Oct. 17, 1956.

Jack L. Love, Roswell, for appellants.

Atwood & Malone, Roswell, for R. M. Tigner.

COMPTON, Chief Justice.

The single question is whether an abuse of discretion appears in the action of the trial court in denying the petition of appellants to intervene in a suit to foreclose a chattel mortgage on a stock of merchandise in the custody of a receiver appointed by the court incident to foreclosure.

The facts of this case differ in no material respect from those present in the case of Tom Fields, Ltd. v. Tigner, 61 N.M. 382, 301 P.2d 322, decided by us September 6, 1956. Indeed, each represents in effect an effort to intervene in the same suit or proceeding pending at the time, in the District Court of Chaves County. The same considerations that moved us to affirm in Fields v. Tigner, supra, apply with equal force here.

The claimed difference in the cases is that Tigner, the owner of a qualifying share of the stock of Owl Drug Company, Inc., in which he had no interest, was guilty of extrinsic fraud in failing to defend the action commenced by him on behalf of the corporation, and the case of Kerr v. Southwest Fluorite Co., 35 N.M. 232, 294 P. 324, is cited in support thereof. This claim must be rejected, the cases obviously are dissimilar. In the Kerr case, supra, nondisclosure that the plaintiffs were also directors of the defendant corporation, a fact not known to the court, was the basis of extrinsic fraud; whereas, the status of Tigner was testified to by him and was known to the court when the judgment was entered.

The trial court did not abuse its discretion in denying the motion to intervene. Accordingly, the judgment will be affirmed and it is so ordered.

LUJAN, SADLER and KIKER, JJ., concur.

McGHEE, J., not participating.

302 P.2d 735

Application of M. T. BROWN and C. V. Hoke, Protested by Chester E. Barnett, File P-795.

Chester E. BARNETT, Appellant, Cross-Appellee,

v.

M. T. BROWN and C. V. Hoke, Appellees, S. E. Reynolds, State Engineer of the State of New Mexico, Respondent, Cross-Appellant.

No. 6105.

Supreme Court of New Mexico.
Oct. 18, 1956.

Morgan & Morgan, Portales, Smith & Smith, Fred C. Tharp, Clovis, for appellant and cross-appellee.

Richard H. Robinson, Atty. Gen., Charles D. Harris and Jack L. Love, Sp. Asst. Attys. Gen., for respondent and cross-appellant.

Hartley & Buzzard, Clovis, for appellees.

McGHEE, Justice.

As this appeal is presented to us, the issues are precisely the same as those raised and passed upon in our decision filed August 15, 1956, in the appeal styled: In the matter of the Application of Sam Johnson, Protested by Chester Plummer, H. L. McCrary, C. A. Tevis and H. J. McCrary, File P-1287. Chester Plummer, et al., v. Sam Johnson and S. E. Reynolds, State Engineer of the State of New Mexico, our docket No. 6113, which decision controls disposition of this appeal.

The judgment of the lower court is reversed with direction to the trial court to reinstate the case upon its docket and to proceed in accordance herewith under the aforesaid decision.

It is so ordered.

COMPTON, C. J., and LUJAN and KIKER, JJ., concur.

SADLER, Justice (dissenting).

This will announce my disagreement with the conclusion reached by the majority. It became apparent to me after reading the briefs in support of motion for rehearing in Plummer v. Johnson, N.M., 301 P.2d 529, 531, recently decided, which I favored granting but which the majority denied, that under the statutes involved a party may not secure an appeal through extrajudicial efforts by simply filing with the clerk of the district court a proof of service of notice of appeal on the State Engineer and other interested parties.

Nor is it my understanding of the State Engineer's position in Plummer v. Johnson, supra, "that taking an appeal from a decision of the state engineer requires the filing of a formal application therefor and the allowance of the same by the district court," as stated in the opinion in the case above mentioned. In their brief filed in that case, counsel had stated:

> "There is no reason for advance notice to the State Engineer or the other interested parties of the filing of an appeal. The statute does not contemplate that the question of whether an appeal should be granted is subject to litigation. The statute confers an unconditional right of appeal to the district court from any decision of the State Engineer."

This statement seems inconsistent with the court's understanding of appellee's position in Plummer v. Johnson, above mentioned, as stated in its opinion in that case. But that is neither here nor there. The point is that a party appealing should take some action through the clerk of the district court. In other words, when the statute, 1953 Comp. § 75–6–1 calls for service of notice of appeal "in the same manner as summons in actions brought before the district courts," the meaning is clear. It requires a notice issued by the district court clerk under the seal of the court, bearing the docket number of the appeal, whether for personal service or by publication. In no other fashion may the State Engineer keep adequately informed of what is taking place and the time for future steps. Service of a notice so issued is essential to jurisdiction. See, Klema v. Neuvert, 156 Kan. 633, 135 P.2d 557.

The majority disagreeing, I dissent.

302 P.2d 953

Encarnacion RIVERA, Administrator of the Estate of Alice Rivera, Deceased; Encarnacion Rivera, Administrator of the Estate of Russell James Rivera, an infant, Deceased; and Encarnacion Rivera, an individual, Plaintiff-Appellant and Cross-Appellee,

v.

ANCIENT CITY OIL CORPORATION, a corporation, Defendant-Appellee and Cross-Appellant.

No. 6052.

Supreme Court of New Mexico.
Sept. 10, 1956.
Rehearing Denied Nov. 16, 1956.

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[redacted]

Joseph L. Smith, Henry A. Kiker, Jr., Albuquerque, for appellant.

Catron & Catron, Santa Fe, for appellee.

PER CURIAM.

Upon consideration of motion for rehearing, the original opinion filed herein is withdrawn and the following substituted therefor:

COMPTON, Chief Justice.

The plaintiff as an appellant in this Court complains of the action of the trial court in granting the motion of defendant for judgment notwithstanding the verdict on the plaintiff's first cause of action and from the judgment entered pursuant to said order. In his amended complaint upon which the cause was tried four causes of action were asserted against defendant by plaintiff but he neither appeals from the order of the trial court as it related to the third and fourth causes of action, nor from the judgments entered upon the second, third and fourth causes of action. The defendant by cross-appeal complains of the judgments entered against it upon the third and fourth causes of action.

The various causes of action asserted grew out of an explosion and fire which resulted in the death of plaintiff's wife and infant child as well as the destruction of his home and its contents. On September 14, 1952, the plaintiff with his family was living in a two-room frame house near Terrero, New Mexico. His wife was 19 years of age, an elder son, Roland, was two years of age and his infant son, Russell James, was a little more than a month old. A day or two before the tragic explosion and fire the plaintiff had purchased from the Red Arrow Camp Store at Terrero five gallons of kerosene which was placed in a 5-gallon Wesson Oil can which he had brought to the store with him.

The kerosene was kept in a tank or barrel at the store which had been filled by one John Law, a delivery truck driver for the defendant, Ancient City Oil Corporation, only a day or so before the plaintiff's purchase. The proprietor of the store had obtained the kerosene from a tank of defendant corporation at Santa Fe, New Mexico. After the oil purchased as kerosene was taken to his home by the plaintiff in the Wesson Oil can, he stored it in a shed adjacent to his house.

On the day of the fatal fire at about six or seven in the evening, the plaintiff drove to the Red Arrow Camp Store to make some purchases, taking along with him his little son, Roland. He spent, perhaps, an hour or longer visiting with the wife of the proprietor of the store and her sister, and then returned to his home. Immediately after his arrival the wife made ready to serve the evening meal. Before doing so, however, she decided to start a fire to warm the room. Placing some kindling in the stove she then proceeded to the store room or shed adjacent to the house and after taking some kerosene from the 5-gallon Wesson Oil can by pouring it into a 1-gallon can, she returned to the house with it. The plaintiff, an eyewitness, testified that he was present and saw no smoke which might indicate that the kindling had begun to burn as she began pouring the contents of the 1-gallon can into the stove. There was an immediate flash and explosion which completely destroyed plaintiff's house in a matter of thirty minutes, this despite the efforts of the Pecos, New Mexico, Fire Department. The plaintiff's wife, Alice Rivera, suffered second and third degree burns which completely covered her body, with the exception of her feet. She died five days later. No trace of the infant child, Russell James, was ever found, establishing rather conclusively, it seems to us, that he perished in the fire which destroyed the house. It thus became the plaintiff's theory in the trial of the cause that the baby had been totally cremated in the fire, a fact he was unable to prove definitely by reason of the fact that he did not see the baby when he returned to his house from the Red Arrow Camp Store, although they had left it in the bedroom when he started to the store.

As already indicated, the plaintiff asserted four causes of action against the defendant, Ancient City Oil Corporation. In the first cause of action he sought damages in the sum of $128,520 for the death of his wife; in his second cause of action, $15,500 for the death of his infant son; in his third cause of action, $1,802 for the loss of certain personal property in the destruction of his home by fire; and, in his fourth cause of action, $10,000 on account of personal injuries received by plaintiff, individually, in the explosion and fire which followed. In his original complaint, Mr. and Mrs. E. J. Patterson, proprietors of the store at which the kerosene was purchased, had

been joined as defendants but they were dismissed out at the commencement of the trial, leaving Ancient City Oil Corporation as the sole defendant.

After trial, the jury returned verdicts for the plaintiff against the defendant, assessing damages at $25,235 on the first cause of action; $1,802 on the third cause of action and $550 on the fourth cause of action. The verdict on the second cause of action claiming damages on account of the death of the infant was in favor of the the defendant. Following the return of these verdicts into court, the defendant filed a motion for judgment notwithstanding the verdict as to such of the verdicts as were unfavorable to it.

The trial court thereafter entered an order granting appellee's motion for judgment notwithstanding the verdict as to the first cause of action; also, as to the third cause of action in so far as the verdict on that cause of action exceeded the sum of $650. In the same order, the trial court denied appellee's motion for judgment notwithstanding the verdict with respect to the fourth cause of action; denying, also, appellee's motion for a new trial as to the first, third and fourth causes of action.

Judgments were thereafter entered in conformity with the trial court's order, granting defendant judgment notwithstanding the verdict as to the first cause of action and for the reduced sum of $650 on plaintiff's third cause of action in conformity with action by the trial court on defendant's motion for judgment notwithstanding the verdict as to this cause of action. Judgments in conformity with the verdicts of the jury, in defendant's favor, as to the second cause of action and against defendant for $550 on fourth cause of action were duly entered by the court.

Plaintiff has lodged this appeal from the order of the trial court granting appellee's motion for judgment notwithstanding the verdict on the first cause of action, and from the judgment entered pursuant to the said order. The plaintiff has not prosecuted an appeal from the order of the trial court as it relates to the third and fourth causes of action, nor from the judgments entered upon the second, third and fourth causes of action. The defendant by cross-appeals has challenged correctness of the judgments entered against it on the third and fourth causes of action, about which more will be said later.

This leaves for consideration and decision by us on the main appeal the single question of whether the trial court erred in granting the defendant's motion for judgment in its favor notwithstanding the verdict on plaintiff's first cause of action, namely, an award of damages in his favor for $25,235 for the death of his wife by reason of injuries suffered in the explosion and fire following it.

The evidence in the case disclosed that the supposed standard kerosene purchased at the Red Arrow Camp Store had been contaminated by the addition thereto of from 7% to 8% gasoline, by volume. Whereas the flash point of standard petroleum required by law is 115°, examination disclosed that the flash point of the fluid purchased by plaintiff was 52° Fahrenheit, as compared to the 115° required by law. This fact and other evidence in the case left no doubt of its sufficiency to establish actionable negligence on the part of the defendant, Ancient City Oil Corporation, whose delivery truck had furnished the fuel or liquid from which plaintiff's purchase was supplied by Red Arrow Camp Store, leaving only for determination whether or not contributory negligence on the part of plaintiff's deceased wife in pouring kerosene onto live coals, or hot ashes, in the stove presents a bar to recovery.

Appellee had the burden of proving that plaintiff's wife failed to exercise reasonable care for her own saftey and that she contributed to her fatal injuries by her own negligence. The test in this regard is whether she used that degree of care for her own safety as would be exercised by an ordinarily prudent person under the same or like circumstances. We start with the proposition that it is common knowledge that standard kerosene may be used safely for illumination, heating, cooking, kindling and building of fires. Goode v. Pierce Oil Corporation, 171 Ark. 863, 286 S.W. 1009; Douglas v. Daniels Bros. Coal Co., 135 Ohio St. 641, 22 N.E.2d 195, 123 A.L.R. 761. In this light, we must consider the evidence.

William Chaffee, a petroleum chemist for the Bureau of Revenue, an expert in that field, testified that when kerosene with a flash point in excess of 52 or 53 degrees Fahrenheit, is poured on live embers, the spark or flame would burn rapidly and progressively and should the flame make contact with the spout of a can, there would be an explosion of the vapors in the can; but if the kerosene were not in excess of the statutory flash point, danger of an explosion would be remote. We quote briefly from his testimony:

"* * * Q. State whether or not you have an opinion, from your observations and experience, whether or not an explosion would have occurred—assuming that the deceased had poured fluid or kerosene that was within all the standard qualifications on the kindling in the stove, if the fluid itself were within the standard limitation, would it have burned or would an explosion have occurred?

"*Mr. Catron:* I object to the question for the reason it is based on an incomplete set of facts. The witness stated live coals.

"Court: You may use the word 'embers' in your hypothetical question, with

the qualifications, in addition, Mr. Chaffee, there being embers in this stove in which the fluid described—A. Let me re-state what my interpretation of your question is—

"Mr. Smith: It is simply this—do you believe, even adding the additional factor, that Mr. Catron insists upon that, there were embers under the kindling—would the explosion have occurred, in your opinion, had the fluid not contained the contamination that you speak of? A. I don't believe the conditions would favor such a fire and explosion under those circumstances.

* * * * * *

"Q. State whether or not, in your opinion, the fact that the fluid—assuming that it did contain approximately 8% contamination, would result in the explosion—assuming an explosion occurred? A. Under those circumstances it would appear to me, in my personal opinion, there would be a very good chance for an explosion.

* * * * * *

"Q. Now, furthur assuming that the kerosene were within standard limitation, that is 115 degrees flash point and 550 degrees distillation, would the fire and the kerosene then burn progressively in the stove? A. Now, the situation is this—the kerosene would ignite when it hit the live embers, but not as much as if the oil in the can was not in excess of its flash point, then the danger of an explosion within the can would be remote.

* * * * * *

"Mr. Catron: Assuming that we have a can similar to this with a spigot on it and a person is pouring that into a stove where there are live coals which ignite the kerosene which reaches the live coals, will that flame stop there or will it follow the stream up to can? A. Now, kerosene is being poured from the spout, is ignited in the stove—will these flames follow up the fume to the spout—My opinion would be that if this pouring continued that there is a possibility these flames would reach the spout.

* * * * * *

"Q. And would cause an explosion? A. No, I don't believe so, no.

"Q. What would happen, would the kerosene fumes inside the can just burn up? A. Those fumes are not in sufficient concentration because the flash temperature of the oil has not been reached and I don't believe there would be an explosion or a fire in that can.

"Q. So then your idea is that the flame would come up—follow up the stream and go into the can and it would

just simply burn in there, is that it? A. I don't believe they would go into the can—the flames.

"Q. So your idea is it would stop right there, is that it, even though you kept on pouring? A. That would be my opinion, yes."

Unquestionably, this evidence presents a question of fact, whether plaintiff's wife, believing that she was using ordinary kerosene, was contributorily negligent. Where reasonable minds might very well differ on the question of proximate cause, remote cause, sole cause, or intervening cause, the matter is issuable before a jury. American Insurance Co. v. Foutz & Bursum, 60 N.M. 351, 291 P.2d 1081; Lucero v. Harshey, 50 N.M. 1, 165 P.2d 587.

In passing upon a motion for judgment notwithstanding the verdict the favored party is entitled to have the testimony considered in a light most favorable to him and is entitled to every inference of fact fairly deductible from the evidence; all contrary evidence is to be disregarded. Michelson v. House, 54 N.M. 197, 218 P.2d 861. Ordinarily, whether a plaintiff's negligence proximately contributes to his injury, is a question for the jury. Williams v. Haas, 52 N.M. 9, 189 P.2d 632; Thompson v. Dale, 59 N.M. 290, 283 P.2d 623.

Coming next to the matter of defendant's cross-appeals from the judgments entered on the third and fourth causes of action for $650 and $550, respectively, in plaintiff's favor, we think reasonable minds might very well differ on the question whether the decedent plaintiff's negligence was the sole cause of the accident and resulting damage. Many cases cited by the defendant on the issue of plaintiff's negligence, denominate it as "contributory" negligence, or say it amounts to that, to say the least. Sinclair Refining Co. v. Tompkins, 5 Cir., 117 F.2d 596; Goode v. Pierce Oil Corp., supra; Crouch v. Noland, 238 Ky. 575, 38 S.W.2d 471; Parton v. Phillips Petroleum Co., 231 Mo.App. 585, 107 S.W. 2d 167.

In presenting argument on its cross-appeals, the defendant expresses dissatisfaction with the trial court's action in refusing certain requested instructions. We have carefully reviewed the instructions given in the light of these requests and must give it as our settled opinion that consideration of defendant's case was in no way prejudiced by the refusal of the requested instructions. The trial judge must have felt the instructions when viewed as a whole adequately covered the case. We are unable to disagree with him.

The judgment is affirmed as to the third and fourth causes of action and reversed with respect to the first cause of action with direction to the trial court to enter judgment against cross-appellant and the

sureties upon their supersedeas bond for the full amount awarded by the jury.

It is so ordered.

LUJAN and McGHEE, JJ., concur.

KIKER, J., not participating.

SADLER, Justice (dissenting in part).

With so much of the prevailing opinion as reverses action of the trial court in granting judgment notwithstanding the verdict on the first cause of action, let me be recorded as being in complete disagreement. When the verdict of a jury contradicts a physical fact in a material respect it should be disregarded and judgment rendered notwithstanding it. State ex rel. Kansas City Southern R. Co. v. Shain, infra. That is exactly what the trial judge did in the case at bar with the verdict for plaintiff on the first cause of action, and his ruling merits our approval.

If under the facts, a plaintiff be guilty of contributory negligence, we should unhesitatingly so declare as a matter of law, just as the trial judge here did. Gildersleeve v. Atkinson, 6 N.M. 250, 27 P. 477; Caviness v. Driscoll Construction Co., 39 N.M. 441, 49 P.2d 251; Gray v. Esslinger, 46 N.M. 421, 130 P.2d 24; Koock v. Goodnight, Tex.Civ.App., 71 S.W.2d 927; State ex rel. Kansas City Southern Ry. Co. v. Shain, 340 Mo. 1195, 105 S.W.2d 915; Sinclair Refining Co. v. Tompkins, 5 Cir., 117 F.2d 596.

If one throws a lighted match into a can of gunpowder; or, attempts to cross a railroad track, having failed to stop, look and listen; or, points a pistol at another and fires, thinking the chambers empty; the one so doing is guilty of negligence *as a matter of law.* If suffering injury himself in the act, he would be absolutely barred of recovery by his own contributory negligence. It would avail him naught to say he did not know the powder would flash and explode, or was in complete ignorance of the presence of a train in the vicinity; or, that he did not know the gun was loaded.

There are certain immutable facts of life that cannot be ignored and of which one cannot plead ignorance. One such fact is that to stand above the fire box of a stove and pour over live coals or hot ashes therein a liquid so highly inflammable as petroleum, contaminated or not, a flash fire inevitably will follow, frequently to the serious injury or death of the person so engaged. Such a result followed here which ended in death.

The jury found in answer to a special interrogatory that there were live coals in the stove. It could not find otherwise under the evidence. The decedent, herself, who survived the injury for a few days, told officer Rodriguez she poured liquid petroleum over the "live coals," as the witness first expressed it, or over "hot ashes" as he later modified her statement so told him.

It matters not which, either was negligence as a matter of law, but the jury's special finding was there were live coals in the fire box. It, obviously, was negligence of the plainest sort to do what this poor woman did in attempting to start a fire and for which, unfortunately, she paid with her life.

The majority have quoted at length in their opinion from the testimony of William Chaffee, a petroleum chemist, testifying as an expert. Frankly, there is little else in the record on which to rest the majority action besides the testimony of experts, going almost wholly to the question of defendant's negligence in contaminating the petroleum. This is something assumed by me, but it fails to destroy the effect of decedent's contributory negligence as a bar to recovery. Nevertheless, let us look at the testimony of the expert, Chaffee, as a whole. On cross-examination he renders absolutely innocuous what he says on direct examination. He was asked and gave answers, as follows:

"* * * Mr. Catron: You mean to tell the jury, Mr. Chaffee, that the pouring of even standard kerosene on live coals is perfectly safe, is that it? * * * A. No.

* * * * * *

"Mr. Catron: You don't mean to tell them that? A. No, I don't believe it would be perfectly safe to do that.

* * * * * *

"Mr. Catron: So that what you do mean to testify or tell the jury, is that it is hazardous? A. Yes.

"Q. But in any event, to wind up, Mr. Chaffee, isn't it a matter of common knowledge, of your knowledge, that the pouring of straight kerosene of 115 degrees on live coals is hazardous? A. There is an element of hazard to it.

"Q. Did you ever pour kerosene, whether it was pure kerosene or contaminated kerosene, on live coals? A. I did not pour it. I threw it at live coals.

"Q. And you threw it in because you did not want to get close enough to pour it in, isn't that correct? A. I would say that is correct, yes.

"Q. So you figured it was a hazard? A. It was a hazard.

"Q. And that was straight, pure kerosene? A. Certainly."

How, in all reason, can it fairly be said that, even under the expert's testimony, the decedent was not guilty of contributory negligence? Parton v. Phillips Petroleum Co., 231 Mo.App. 585, 107 S.W.2d 167.

The weakness in the majority position is that it carries approval of a verdict of the jury based on surmise and speculation. It is all well and good to permit a jury to resolve issuable facts, provided it may do so without engaging in unwarranted and gossa-

mer like inference. But where, as it here impresses me, the court has licensed the jury to stretch inferences to a thread-like fineness; indeed, beyond all reason, in order to reach the verdict it does, then, the court of its own motion should boldly say so, and render judgment notwithstanding the verdict.

Here the trial court could not properly refuse to say *as a matter of law*, the decedent was contributorily negligent in pouring liquid petroleum into the fire box while standing in such proximity that any flash of the flames would envelop her body. Since the flash of fire was almost instantaneous, following the pouring of petroleum into the fire box, all question of causal connection is at once resolved against the verdict.

If the decedent knew or should have known of the presence of either "live coals" or "hot ashes" in the stove, it was contributory negligence to pour the highly inflammable petroleum over the kindling with which she had covered same. Should she have known? There cannot be the slightest doubt on this score. Only a few short hours previously the family, including decedent, had warmed by a fire burning in this very stove. An exercise of the slightest care or caution would have disclosed the presence there, still, of burning embers or hot ashes in the fire box.

This ill-fated woman discovered the presence of the live coals or hot ashes, but too late to save her own life and that of her small baby about 1½ months old. It was a terrible accident and one to be deeply deplored. We may assume defendant's negligence in contaminating the petroleum. Indeed, contributory negligence does assume defendant's primary negligence. But the tragic sequence of events following on the heels of decedent's negligence can no more be laid at defendant's door than at the door of some stranger to the accident. The negligence of the one has completely neutralized that of the other and there properly can be no recovery.

In a futile effort to find some evidence in the record to support an inference that would warrant a jury in absolving decedent of contributory negligence, the majority recite in their opinion the testimony of decedent's husband, the plaintiff, that he saw no smoke following the placing by his wife of kindling wood in the fire box. Let us travel the tortuous trail of inference which one must follow from such negative proof to clear the decedent of obvious negligence.

The husband, plaintiff, saw no smoke. (In this particular, it is not his negligence, of course, but that of the decedent wife which is important.) But the husband saw no smoke. Ergo, there either was no smoke, *or the wife saw none*. Hence, the wife was not negligent! This, in the face of the physical fact that wood placed on live coals, *as a law of nature*, produces smoke—that,

actually, there was smoke unless, conceivably, the flash fire followed so soon the pouring of liquid petroleum on the live coals and hot ashes, it had no time to form.

How do we know deadly heat in the form either of live coals or hot ashes lurked in the fire box? Because the decedent herself said so! Because the special verdict of the jury said so! And, finally, because the instantaneous flash fire and explosion thundered an affirmation!

In the face of such irrefutable physical facts as these, the majority find themselves able to hold issuable before a jury the question of contributory negligence on the part of the decedent. The trial judge faced with a decision of the same question, promptly, and properly, accepted as conclusive the unanswerable story told by the physical facts and rendered judgment accordingly, notwithstanding the verdict. His judgment of the matter deserves a prompt affirmance by us.

The unfortunate victim of this tragedy, under admitted facts, was guilty of inexcusable, unforgettable, and legally unforgivable negligence. Any verdict to the contrary impeaches the verity of a fact of life and indicts as false the general experience of mankind in the particular involved. A reversal, in my opinion, is wholly unwarranted. The majority ruling otherwise,

I dissent.

303 P.2d 390

STATE of New Mexico, Plaintiff-Appellee,

v.

Manuel OCANAS, Defendant-Appellant.

No. 6131.

Supreme Court of New Mexico.

Nov. 9, 1956.

[redacted]

McAtee, Toulouse & Marchiondo, Albuquerque, for appellant.

Richard H. Robinson, Atty. Gen., Paul L. Billhymer, Harry E. Stowers, Jr., Asst. Attys. Gen., Santa Fe, for appellee.

COMPTON, Chief Justice.

Appellant was convicted by a jury of Bernalillo County of the crime of burglary, and he appeals.

The information contains two counts. Count one charges that appellant did break and enter in the nighttime the dwelling house of Mrs. Isabel Muniz with intent to steal. Count two charges that appellant did steal money in excess of $50, the property of Mrs. Muniz. He was found guilty of the former charge and acquitted of the latter.

It is asserted that the court erred in the admission of evidence with respect to prior convictions of felonies on cross-examination of appellant. Appellant had testified in his own behalf, and the district attorney, having been supplied with his criminal record by the Federal Bureau of Investigation, sought to impeach his testimony by showing he had been convicted of numerous felonies. On cross-examination, he was interrogated with regard to such former convictions, as follows:

"Q. Mr. Ocanas, have you ever been convicted of a felony? A. Yes, sir.

"Q. How many times?

* * * * * *

"Q. How many times have you been convicted of a felony, Mr. Ocanas? A. Twice, sir.

"Q. And what were those convictions for?

* * * * * *

"Q. Will you answer the question, please? A. Yes, sir.

"Q. Would you tell the Court and Jury what felonies you have been convicted of? A. Yes, sir, for narcotics, sir, user of marijuana, yes, sir.

"Q. Which felony was that? A. Sir?

"Q. When was that? A. That was in '53, sir.

* * * * * *

"Q. What state? A. New Mexico, sir.

"Q. What other felony have you been convicted of? A. I have been convicted for the same thing, sir.

"Q. And where was that? A. That was in the state of California, sir.

"Q. And what year? A. I wouldn't want to say on that, sir. I am not exact on that.

"Q. Isn't it true that you were convicted of two felonies in California? A. No, sir, no, sir—

"Q. On 8/5/43,—where were you in August of 1943? A. In California.

"Q. And where were you on August 5, 1943? A. Probably California, sir.

"Q. Were you convicted of grand theft auto in California in 1943? A. Yes, sir, yes, sir.

"Q. And where were you on July 11, 1944? A. In California.

"Q. And do you know where you were on July 11, 1944? A. That was when I was convicted of, like I said, narcotics, marijuana.

"Q. In California? A. Yes, sir.

* * * * * *

"Q. Now, where were you on September 12, 1948? A. I wouldn't know, sir. You would have to tell me, then I would recall it.

"Q. Were you in California? A. Probably sir, I don't recall.

"Q. Were you convicted of a felony in 1948, September? A. That was the one I told you for narcotics, yes, sir.

"Q. Well, that was about August of 1943?

* * * * * *

A. I think that was for the stolen car or something, sir, you would have to remind me, I don't recall the dates."

We have repeatedly held that on cross-examination, the State may go no further than to show the conviction of the witness and the name of the particular felony or misdemeanor of which he had been convicted, State v. Griego, 61 N.M. 42, 294 P.2d 282; State v. Riley, 40 N.M. 132, 55 P.2d 743; State v. Conwell, 36 N.M. 253, 13 P.2d 554; State v. Roybal, 33 N.M. 540, 273 P. 919, and we adhere thereto. By statute, the district attorney on cross-examination was entitled to show all prior convictions and the names of the particular offenses. Section 20-2-3, 1953 Compilation. The present examination of

the witness went no further. Appellant was either evasive in his answers or was confused as to the felonies committed by him, and it is apparent the district attorney was merely assisting him in identifying them. Appellant was not prejudiced by the cross-examination.

The sufficiency of the evidence is challenged. Specifically, it is argued that there is no substantial evidence of breaking and entering, or that the offense was committed in the nighttime. Mrs. Muniz left her home about 5:00 p. m. and at that time the doors and windows were locked. When she returned about 9:00 p. m., she found her house disarranged. Her bed was "mussed up." Clothing had been removed from a suit case. A pair of earrings were missing. A window screen, previously nailed to a window, had been removed and was found lying on the ground. Nails at the corners of the window had been bent and the window was up. There were foot prints under the raised window identified as having been made by the shoes which the appellant was wearing at the time of his arrest, which was shortly after Mrs. Muniz returned home on the evening of December 15, 1954.

It was stipulated as a fact that the sun set at 4:56 p. m. on the day of the offense and that it was nighttime after 5:24 p. m. Whether the offense was committed in the nighttime, the appellant himself furnishes the answer. He testified that he was in the home of his mother until after 5:30 that night. Further, he was seen near the Muniz home between 7:00 and 7:30 p. m. by several witnesses. We think this evidence, though circumstantial in part, amply supports the finding of the jury that the breaking and entering was in the nighttime. State v. Rice, 58 N.M. 205, 269 P.2d 751; State v. Reese, 36 N.M. 28, 7 P.2d 295.

We make the observation the jury was instructed that both breaking and entering in the nighttime with intent to commit the crime of larceny, was a material allegation to be established by the evidence before a verdict of guilty would be warranted. The instruction was much too liberal and placed an extra burden upon the State. The mere entry of an occupied dwelling house in the nighttime with intent to commit larceny, is burglary. Section 40-9-7, 1953 Compilation.

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

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

303 P.2d 696

Raquella Gomez GURULE, Plaintiff-Appellee,

v.

Ramoncita Gomez De CHACON and Arthur Chacon, Defendants-Appellants.

No. 6110.

Supreme Court of New Mexico.

Nov. 14, 1956.

Jethro S. Vaught, Jr., Albuquerque, for appellants.

Coker, Boyd & May, Albuquerque, for appellee.

COMPTON, Chief Justice.

This is an action in partition. The complaint alleges that appellee and two sisters,

Victoriana Gomez Sandoval and appellant, Ramoncita Gomez de Chacon, are the owners as tenants in common of the premises involved; that each owns an undivided one-third interest therein. The answer denies all allegations of substance. Further answering, and by way of counterclaim, appellants claimed the fee title to the whole of the premises. The trial court concluded that the three sisters were tenants in common and partitioned the same among them, and appellants appeal.

The title stems from Eugenio Gomez and Victoriana P. de Gomez, parents of the parties, who died intestate in 1922 and 1930 respectively. They left surviving them other children, but they are not concerned here. The estates were currently probated, beginning in 1930, and appellant, Ramoncita Gomez de Chacon, was the administratrix of both estates. The estates were closed May 8, 1933. As a part of the assets of the estates there were 18 acres of land, a portion of which was subsequently designated as Tracts 115–A, 115–B, and 115–C, Map 27, Middle Rio Grande Conservancy District, the premises here involved.

While the estates were in the process of probation, Ramoncita Gomez de Chacon failed to pay the taxes assessed against the estates for the years 1931, 1932, and 1933, and the property was sold to the State in 1937. On March 24, 1952, appellant, Arthur Chacon, husband of Ramoncita, purchased Tracts 115–A and 115–C, and appellant, Ramoncita, purchased Tract 115–B from the State for delinquent taxes, penalties and interest so assessed for said years.

The conclusion must be sustained. The payment of taxes was an obligation of the administratrix under the facts. One thus obligated may not through his own default obtain advantage by purchase of a tax title. The purchase under such circumstance will be deemed by a court of equity as payment of taxes for the benefit of all, subject to contribution. Smith v. Borradaile, 30 N.M. 62, 227 P. 602; Matlock v. Mize, 55 N.M. 218, 230 P.2d 246; Akin v. Loudder, 201 Okl. 47, 200 P.2d 763; McAlpine v. Meehan, 312 Mich. 107, 19 N.W. 2d 765. Compare Zaring v. Lomax, 53 N.M. 273, 206 P.2d 706.

In 1933 or 1934, when appellee was of the age of 14 or 15 years, the adult heirs made a family settlement of the 18 acre tract, dividing it into nine parts, and set aside to appellee Tract 115–A. Appellants make the contention that since the 18 acre tract had been partitioned, the rule as to cotenancy does not apply. This contention cannot be sustained. Appellee knew of the parol partition but it was never carried out by her. At no time, before or after attaining her majority, did she take possession of the tract, assert acts of ownership, or do other things denoting an acceptance of the oral agreement. Madrid v. Borrego, 54

N.M. 276, 221 P.2d 1058; Smith v. Borradaile, supra. Furthermore, appellants' title is based on a sale of the property for taxes accruing prior to the partition.

It is contended that appellee is guilty of laches and is thereby estopped to maintain the action. This contention likewise is without merit. Appellants have been in possession of all three tracts since the parol partition was made. Incidentally, they took the tract with the improvements, the dwelling house, as their share. Appellee made her home with appellants until 1940, when she married and established a home of her own. In 1941, she inquired of her sister, Ramoncita, as to the tract of land previously awarded to her, and appellant gave her an evasive answer, and she did nothing more about it until 1949. She then informed her sister, Ramoncita, that she wanted to build a house on her tract and wanted to pay all taxes on it. Again Ramoncita brushed her off by saying "she had lost the deeds". It was not until 1952 that appellants informed her of the actual status of her property—that they had purchased it. Since there was no severance of the common property, a mere lapse of time did not dissolve the cotenancy. Hollaway v. Berenzen, 208 Ark. 849, 188 S.W.2d 298; Corn v. First Texas Joint Stock Land Bank of Houston, Tex.Civ.App., 131 S.W.2d 752; Yarwood v. Johnson, 29 Wash. 643, 70 P. 123. Nor did appellants' possession of the tracts involved, lend support to their claim; the possession of one cotenant of the common property, is deemed to be possession by all. Johns v. Scobie, 12 Cal.2d 618, 86 P.2d 820, 121 A.L.R. 1404; Miller v. Murphy, 119 Mont. 393, 175 P.2d 182.

The trial court required contribution of $254.65, without interest, being one-third of the amount expended by appellants for taxes, and assigned as error is the refusal of the court to allow statutory interest. True, the Statute, § 72-8-9, 1953 Comp., provides that a former owner may redeem from tax sale by payment of interest from the date of sale at the rate of one per cent per month, but other considerations were involved here. No doubt the trial court took into consideration, among other things, the long use made of the common property by appellants in making the division. We cannot say the adjustment was inequitable.

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

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

303 P.2d 698

MOUNTAIN STATES FIXTURE COMPANY, a Corporation, Plaintiff-Appellant,

v.

Gus DASKALOS and Andy Dovas, Defendants-Appellees.

No. 6115.

Supreme Court of New Mexico.

Nov. 16, 1956.

Noble & Noble, Las Vegas, for appellant.

Roberto L. Armijo, Las Vegas, for appellees.

McGHEE, Justice.

The lower court dismissed an action against defendants on a Colorado judgment obtained under cognovit provisions of defendants' promissory note and the plaintiff appeals from the dismissal.

The facts found by the trial court, as summarized, are: The defendants, residents of New Mexico, contracted with the Grauman Company, a Colorado corporation, for the purchase of bar fixtures, by contract of July, 1951. This contract provided for the making of defendants' promissory note and chattel mortgage for an unpaid balance of the purchase price. In October, 1951 an agent of the corporation delivered the fixtures to the defendants at Las Vegas, New Mexico, at which time he presented to the defendants and procured their signatures upon a promissory note containing cognovit provisions authorizing any attorney of any justice court or court of record to enter their appearance therein, to waive all process and to confess judgment in favor of the legal holder against them for amounts then owing, costs and attorney's fees. The note was delivered to the agent and representative of the Grauman Company in Las Vegas, New Mexico.

The promissory note was endorsed to the plaintiff by the Grauman Company, without recourse, and on March 27, 1952, the District Court of the City and County of Denver, Colorado, entered judgment against the defendants for $2,213.10, plus costs, in an action by the plaintiff on the note. Judgment was rendered under the cognovit provisions contained in the note, the defendants neither being served with process nor otherwise appearing.

The lower court concluded the Grauman Company, in procuring the signatures of defendants upon the promissory note at Las Vegas, New Mexico, violated the provisions of Ch. 46, Laws of 1933; that the cognovit provisions of the note were void and the Colorado judgment obtained thereunder was jurisdictionally defective.

On this appeal the plaintiff contends the Colorado judgment is entitled to full faith and credit here and is valid in all respects. It specifically objects to the refusal of the trial court to receive in evidence a copy of the conditional sale contract executed in Colorado between the defendants and the Grauman Company, wherein it is expressly provided: "This contract is entered into and is to be performed at Denver, Colorado. All disputes shall be decided according to the laws of the State of Colorado." Apparently the exhibit was excluded from evidence upon the basis the earlier contract had merged in the promissory note and chattel mortgage.

The plaintiff contends the stipulation of the parties to be bound by the laws of Colorado did not merge in the note. It is further contended that the whole transaction in question, considered under any of the various choice-of-law doctrines, should be governed by Colorado law, as the contract was made in that state, there to be

performed, that it was breached in Colorado and action was there instituted upon the default under a procedure recognized as vesting the Colorado forum with jurisdiction over the defendants.

It should be noted at the outset it is nowhere contended or suggested the promissory note containing the cognovit provision or the agreement in the conditional sale contract that the parties would be bound by Colorado law were made in bad faith or under conspiracy to defeat the public policy of this state as declared by Chapters 46 and 48, Laws of 1933. Chapter 46 now appears as §§ 21–9–16, 21–9–17, N.M.S.A.1953, and Chapter 48 as § 21–9–18, N.M.S.A.1953. These laws have never been amended. The present §§ 21–9–16 and 21–9–18 (formerly designated §§ 19–916, 19–918, N.M.S.A.1941) have been quoted in full in Ritchey v. Gerard, 1944, 48 N.M. 452, 152 P.2d 394, and will not be repeated here. It is sufficient to note the first of these sections declares cognovit provisions executed as part of a negotiable instrument or written contract to pay money, and before a cause of action has accrued thereon, are illegal and void. The second defines a cognovit note and declares any person who procures the execution, endorsement or assignment thereof, or who accepts and retains such instrument as payee, endorsee or assignee, or whoever attempts to enforce a foreign judgment based upon any such instrument shall be deemed guilty of a misdemeanor and penalized upon conviction. Section 21–9–17 forbids execution or other process to aid or enforce a foreign judgment obtained under cognovit provisions and declares no such judgment shall be or become a lien upon real estate.

Certainly our statutes may not be construed or administered in a manner offensive to art. IV, § 1, of the United States Constitution providing full faith and credit shall be given in each state to the judicial proceedings of every other state.

The narrow question before us is whether the procedure authorized under cognovit provisions contained in a promissory note executed in this state and payable in Colorado, in connection with a contract made and to be performed in Colorado, is sufficient to give the Colorado court jurisdiction over the defendants in an action upon the promissory note.

Numerous cases are collected in the Annotation in 19 A.L.R.2d 544, entitled "What law governs validity of warrant or power of attorney to confess judgment." After describing the different rules employed in different states as to governing law (i. e., the place of execution, the place of payment of the obligation, or the law of the forum either where judgment is sought or where a foreign judgment is sued on) the annotator urges adoption of a distinction between formal and substantive validity. Questions as to form of execution would therefore be referable to the laws of the

state where the cognovit provision was executed, while questions affecting the essential or substantial validity of such provision would be referable to the laws of the place of performance.

The annotation recognizes, however, that existing judicial authority preponderates in favor of the view the validity of these provisions is governed by the law of the place of execution, with little or no discrimination as to questions of formal or substantive validity.

While the learned trial judge proceeded in accordance with the weight of authority, where the agreement of the parties is silent on which law shall govern, we are of the opinion the present case should be controlled by the principle heretofore established in the case of Goode v. Colorado Investment Loan Company, 1911, 16 N.M. 461, 117 P. 856, where it was held competent for contracting parties to agree to be bound by the laws of the state of the residence of one of them where the contract was to be performed, although some portion of their agreement is illegal where executed and under the law of the forum where suit is brought. In that case Colorado law applied in an action to foreclose a mortgage on New Mexico realty and recovery of twelve percent interest upon the indebtedness was permitted, although the same would have been usurious under New Mexico law.

The doctrine of merger does not apply to the conditional sale contract here involved, except as its provisions are either carried forward or changed in the promissory note and chattel mortgage later executed thereunder, and the plaintiff should have been allowed to show the agreement of the defendants that all disputes would be decided under Colorado laws. Continental Life Ins. Co. v. Smith, 1936, 41 N.M. 82, 64 P.2d 377; Bass v. Occidental Life Ins. Co., 1914, 19 N.M. 193, 142 P. 798.

It is not controverted that in Colorado cognovit provisions incorporated in promissory notes, etc., are valid, and the appearance of an attorney thereunder and his confession of judgment are sufficient to confer jurisdiction upon the courts of that state.

The Colorado judgment is entitled to full faith and credit. The judgment of the lower court is reversed and the cause remanded with direction that plaintiff's complaint be reinstated and further proceedings be had in accordance herewith.

It is so ordered.

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

[redacted]